



Office of Commissioner  
Rebecca Kelly Slaughter

United States of America  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20580

October 26, 2020

The Honorable Eugene Scalia  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

**Re: Proposed Rule: Independent Contractor Status under the Fair Labor Standards Act,  
RIN 1235-AA34**

Dear Secretary Scalia:

I respectfully submit this comment in response to the Department of Labor's ("Department" or "DOL") September 22, 2020, Notice of Proposed Rulemaking titled, the "Independent Contractor Status under the Fair Labor Standards Act" ("Proposed Rule" or "Proposal").<sup>1</sup> By my comment, I urge DOL to rescind the NPRM because the record does not reflect current labor market realities, including concentration and monopsony power, or the likely anticompetitive consequences of the proposal.

**Statement of Interest**

I am a Commissioner at the Federal Trade Commission (FTC). The FTC has a mandate to promote competition and ensure that markets work for the benefit of consumers and workers. The Commission enforces both antitrust and consumer protection laws, and it regularly engages in research and advocacy focused on its enforcement mandate. Promoting and protecting competition is an important goal of the federal government; while furthering this goal is mission-critical for the FTC, every executive department and agency can and should contribute to the effectiveness of that mission by using its relevant authority to help promote competitive markets. To that end, I hope the Department of Labor will consider my perspective on the competition issues implicated by the pending NPRM.

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<sup>1</sup> This comment represents my views and does not necessarily reflect those of the Federal Trade Commission or any other Commissioner; Independent Contractor Status under the Fair Labor Standards Act, 85 Fed. Reg. 60600 (proposed September 22, 2020) (to be codified at 29 C.F.R. pts. 780, 788, 795) [hereinafter "NPRM"].

## Summary

The Fair Labor Standards Act's ("FLSA")<sup>2</sup> statutory purpose is to ensure a "fair day's pay for a fair day's work."<sup>3</sup> The Act maintains a broad interpretation of "employee" that enables millions of workers to receive critical benefits and protections.<sup>4</sup> Unfortunately, a hallmark of the fissured economy is that too many firms have been skirting the requirements of the Act by classifying their workers as independent contractors rather than employees, depriving workers of important statutory protections and benefits. This problem is frequently discussed in terms of the "gig economy," but in fact there is similar workplace fissuring in home care, janitorial work, trucking, construction, hospitality, and restaurants, to name a few. The Proposed Rule's restrictive and erroneous interpretation of the long-standing "economic realities" test used to determine independent contractor status will only exacerbate the problem of worker misclassification. The Proposal takes the Supreme Court's five factor test, where all five factors are given equal weight, and narrows it down to focus on only two further narrowed factors: economic control and opportunity for profit and loss. As a result, fewer employees will be covered by the FLSA and firms will be able to avoid their obligations under this law, which include worker protections such as minimum wage, overtime, and child labor laws.

Although the Proposed Rule largely involves labor law and policy, it implicates competition and the FTC's competition mission. To that end, it is problematic that the NPRM fails to consider important competition-related issues and potential anticompetitive effects of the Proposal. First, in explaining the Proposed Rule, DOL fails to consider the growing consensus that many labor markets are highly concentrated and characterized by the pervasive monopsony power that employers hold over workers.<sup>5</sup> Second, the NPRM does not consider ways in which the Proposed Rule could harm competition, for example, by giving firms that classify their workers as independent contractors an unfair competitive advantage over their rivals, reducing worker bargaining power, and increasing the likelihood of more workers being subjected to anticompetitive contract terms. Finally, the Proposal will create legal uncertainty about the application of the antitrust exemption for labor organizing, which could deprive workers of this important tool used to counter the enormous bargaining power that employers enjoy over their workers.<sup>6</sup> I believe DOL should rescind the NPRM because the record does not adequately consider these issues.

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<sup>2</sup> Fair Standards Labor Act, 29 U.S.C. §§ 201–19.

<sup>3</sup> President Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours (May 24, 1937), <https://www.presidency.ucsb.edu/documents/message-congress-establishing-minimum-wages-and-maximum-hours>.

<sup>4</sup> See *United States v. Rosenwasser*, 323 U.S. 360, 362–363, 363 n.3 (1945) ("Sen. Rep. No. 884 (75th Cong., 1st Sess.) p. 6, states that the term "'employee' is defined to include all employees. Senator Black said on the floor of the Senate that the term 'employee' had been given 'the broadest definition that has ever been included in any one act.' 81 Cong.Rec. 7657.") (alteration omitted).

<sup>5</sup> Monopsony power is the market power held by buyers, including employers as buyers of labor.

<sup>6</sup> Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, American Antitrust Institute 2 (July 31, 2018), [https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper\\_0.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0.pdf). ("In exempting labor and management from antitrust scrutiny during lawful collective bargaining, Congress chose to elevate the national interest in fair wages and working conditions above the national interest in promoting competition among workers.")

## I. The NPRM and the Proposed Rule do not account for high labor market concentration and market power of employers

The NPRM fails to consider the state of concentration and monopsony power in labor markets in discussing market realities and evaluating the impact of the Proposed Rule. By not considering these labor market realities, the NPRM cannot properly evaluate or sufficiently justify a rule that stands to harm competition for workers' labor. This failure will also make it more difficult for the FTC to protect labor market competition on behalf of workers.

Evidence shows that labor market concentration today is particularly high, suggesting significant monopsony power.<sup>7</sup> In one study, Azar, Marinescu, and Steinbaum calculated labor market concentration in over 8,000 geographic-occupational markets in the U.S. Using the metrics in the DOJ and FTC's Horizontal Merger Guidelines, they found that average labor markets are characterized as "highly concentrated." Their findings also indicate that labor market concentration creates monopsony power for employers.<sup>8</sup> There has been particular focus on industries where monopsony power over low-wage workers is common, and where Black and Latinx workers are overrepresented; in these markets, workers are most in need of the FLSA's protections and suffer most from misclassification.<sup>9</sup> Monopsony power is associated with adverse economic effects because it exacerbates a firm's "incentive to buy less in order to drive down input prices."<sup>10</sup> In labor markets, that means that firms hire fewer employees and pay lower wages to their workers.

The FTC takes monopsony power seriously, particularly in the context of labor markets, and is committed to reviewing mergers and investigating conduct for antitrust violations in labor markets.<sup>11</sup> Increases to employers' monopsony power as a result of mergers or conduct have the

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<sup>7</sup> See Council of Econ. Advisors, *Labor Market Monopsony: Trends, Consequences, and Policy Responses*, Council of Econ. Advisors, (Oct. 2016),

[https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025\\_monopsony\\_labor\\_mrkt\\_cea.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf); Alan Manning, *Imperfect Competition in the Labor Market*, in 4b HANDBOOK OF LABOR ECONOMICS 973–1041 (Orley Ashenfelter & David Card eds., 2011); Yue Qiu & Aaron J. Sojourner, *Labor-Market Concentration and Labor Compensation* (Jan. 8, 2019), <https://ssrn.com/abstract=3312197>.<sup>7</sup> See *Labor Market Monopsony: Trends, Consequences, and Policy Responses*, Council of Econ. Advisors, (Oct. 2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025\\_monopsony\\_labor\\_mrkt\\_cea.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf); Alan Manning, *Imperfect Competition in the Labor Market*, in 4b HANDBOOK OF LABOR ECONOMICS 973–1041 (Orley Ashenfelter & David Card eds., 2011); Yue Qiu & Aaron J. Sojourner, *Labor-Market Concentration and Labor Compensation* (January 8, 2019), <https://ssrn.com/abstract=3312197>.

<sup>8</sup> José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 Lab. Econ. 101886 (2020),

<https://www.sciencedirect.com/science/article/abs/pii/S0927537120300907>; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §5.3 (2010).

<sup>9</sup> National Employment Law Project, Comments on Independent Contractor Status Under the Fair Labor Standards Act (Oct. 26, 2020), <https://s27147.pcdn.co/wp-content/uploads/NELP-Independent-Contractor-NPRM-USDOL-Comments-10-26-2020.pdf>.

<sup>10</sup> C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2079 (2018).

<sup>11</sup> See Fed. Trade Comm'n, *Oversight of the Enforcement of the Antitrust Laws, Responses from Joseph Simons, Chairman, Fed. Trade Comm'n*, Fed. Trade Comm'n (Nov. 6, 2018); Fed Trade Comm'n & Dep't of Justice, <https://www.judiciary.senate.gov/imo/media/doc/Simons%20Responses%20to%20QFRs.pdf>; *Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets*, (Apr. 13, 2020), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-)

potential to harm competition and affect workers' wages and mobility. As discussed below, the Proposed Rule may exacerbate monopsony power in labor markets by decreasing the bargaining power of workers as compared to their employers. The FTC can do its part to address monopsony power by enforcing the antitrust laws to stop illegal mergers and anticompetitive conduct that harm workers, or through rulemaking to stop unfair methods of competition. However the burden on the FTC to do that work will be substantially increased if the Proposed Rule goes into effect and exacerbates the monopsony market conditions that give rise to potential law violations. Enforcement by the FTC once a violation has occurred or is imminent is no substitute for ex ante rulemaking by the Department of Labor to curb employer monopsony power.

## **II. The NPRM does not adequately or accurately consider the competitive effects of the Proposed Rule**

### *a. The Proposed Rule is likely to harm competition*

The NPRM fails to take into account the harm to competition that is likely to result because the Proposed Rule will permit and encourage more classification, or—more accurately—misclassification, of workers as independent contractors. This harm to competition may manifest in three ways.

First, the Proposed Rule will give firms that rely on it to misclassify their workers as independent contractors an unfair competitive advantage. Firms that misclassify workers as a means of avoiding their legal obligations under the FLSA can compensate those workers less than firms that properly classify similar workers as employees.<sup>12</sup> Indeed, numerous studies, none of which are cited in the NPRM, show that independent contractors earn less than similarly situated employees.<sup>13</sup> Last year, the District Court for the Northern District of California held that misclassification of drivers as independent contractors could significantly harm competition, “[Plaintiff] Diva’s allegations support the inference that Uber could not have undercut market prices to the same degree without misclassifying its drivers to skirt significant costs.”<sup>14</sup>

Second, misclassification harms the ability of workers to compete for better wages and working conditions. As the Economic Policy Institute notes, “Misclassification undermines worker

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justice/statement\_on\_coronavirus\_and\_labor\_competition\_04132020\_final.pdf; Fed. Trade Comm’n, *FTC Hearing #2: Monopsony and the State of U.S. Antitrust Law* (Sept. 18, 2020), <https://www.ftc.gov/news-events/events-calendar/2018/09/ftc-hearing-2-competition-consumer-protection-21st-century>; Fed. Trade Comm’n, Press Release, *Statement of the FTC Chairman Regarding Announcement that Aveanna Healthcare and Maxim Healthcare Services have Terminated Their Acquisition Agreement* (Jan. 30, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/statement-ftc-chairman-regarding-announcement-aveanna-healthcare>.

<sup>12</sup> Ioana Marinescu and Eric Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony*, Roosevelt Institute 17 (Dec. 21, 2018), [https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI\\_ProposalToEnhanceAntitrustProtection\\_workingpaper\\_201812.pdf](https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_ProposalToEnhanceAntitrustProtection_workingpaper_201812.pdf)

<sup>13</sup> See Eduardo Porter, *Shaky Jobs, Sluggish Wages: Reasons Are at Home*, N.Y. Times (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/business/economy/economy-labor-wages-subcontracting.html>.; Gov’t Accountability Office *Contingent Workforce: Size, Characteristics, Earnings, and Benefits*, (April 20, 2015), <https://www.gao.gov/products/GAO-15-168R>; National Employment Law Project, Catherine Ruckelshaus, *Independent Contractor v. Employee: Why Misclassification Matters and What we can do to Stop It* (2016), <https://www.nelp.org/publication/independent-contractor-vs-employee/>.

<sup>14</sup> *Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074 (N.D. Cal. 2019).

bargaining power, for both workers who are misclassified and the directly employed workers alongside whom they work.” By misclassifying workers as independent contractors, the Proposed Rule will deprive those workers of the protections provided by the FLSA. When employees lose those protections, they are at a disadvantage in negotiating wages and other terms of employment. As a result, many independent contractors receive hourly wages that are effectively below the federal or state minimum wage, while working more than a 40-hour week.<sup>15</sup>

Finally, the NPRM fails to thoroughly and accurately consider the issue of anticompetitive vertical restraints. The Proposed Rule merely suggests that vertical restraints, such as “requirements that the individual work exclusively for [the employer] during the working relationship or prohibiting the individual from working for others after that relationship ends,” are indicative of economic dependence.<sup>16</sup> That is true, but beyond being evidence of economic dependence, vertical restraints like non-competes can also be anticompetitive. There is abundant evidence that non-competes among low wage workers are pervasive and problematic and bipartisan agreement among FTC commissioners that these can pose a significant competition problem.<sup>17</sup> Most workers are subjected to non-compete restrictions with little notice or opportunity to negotiate; such provisions are presented as part of take-it-or-leave-it employment contracts and restrict where an employee can work after they leave a job.<sup>18</sup> This restriction on competition post-employment significantly deepens a worker’s dependence on his or her employer. These restrictions also can have horizontal effects if multiple employers in a labor market use them. As Marinescu and Hovenkamp explain, non-competes serve “to increase the level of effective market concentration to the extent that employees subject to such agreements face fewer competitive choices.”<sup>19</sup>

In theory, properly classified independent contractors are truly independent of their employers and therefore should be able to freely negotiate what, if any, vertical restraints they are willing to

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<sup>15</sup> See Françoise Carré, Economic Policy Institute, (*In)dependent Contractor Misclassification* (June 8, 2015), <https://www.epi.org/publication/independent-contractor-misclassification/>.

<sup>15</sup> NPRM at 60613.

<sup>16</sup> NPRM at 60613.

<sup>17</sup> See Fed. Trade Comm’n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues* (Jan. 9, 2020), <https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues>; Fed. Trade Comm’n, Comm’r Rebecca Kelly Slaughter, *Remarks of Commissioner Rebecca Kelly Slaughter at FTC Workshop on Non-Compete Clauses in the Workplace* (Jan. 9, 2020), <https://www.ftc.gov/public-statements/2020/01/remarks-commissioner-rebecca-kelly-slaughter-ftc-workshop-non-compete>; Fed. Trade Comm’n, *Remarks of Comm’r Noah Joshua Phillips, Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues*, (Jan. 9, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1561697/phillips\\_-\\_remarks\\_at\\_ftc\\_nca\\_workshop\\_1-9-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf).

<sup>18</sup> Evan Starr, J.J. Prescott, & Norman D. Bishara, *Noncompetes in the U.S. Labor Force* (U. Mich. L. & Econ. Research Paper No. 18-013, 2019), <https://ssrn.com/abstract=2625714>; Matt Marx, *The Firm Strikes Back: Noncompete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695 (2011), <https://pdfs.semanticscholar.org/f0cc/a352c57244794405de5f4015ed1ec55bf93b.pdf?ga=2.189624107.1684170475.1578502723-753797417.1578502723>.

<sup>19</sup> Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 0131, 1056 (2019), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11340&context=ilj>.

accept as a condition of contracting for work.<sup>20</sup> However, the record in the NPRM fails to note how widespread the application of non-competes and other vertical restraints are across fissured workplaces that are classifying their workers as independent contractors. For example, gig workers, who are frequently deemed by their employers to be independent contractors, are often subject to vertical restraints in their contracts.<sup>21</sup> The Proposed Rule fails to recognize that the widespread use of vertical restraints against workers belies classification of those workers as independent contractors, and furthermore may be anticompetitive.

As noted in a recent joint statement by the FTC and DOJ, the antitrust agencies are on high alert for anticompetitive conduct that harms workers, particularly with respect to the COVID-19 crisis and essential employees such as health care and warehouse workers.<sup>22</sup> Application of anticompetitive vertical restraints against improperly classified independent contractors is just the type of conduct we should be monitoring, and the Proposed Rule will make such application more common. Our sister agencies in the federal government should not be promulgating rules that makes such anticompetitive conduct more likely and, in turn adding to an under-resourced FTC's already voluminous workload.

b. *The NPRM states that the Proposal will increase competition without adequate support*

Rather than properly understanding the competitive implications of the Proposed Rule, the NPRM makes two unsupported and misguided statements regarding the Proposed Rule's effect on competition.<sup>23</sup> First, the NPRM claims that more independent contracting will foster competition. It cites the practice of multi-apping, the practice of “simultaneously run[ning] a company]'s virtual platform alongside the platform of a competitor to compare virtual opportunities in real time and pick the best opportunity on a job-by-job basis.” It goes on to state that an employer's ability to do so “depends on being able to confidently classify workers as independent contractors.<sup>24</sup>” However, a thoroughly developed record would make clear that independent contractor status is not what allows a worker to work for two rivals. Indeed, many hourly workers are employed at more than one job, including for two employers who are rivals in the same industry.<sup>25</sup> In fact, multi-apping is not evidence of competitive benefits of misclassification of workers; rather it may be evidence that misclassified workers are

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<sup>20</sup> David Weil, Lots of Employees Get Misclassified as Contractors. Here's Why It Matters, HARV. BUS. REV. (July 5, 2017), <https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters>.

<sup>21</sup> Marshall Steinbaum, *Monopsony and the Business Model of Gig Economy Platforms*, OECD 8 (Sept. 17, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2019\)66/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf) (“As previously mentioned, all of the vertical restraints imposed by dominant gig economy platforms are enabled by the pervasiveness of employer monopsony power.”).

<sup>22</sup> *Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets*, Fed Trade Comm'n & Dept. of Justice, Dep't (April 13, 2020), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement\\_on\\_coronavirus\\_and\\_labor\\_competition\\_04132020\\_final.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf).

<sup>23</sup> NPRM at 60609–10, 60633.

<sup>24</sup> *Id.* at 60609–10.

<sup>25</sup> Binyamin Appelbaum & Damon Winter, *One Job Is Better Than Two*, N.Y. TIMES (Sept. 1, 2019), <https://www.nytimes.com/2019/09/01/opinion/working-two-jobs.html> (“Bridget Hughes, 29, works a regular day shift at a Burger King in Kansas City, Mo. Three nights a week, she also works the overnight shift at a nearby McDonald's. She makes \$10 an hour at Burger King and \$9.50 an hour at McDonald's and, together with her husband's job at a gas station, they manage to feed their three children and to pay the rent.”).

systematically underpaid and must work two or three jobs in order to make ends meet.<sup>26</sup> The NPRM should consider this evidence and reconsider the competitive implications of multi-apping.

Moreover, the Proposal does not fully provide or discuss the data on the frequency and extent of multi-apping, or consider evidence regarding the steps firms take to disincentivize multi-apping. For example, some ride-share app drivers are limited to only one app because of the market in which they operate or because of the year their vehicle was made.<sup>27</sup> Uber has been known to discourage multi-apping by monitoring whether drivers were logging into more than one platform simultaneously and penalizing those that did not exclusively take Uber customers.<sup>28</sup> Further, it may be in an app's economic interest to prevent multi-apping precisely because a truly competitive market would normally result in increased payments as each app attempts to attract drivers.

Second, the NPRM reaches the inadequately supported conclusion that “competition will increase and prices will decrease” when more workers are classified as independent contractors.<sup>29</sup> The basis for this statement is merely one non-peer reviewed article from 2010 that makes a similar claim but provides little evidence to support this assertion.<sup>30</sup> The article does not take into account recent developments in employment classification and lacks a sufficient evidentiary basis to support a conclusion about competitive effects in the federal rulemaking process.

### **III. The Proposed Rule would create legal confusion around the labor exemption to the antitrust laws**

Under the Clayton Act, the Norris-La Guardia Act, and longstanding jurisprudence, workers are afforded an exemption from the antitrust laws for collective bargaining activity.<sup>31</sup> This recognizes the fact that the bargaining power employers wield far outweighs that of individual workers, and that workers must be able to organize in order to counter employer bargaining power. These exemptions function hand-in-hand with the National Labor Relations Act of 1935

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<sup>26</sup> See Julia Beckhusen, U.S. Census Bureau, *About 13M U.S. Workers Have More Than One Job* (June 18, 2019), <https://www.census.gov/library/stories/2019/06/about-thirteen-million-united-states-workers-have-more-than-one-job.html>; Breno Braga, K. Steven Brown & Signe-Mary McKernan, Urban Institute, *Working to Make Ends Meet During Good Economic Times* (Feb. 2019), [https://www.urban.org/sites/default/files/publication/99772/working\\_to\\_make\\_ends\\_meet\\_during\\_good\\_economic\\_times\\_3.pdf](https://www.urban.org/sites/default/files/publication/99772/working_to_make_ends_meet_during_good_economic_times_3.pdf); Valerie Wilson, *Women Are More Likely to Work Multiple Jobs than Men*, Economic Policy Institute (July 9, 2015), <https://www.epi.org/publication/women-are-more-likely-to-work-multiple-jobs-than-men/>.

<sup>26</sup> For discussion of why some drivers are “non-shifters.” Sydnee Caldwell & Emily Oehlsen, *Monopsony and the Gender Wage Gap: Experimental Evidence from the Gig Economy* (Nov. 29, 2018), <https://www.haas.berkeley.edu/wp-content/uploads/Sydnee-Caldwell-Monopsony-and-the-Gender-Wage-Gap.pdf>.

<sup>27</sup> See *id.*

<sup>28</sup> See Steinbaum, *supra* note 21 at 7 (“In some cases, workers are also penalized for “multi-homing,” that is, activating more than one platform concurrently and selecting the gig with the best terms.”); See also Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS., 45, 55 (2019)

<sup>29</sup> NPRM at 60633.

<sup>30</sup> J. Eisenach, *The Role of Independent Contractors in The U.S. Economy*, Navigant Economics (2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1717932](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1717932)

<sup>31</sup> The Clayton Act, 15 U.S.C. §17; the Norris-La Guardia Act, 29 U.S.C. §§ 101–115 (2012); *United States v. Hutcheson*, 312 U.S. 219 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

(“NLRA”), which protects the rights of workers to collectively bargain for better pay, benefits, and working conditions.<sup>32</sup>

The Proposed Rule only adds to the legal uncertainty surrounding which independent contractors qualify for the collective bargaining antitrust exemption.<sup>33</sup> Such uncertainty is problematic because it adds yet another barrier to workers’ efforts to collectively bargain and obtain the rights and protections afforded by the NLRA. To be clear, I believe that even properly classified independent contractors should get the benefit of the labor exemption in order to organize against unfair labor practices and to seek better wages, terms of employment, and working conditions. However, as the jurisprudence around that determination remains unclear, it is particularly important that workers not be misclassified as independent contractors—as the Proposed Rule would facilitate—and therefore potentially deprive them of the ability to organize.

### **Conclusion**

The NPRM fails to consider important competition-related issues and potential anticompetitive effects of the Proposal. As a result, the Proposal is deeply flawed and risks serious harm to workers, as well as competition more broadly. I respectfully request that DOL rescind the NPRM, unless and until it can fully develop the record on the competition issues discussed herein.

Sincerely,



Rebecca Kelly Slaughter  
Commissioner  
United States Federal Trade Commission

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<sup>32</sup> The National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012); Hiba Hafiz, *Labor’s Antitrust Paradox*, 86 U. CHI. L. REV. 381, 386–387

<sup>33</sup> See Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOYOLA U. CHI. L.J. 969, 988–90 (2016); *Am. Fed’n of Musicians of U. S. & Canada v. Carroll*, 391 U.S. 99, 105–06 (1968) (upholding the criteria that whether the “orchestra leaders were a ‘labor’ group and parties to a ‘labor dispute’ [depends on] the ‘presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors.’”).