

Yale University

Thurman Arnold Project

Competition Policy Modules
Labor Team

Updating Antitrust and Competition Policy: Labor Issues

May 2021

David Bassali
Brandon Baum
Rafael Bezerra Nunes
Kyle Bigley
Sam Hull
Kaleb Mount

Bruno Polonio Renzetti
Janani Rajashekar
Zach Shelley
Talia Stender
Ian Veidenheimer
Yan Xing

Introduction

Labor markets are becoming increasingly concentrated¹. A recent study found that the average labor market is dominated by just over three recruiting firms,² with many sectors facing even more concentration. This trend is also evinced by rising markups, which can result from the limited competition and can further erode the labor share.³ The declining labor share, combined with economic growth for the top 1% of the income distribution, is a source of rising inequality. In this sense, the broader problems of declining competition that have been highlighted in recent years⁴ are weaponized against worker welfare. The deleterious effects of such asymmetries extend to the overall economy, because reducing wages reduces consumer expenditures and leads to inefficient investment of labor.⁵

The optimal solution to this problem would be to restore competitive labor markets. As discussed below, this would involve unwinding mergers and implementing more aggressive attempts to combat monopolization. However, such interventions would take decades to fully restore labor power. Therefore, these pro-competitive policies must be combined with efforts to restore worker power in the short term. Labor law has long recognized asymmetries of power and attempted to countervail employer power by aggregating workers as a collective. Promoting worker power is part of the longstanding industrial-democratic tradition. There may be some concern that increasing worker bargaining power too much could likewise lead to wages that are above competitive levels instead of below them, but the current economy is heavily skewed in favor of employers.⁶ It will likely take so long to return wages to competitive levels there will be time to adjust policy if fears of overshooting grow. Unionization and worker aggregation enables workers to have a voice and should be prioritized to ensure that competitive balance is restored in the economy.

The present policy proposal focuses on four topics that we think are of the highest importance for updating competition policy in order to address the current issues related to anticompetitive effects in labor markets: mergers in labor markets, the use of non-compete and no-poach agreements, market power in the gig economy and how workers can countervail the power of employers.

Part I: Problem: Anti-competitive effects of Mergers in Labor Markets

The market power currently present in many industries in the United States also exists in the labor market in the form of collusion or monopsonization. The concentration of labor markets, in part

¹ José Azar, Marshall Steinbaum & Ioana Marinescu. *Labor Market Concentration*. NBER Working Paper 24147 (2019); Austan Goolsbee & Chad Syverson. *Monopsony Power in Higher Education: a tale of two tracks*. NBER Working Paper 26070 (2019).

² José Azar, Marshall Steinbaum, Ioana Marinescu. *Labor Market Concentration*. NBER Working Paper 24147 (2019).

³ Greg Kaplan & Piotr Zoch. *Markups, Labor Market Inequality and the Nature of the Work*. BFI Working Paper. Feb. 19, 2020. (<https://bfi.uchicago.edu/working-paper/2020-09/>)

⁴ Matt Stoller, Goliath: *The 100-Year War Between Monopoly Power and Democracy* (Simon and Schuster, 2019); Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018).

⁵ U.S. Department of Treasury. *Non-Compete Contracts: Economic Effects and Policy Implications*. March, 2016; C. Scott Hemphill & Nancy L. Rose. *Mergers that Harm Sellers*. 127 Yale L. J. 2078 (2018).

⁶ Sanjukta Paul. *Antitrust as Allocator of Coordination Rights*. 67 UCLA L. Rev. 378 (2020).

produced by decades of unchallenged mergers, directly harms workers and contributes to lower wages, inequality, and the decline in productivity and competitiveness of the American economy. To this point, the federal government has failed to challenge mergers based on their labor market impacts.

Mergers are currently regulated by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”), which amended the antitrust laws in the United States, particularly the Clayton Act of 1914. The HSR Act sets the threshold for mergers and other sort of acquisitions that must be previously cleared by the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”). Parties that do not comply with the rules set by the HSR Act are subject to civil penalties.

Most of the thresholds set by the HSR Act are related to size-of-the-transaction and size-of-the-parties requirements. Such assume that the size of the players and the transaction are the best proxies to assess if a merger may pose threats to competition if consummated. However, the economy has since the evolved and the antitrust laws have not progressed *pari passu*.

There are several aspects of mergers that should be considered and may even be more revealing than the HSR thresholds. For instance, the current thresholds do not evaluate and track the effects of the merger in labor markets, such as the number of employees or the representativeness of the company as an employer in a given market. We believe it is necessary to add labor markets effects to the current merger review to address the most up-to-date competitive issues.

In addition to the HSR Act, the current analysis of mergers follows the Horizontal Merger Guidelines of the FTC and DOJ (“the Guidelines”). The Guidelines outline the techniques and policies applied by government agencies with respect to mergers and acquisitions under federal antitrust law. Even though the Guidelines seek to identify and reduce market power arising from mergers, they are highly focused on price effects.

There is significant literature on the existence of monopsony power by employers. The term “monopsony” is not new to competition practice, as it can be found on the Guidelines sections on mergers of competing buyers. It is a well-established term and its application to mergers in labor markets would not represent an innovation in merger analysis. The tool is available – it just needs to be used by the agencies.

Firms with monopsony power have the ability to pay lower prices for their inputs. In the labor markets, the inputs are the workers, and the prices are the wages paid to those workers⁷. That is, labor monopsony occurs when the lack of competition in labor markets allows employers to suppress employee wages. These lower wages reduce the incentive for workers to choose employment in that industry, causing an inefficient allocation of labor.⁸ The current economic

⁷ C. Scott Hemphill & Nancy L. Rose point that one of the possible effects of mergers between sellers is the harm to workers sellings labor. *Mergers that Harm Sellers*. 127 Yale L. J. 2078 (2018).

⁸ C. Scott Hemphill & Nancy L. Rose. *Mergers that Harm Sellers*. 127 Yale L. J. 2078 (2018).

literature provides evidence that labor markets in the United States are highly concentrated, with at least 60% of labor markets in the United States qualifying as “highly concentrated.”⁹

According to Azar, Berry & Marinescu, higher concentration in labor markets is associated with lower wages and an increase in employer market power.¹⁰ The authors conclude that a monopolist would find it profitable to decrease wages by 5% in most markets and that workers’ productivity is 17% greater than their wages¹¹.

There is enough evidence to affirm that the concentration of labor markets directly harms workers, contributes to inequality and impedes the productivity and competitiveness of the economy¹³. These issues are even more significant because they disproportionately affect low-wage workers¹⁴.

Monopsony in labor markets create an environment that welcomes anticompetitive conduct by employers. Monopsony facilitates collusion between firms (wage-fixing and no-poach agreements) and provides them with the necessary leverage to impose non-compete agreements on employees. Mergers that affect labor markets have the potential to create or reinforce market power and enable the firms to further suppress wages post-merger¹⁵.

Antitrust authorities have a role to play in this exceptionally important issue for the American people and the economy. The section below presents suggestions for the Biden Administration to tackle the topic and promote a more fair and competitive labor market.

Solutions

Enforcement Actions:

- **Greater scrutiny of mergers going forward.** There is no record of a merger being challenged because of possible anticompetitive effects on labor markets.¹⁶ The antitrust agencies have not even have analyzed the labor market effects of mergers *vis-à-vis* product market effects. The FTC and DOJ should analyze in more detail cases with the potential to affect labor markets and a subset of cases should be prioritized, including pharmaceutical,

⁹ José Azar, Marshall Steinbaum, Ioana Marinescu & Bledi Taska. *Concentration in US Labor Markets: Evidence from Online Vacancy Data*. NBER Working Paper 24395 (2019). Markets are highly concentrated if they have an HHI of at least 2,500.

¹⁰ José Azar, Steven Berry, & Ioana Elena Marinescu. *Estimating Labor Market Power*. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3456277

¹¹ José Azar, Steven Berry & Ioana E. Marinescu. *Estimating Labor Market Power*. (September 18, 2019). Available at SSRN: <https://ssrn.com/abstract=3456277>

¹³ Ioana Marinescu & Herbert Hovenkamp. *Anticompetitive Mergers in Labor Markets*. Indiana Law Journal, vol. 94. “Compared to a perfectly competitive labor market, monopsony leads to lower employment and lower wages. *Ceteris paribus*, lower employment also entails lower production on the output (product) side. Ultimately, imperfect competition in the labor market has the same kind of depressing effect on production as imperfect competition in the product market”.

¹⁴ Alan B. Krueger & Eric A. Posner. *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*. The Hamilton Project. February 2018.

¹⁵ Ioana Marinescu & Herbert Hovenkamp. *Anticompetitive Mergers in Labor Markets*. Indiana Law Journal, vol. 94.

¹⁶ Suresh Naidu, Eric A. Posner & E. Glen Weyl. *Antitrust Remedies for Labor Market Power*. Harvard Law Review, 536 (2018).

health care, agricultural, telecom and media mergers. The more in-depth review could identify blind spots that are usually not fully addressed by the agencies.

Executive Actions:

- **Update the 2010 Merger Guidelines.** The 2010 Horizontal Merger Guidelines are the main tool employed by the FTC and DOJ to review mergers. However, the Guidelines are focused on product market competition and largely ignore issues related to the labor market. As put by Marinescu & Hovenkamp, mergers affecting the labor market require rethinking of merger policy, without altering its fundamentals.¹⁷ We suggest that the Guidelines be reviewed to evaluate concerns related to possible labor market power arising from a merger. There are potential improvements to virtually every section of the Guidelines. The agencies should be looking for new and improved methodologies to assess the relevant market for labor market mergers, such as the method proposed by Marinescu & Hovenkamp.¹⁸ The objective is for the FTC and DOJ to take into account the possible labor market effects of the merger, which are more significant when the merging parties are competitors in the same local market. Labor markets should be identified as an additional source of concern for the authorities when evaluating a merger. It is useful to recall Krueger and Posner’s suggestions for updating the Merger Guidelines, allowing the government to screen mergers based on the likely effects on labor markets: i) the agencies should define the labor activity, even broadly in some cases; ii) identify the labor markets affected by the merger; iii) assess if the merger has an effect on concentration in the labor market; and iv) allow firms to demonstrate any benefits that the merger would create to the labor market in order to offset any losses to the workers.¹⁹ Specific recommended adjustments to the merger guidelines are found below.

Section 2 of the Merger Guidelines provides a list of evidence employed by the Agencies to predict the anti-competitive effects of mergers. The list is not exhaustive, but explicitly including labor market effects in the section would guide the analysis and provide notice to firms that the Agencies intend to consider these effects. **Amend Section 2 to add:**

EVIDENCE OF ADVERSE COMPETITIVE EFFECTS

2.1.6 Distortions in Labor Markets

The Agencies consider whether a merger may lessen competition in the labor markets in which the merging parties are active. Markets with fewer relevant employers are more prone to anti-competitive

¹⁷ Ioana Marinescu & Herbert Hovenkamp. *Anticompetitive Mergers in Labor Markets*. Indiana Law Journal, vol. 94.

¹⁸ Ioana Marinescu & Herbert Hovenkamp. *Anticompetitive Mergers in Labor Markets*. Indiana Law Journal, vol. 94. See also José Azar, Steven Barry & Ioana E. Marinescu. *Estimating Labor Market Power*. (September 18, 2019). Available at SSRN: <https://ssrn.com/abstract=3456277> or <http://dx.doi.org/10.2139/ssrn.3456277>

¹⁹ Alan B. Krueger & Eric A. Posner. *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*. The Hamilton Project. February 2018. “Under our proposal, the regulators would be on guard against effects on both product market competition and labor market competition. The two are obviously different. Imagine that two manufacturers seek to merge, and that they both sell goods into a national market in which many other competitors are involved. The merger would pass the Guidelines as currently written. But imagine that the factories of the two competitors are located in the same town, and those factories are the largest employers of the town’s low-skill workers. The merger should be blocked because of its negative labor market effects unless the merging companies can show that the labor market will remain competitive or that there are other significant benefits from the merger”. (p. 12).

conducts, such as no-poaching and wage-fixing agreements. For example, if the firm post-merger becomes the greatest employer in a specific labor market, their merger could result in losses to the employees, reducing their mobility and bargaining power.

Section 4 of the Merger Guidelines addresses the question of market definition. The correct definition of the market limits the area in which the merger will impose its effects. The markets are defined in two vectors: product and geographic market. Taking inspiration from Marinescu & Hovenkamp²⁰, we propose that the Agencies should also define the relevant labor market affected by a merger. **Amend Section 4 to add:**

MARKET DEFINITION

4.3 Labor Market Definition

When merging firms compete against one another to hire employees, the Agencies define the labor markets that are prone to be affected by the merger. The equivalent of product market boundaries for labor markets are defined by the relevant skillset or training for a person to be considered as a prospective employee. The geographic boundaries for labor markets are affected by the level of mobility of current and prospective employees. Multiple relevant labor markets may be identified.

4.3.1 Skill Labor Market

When an employee hired by one merging firm (Employee A) could also be hired by the other merging firm, the Agencies define a relevant skill labor market around Employee A to evaluate the importance of the competition for Employee A's labor. Such a relevant skill labor market consists of a group of substitute employees including Employee A. Multiple relevant skill labor markets may thus be identified.

4.3.2 The Hypothetical Monopsonist Test

The Agencies employ the hypothetical monopsonist test to evaluate whether groups of employees in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the hypothetical monopsonist test to identify a set of employees that are reasonably interchangeable with the employees hired by one of the merging firms.

The hypothetical monopsonist test requires that a labor market contain enough substitute employees so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only

²⁰ Ioana Marinescu & Herbert Hovenkamp. *Anticompetitive Mergers in Labor Markets*. Indiana Law Journal, vol. 94.

present and future employer for those employees (“hypothetical monopsonist”) likely would impose at least a small but significant and non-transitory reduction in wages (“SSNRW”) for at least one set of employees in the market, including at least one class of employees hired by one of the merging firms. For the purpose of analyzing this issue, the terms of hiring for employees outside the candidate market are held constant. The SSNRW is employed solely as a methodological tool for performing the hypothetical monopsonist test; it is not a tolerance level for price increases resulting from a merger.

The hypothetical monopsonist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant labor market satisfying the test, guided by the principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects.

4.3.3 Benchmark Prices and the SSNRW Test

The Agencies apply the SSNRW starting from wages that would likely prevail absent the merger. If wages are not likely to change absent the merger, these benchmark wages can reasonably be taken to be the prices prevailing prior to the merger. If wages are likely to change absent the merger, e.g., because of innovation or entry, the Agencies may use anticipated future wages as the benchmark for the test. If wages might fall absent the merger due to the breakdown of pre-merger coordination, the Agencies may use those lower wages as the benchmark for the test. In some cases, the techniques employed by the Agencies to implement the hypothetical monopsonist test focus on the difference in incentives between pre-merger firms and the hypothetical monopsonist and do not require specifying the benchmark prices.

The SSNRW is intended to represent a “small but significant” reduction in the wages paid by firms in the candidate labor market. This properly directs attention to the effects of wage changes commensurate with those that might result from a significant lessening of competition caused by the merger.

What constitutes a “small but significant” reduction in wages, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms’ positions in it, and the Agencies may accordingly use a wage reduction that is larger or smaller than the five percent most often utilized in the SSNIP test described in Section 4.1.2. Where explicit or implicit wages for the firms’ specific contribution to value can be identified with reasonable clarity, the Agencies may base the SSNRW on those wages.

4.3.4 Implementing the Hypothetical Monopsonist Test

To implement the hypothetical monopsonist test, the Agencies may identify relevant skill labor markets by applying the six-code Standard Occupational Classification (SOC) system. This six-code definition may be overbroad, including workers with distinct skillsets and therefore providing a more conservative estimate of anti-competitive effects. The Agencies may also define relevant markets by job titles or another method to determine equivalence of skills, training, or responsibilities. The Agencies must assess in a case-by-case analysis which methodology is best suited for the case at hand.

The elasticity of labor supply may vary within a six-digit SOC or job title. The Agencies implement a SSNRW Test in the same sense that the SSNIP test described in Section 4.1.2 is employed to define a relevant market. Small and significant but non-transitory reduction in wages help to evaluate the elasticity of labor supply. A labor supply which has its elasticity below the critical elasticity means that the market is properly defined²¹. If the labor supply is greater than the critical elasticity, it could be argued that the market is defined too narrowly.

In considering employees' likely response to a decrease in wages, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to:

- how employees have shifted job placements in the past in response to relative changes in wages and benefits.
- information from employers, including surveys, concerning how they would respond to wage changes.
- employees informed beliefs concerning how employers would substitute among employee categories in response to relative changes in wages.
- objective information about the skills of employees and the switching costs for them, especially switching from employers in the candidate market to employers outside the candidate market.
- legal or regulatory requirements in a candidate labor market.

Even when the evidence necessary to perform the hypothetical monopsonist test quantitatively is not available, the conceptual

²¹ “The more elastic the labor supply, the more workers will be lost to a decrease in wages. The formula for the critical elasticity of labor supply to the individual firm is the direct equivalent of the formula for the critical elasticity of demand. If the elasticity of labor supply is below the critical elasticity, then the market is an appropriately defined relevant market for the purpose of antitrust merger analysis. If the elasticity of labor supply is greater than the critical elasticity, then the market is defined too narrowly”. (Ioana Marinescu & Herbert Hovenkamp. *Anticompetitive Mergers in Labor Markets*. Indiana Law Journal, vol. 94, p. 1050).

framework of the test provides a useful methodological tool for gathering and analyzing evidence pertinent to employee substitution and to labor market definition. The Agencies follow the hypothetical monopsonist test to the extent possible given the available evidence, bearing in mind that the ultimate goal of labor market definition is to help determine whether the merge may substantially impact the labor market negatively, particularly suppressing wages and benefits.

4.3.5 Geographic Labor Market

The arena of competition affected by the merger may be geographically bounded if geography limits some employees' willingness or ability to work for the merging firms. Both employee and firm locations can affect this. The Agencies apply the principles of market definition described here and in Sections 4.1 and 4.2 to define a relevant market with a geographic dimension as well as a skill dimension.

Agencies may assess the relevant geographic market using the Observed Commuting Zones developed by the United States Department of Agriculture. Observed Commuting Zones reflect commuting patterns to approximate the dynamics of the local economy and labor markets²².

Section 5 of the Merger Guidelines described the methodology used to assess the level of concentration of a given market, relying mostly on the market shares of the players. The main variable considered in assessing the behavior of agents is price. A firm's competitive significance arises from its capacity to readily serve a market if profitable. We understand that the same rationale could be employed for labor markets. Once the relevant labor market is defined, a firm's competitive significance is as great as its ability to absorb new employees in the market. Furthermore, the main competitive variable in labor markets should be wages, with the same role as prices in product markets. Influenced by the works of Azar, et al., we suggest the following amendments to Section 5 as a methodology to assess labor market concentration. **Amend Section 5 to add:**

MARKET PARTICIPANTS, MARKET SHARES, AND MARKET CONCENTRATION

5.4 Labor Market Concentration

The Agencies may also measure market concentration in labor markets, once the relevant labor market is defined according to the Guidelines set forth by Section 4. The relevant labor market concentration refers to the active firms that hire and employ labor. One possible way of measuring labor market concentration is using an analogous analysis to regular product markets. The total number of employees, total

²² It should be noticed that remote work should also play a role in defining the geographic labor market. The pandemic proved that many activities can be conducted remotely, with no need to a daily commute. When assessing the geographic relevant market, the Agencies should attempt to verify the importance of telework in such labor market and include such characteristics in its analysis. If a majority of workers perform their activities remotely, it could be argued that the geographic relevant market should be wider than commuting zones.

expenditures on workers and the total number of positions are equivalent to the traditional measurements of total output, total revenue, and capacity.²³

In Section 6 the Guidelines address the issues regarding possible unilateral effects arising from the merger of two competing firms. The elimination of competition may alone constitute a substantial lessening of competition. The same effects may be imposed upon the relevant labor market of the merger. A possible unilateral effect is discussed below. **Amend Section 6 to read:**

UNILATERAL EFFECTS

6.5 Labor Markets

The Agencies may consider whether a merger is likely to produce effects in the relevant labor markets in which the firms are active by encouraging the merged firm to reduce new job openings and suppressing wages. The Agencies also consider whether a merger is likely to provide incentives for the merged firm to cease employing a specific type (skill) of labor force.

The Guidelines recognize that mergers may reinforce market power and also encourage post-merger coordinated effects between competitors. This is prone to happen not only in product markets, but also in labor markets. In labor markets, coordinated effects may reflect in firms offering the same wages and benefits to current and potential employees, diminishing the competition for job vacancies. In a concentrated market coordinated effects are more likely to take place. **Amend Section 7 to add:**

COORDINATED EFFECTS

7.3 Coordinated Effects in Labor Markets

When examining whether a merger is likely to change the manner in which market participants interact, the Agencies also examine the effects of coordinated effects in labor markets. The Agencies seek to identify how a merger could result in injuries to employees, particularly in the form of lower wages and benefits. The Agencies particularly scrutinize these effects in concentrated labor markets, in which the coordination between firms is easier. Collective market power, in the form of oligopsony, plays a crucial role. The Agencies are particularly likely to challenge mergers that pose a danger of harming employees and the labor market through coordinated effects. History of coordination, such as prior non-poaching violation, would be a relevant factor against the merger.

Questions regarding powerful buyers in the labor markets are in the center stage of any argument related to anticompetitive conducts in labor markets. Monopsony power in labor markets has been largely addressed by the economics literature and

²³ Sources for data regarding job vacancies may be Emsi, Burning Glass and Indeed.

there seems to be no doubt regarding its existence. The current Guidelines should be updated to cover this important issue. The amendments in Section 8 and Section 12 should be structured and thought together, given the intrinsic relationship between powerful employers and mergers of competing employers, considering that the latter may reinforce the existence of the former. **Amend Sections 8 to add:**

POWERFUL BUYERS & MERGERS OF COMPETING BUYERS

Example. Employee A has been able to successfully apply for job vacancies in their commuting zone and choose which package of wages and benefits fits them best from the two available employers. A merger would likely harm the employee. In a post-merger scenario, the dominant (monopsonist) firm would be able to impose lower wages, given that there are no other potential employers in the relevant geographic market.

In the same sense, Section 12 should include guidelines regarding mergers from competing employers and its effects on labor markets.

Amend Section 10 to read:

EFFICIENCIES

When evaluating the effects of a merger on labor markets, the agencies should look for pro-competitive efficiencies, one that would increase the demand for labor in the relevant market.

Efficiency claims in the labor market will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies in labor markets may be viewed with skepticism, particularly when generated outside of the usual business planning process.

Amend Section 12 to read:

MERGERS OF COMPETING EMPLOYERS

In the same sense that mergers between buyers can enhance market power on the buying side of the market, mergers between employers can enhance market power on the “contracting” side of the market – creating monopsony power in a labor market.

Monopsony power in a labor market is a significant concern if employees do not have numerous and attractive opportunities for job placements. When this is the case, the Agencies may conclude that the merger of competing employers is likely to lessen employment conditions in a manner harmful to employees.

Example. Merging Firms A and B are the only two employers in the relevant geographic market for labor related to agriculture. Their merger will enhance employer power and depress the wage paid to employees, causing a transfer of wealth from employees to the

merging firms. These effects can arise if the merger will not lead to any increase in the price charged by the merged firm for its output.

Amend Section 13 to read:

PARTIAL ACQUISITIONS

A partial acquisition can lessen competition in labor markets by providing the acquiring firm with the ability to influence the conduct of the target firm in the relevant labor market. A voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, can permit such influence. Such influence can lessen competition in labor market because the acquiring firm can use its influence to induce the target firm to coordinate its conduct with that of the acquiring firm, in the form of parallelism of wages and benefits.

Also, a partial acquisition can lessen competition in labor markets by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can lead to adverse unilateral or coordinated effects. It can enhance the ability of two firms to coordinate their behavior. The risk of coordinated effects is greater if the transaction also the flow of competitively sensitive information from the acquiring firm to target firm.

Example. Firm B partially acquires Firm A, and is able to access competitively sensitive information regarding jobs placement, wages and benefits offered to certain employees in a given location. This allows Firm B to make informed decisions based on Firm A's strategy, possibly incurring in tacit collusion regarding wages paid in a given labor market.

- **Instruct New Studies by the Agencies.** In addition to reviewing the merger guidelines, we suggest that the agencies employ funds to stimulate new studies focused on the effects of mergers in labor markets, propose a new regulatory agenda and influence the regulatory discussion on the need for reform in merger review.

Legislative Actions:

- **Reform Federal Antitrust Legislation.** The two main antitrust statutes were written in the beginning of the 20th century and, over time, their meaning and focus have been changed by courts. The current consumer welfare standard is sometimes applied by Courts as it does not address modern antitrust issues. This trend is particularly pronounced in the labor market effects of mergers because lower wages can lead to lower prices for consumers, which the parties then claim as an efficiency benefit.²⁴ Below-competitive

²⁴ It is worth noting that that current, standard jurisprudence does not allow an efficiency to be the result of anticompetitive conduct.

wages cause dynamic harms, in the sense that they discourage employees from investing time and training in the affected professions. Reforming antitrust legislation to correct these courts' rulings will improve the allocation of labor and benefit consumers and workers alike. Congress should instruct agencies and courts to consider the labor market effects of mergers, and not only the output price effects. The preamble of a new antitrust law should clarify that one goal of the legislation is well-functioning labor markets that are protected from monopsony power.

PART II: Problem: Non-Compete and No-Poach Agreements Restrict Labor Mobility

No-poach agreements are agreements between competing firms, or firms in upstream or downstream markets, in which both firms commit not to hire employees away from one another. This restricts job mobility and labor supply. Non-competes are clauses in employment contracts that restrict what kind of labor activities, and for how long and where the employer may perform after ending its labor relation. No-poach agreements and non-competes create employer market power and must be prohibited.

No-poach agreements – whether between separate firms or franchises of the same company – limit outside job prospects for employees. While courts have established that no-poach agreements between separate firms violate Section 1 of the Sherman Act, they have yet to firmly condemn no-poach agreements between franchisees.²⁵

Non-competes restrict the jobs employees can take if they leave their current employer. Surveys indicate that more than 40% of employees have been subject to a non-competes or no-poach agreement at some point in their career.²⁶ Non-competes can have benefits in a few limited cases when the employee controls the business' good will or sensitive commercial information that, once hired, they can use to “hold up” the employer by threatening to leave for a competitor.²⁷ This does not describe the vast majority of employees covered by non-competes. Instead, non-competes are used in settings where their effect is to limit employees' job prospects and improve employer bargaining power.

No-poach agreements are always illegal under Section One of the Sherman Act, and the Department of Justice has begun to pursue criminal sanctions against parties that form no-poach agreements.²⁸ No-poach agreements reduce competition for labor, usually among horizontal competitors. Non-competes involve a contract between employer and employee, both of whom allegedly consented. Nevertheless, while the instruments are different in the mechanisms and

²⁵ These agreements between employers fall within the Sherman Act's ban on any “contract, combination . . . or conspiracy, in restraint of trade.” 15 U.S.C § 1; DOJ. *No-Poach Approach*. Spring 2019. (<https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach>)

²⁶ Evan Starr, J.J. Prescott & Norman Bishara. *Noncompetes Agreements in the U.S. Labor Force*. Journal of Law and Economics, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=2625714> or <http://dx.doi.org/10.2139/ssrn.2625714>

²⁷ U.S. Department of Treasury. *Non-Compete Contracts: Economic Effects and Policy Implications*. March, 2016.

²⁸ See *United States v. Surgical Care Affiliates, LLC and Scai Holdings, LLC*. <https://www.justice.gov/opa/press-release/file/1351266/download>

agents involved in restraining job mobility, when a non-compete fails the rule of reason test, they have similar anticompetitive effects.²⁹

No-poach agreements and non-competes produce harms to employees and static and dynamic harms to competition. Both instruments reduce competition in labor markets by reducing potential employee-employer matches. This has the likely effect of reducing the employees' exit options, enhancing employers' bargaining power, since employees' threats to switch jobs are less credible. This reduced bargaining power arises in highly concentrated labor markets where the firm may acquire labor market power, and produces harms to employees who are likely to face lower wages than they would have otherwise if at least some of them had the option to leave for higher-paying offers.

Non-competes and no-poach agreements also produce dynamic harms to competition in the firm's labor market and in the related product market by limiting future labor supply, entrenching the current labor market power levels, and likely resulting in higher levels of concentration in the respective goods or service markets. Potential prospective employees will refrain from entering that labor market due to the lower wages produced by lower bargaining power and widespread use of non-competes and non-poach agreements. Decreased labor supply, whether due to restrictions on the movement of current employees or avoidance of the labor market by potential future employees, may create barriers to entry by for other firms, denying the scale necessary to make producing a good or service profitable. This may create harms related to monopoly or oligopoly, like reduced output, higher prices, lower quality, and reduced innovation.³⁰

This dynamic can also result in similar effects in other labor markets. Higher levels of concentration in the original labor market may spill over to associated labor markets, resulting in lower competition for associated labor if new firms refrain from entering this market due to the original labor market issues.³¹

Solutions

Agency Enforcement Actions:

- **Continue to Pursue Vertical and Horizontal No-Poach Cases:** Even in the absence of an explicit ban on franchise no-poach agreements, continued investigations and prosecutions of both no-poach horizontal and vertical no-poach agreements under Section 1 of the Sherman Act will help restore competition in labor markets and boost wages. The DOJ begun to pursue criminal charges in no-poach cases and bolster its enforcement ability by continuing to do so.³²

Executive Actions:

²⁹ Eric Posner. How Antitrust Failed Workers. Forthcoming (2021).

³⁰ Eric Posner. How Antitrust Failed Workers. Forthcoming (2021).

³¹ Eric Posner. How Antitrust Failed Workers. Forthcoming (2021).

³² Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the Public Workshop on Competition in Labor Markets (Sept. 23, 2019), <https://www.justice.gov/atr/video/opening-remarks-makan-delrahim-assistant-attorney-general-antitrust-public-workshop>.

- **Provide Guidance on the Anti-Competitive Nature of Most Non-Competes and provide better inter-agency coordination for enforcement:** The DOJ Antitrust Division, FTC, and DOL should jointly issue guidance that non-compete agreements are viewed as presumptively anti-competitive and that the DOJ and the FTC may investigate firms for antitrust violations if they have broad uses of non-competes. The DOJ and FTC have already issued joint guidance on no-poach agreements and should take the same course for non-competes. The executive should also promote inter-agency working groups and cooperation.³³

Presume Non-Competes Illegal and Shift the Burden-of-Proof in Determining Their Legality Under the Rule of Reason to the Employer by Using the FTC’s Rulemaking Authority: The Federal Trade Commission should use its statutory authority under section 5 of the Federal Trade Commission Act to issue a rule defining “unfair methods of competition” in this realm to presumptively recognize non-competes as illegal and to shift of the burden-of-proof in determining their legality under a rule-of-reason approach to the employer once the plaintiff has shown that the non-compete restrained their ability to move to a higher paying job.³⁴ The Federal Trade Commission has been granted authority under the FTC Act, Section 6(g), 15 U.S.C. Sec. 46, to issue rules in pursuit of its “unfair methods of competition” authority.³⁵ Differently from the its rulemaking authority regarding “unfair or deceptive acts or practices in or affecting commerce”, the rulemaking under the “unfair methods of competition” authority has been used only once, was never enforced, and later repealed.³⁶ However, it has been increasingly suggested by many scholars as a powerful tool to deal with competition issues and, in particular, non-competes.³⁷ The DC Circuit, in the case *Nat’l Petroleum Refiners Ass’n v. FTC*, recognized the FTC authority to engage in rule-making.³⁸ In order to issue a rule, the FTC would have to comply with the requirements of the Administrative Procedure Act, Notice and Comment rulemaking

³³ See “Antitrust Guidance for Human Resource Professionals” (<https://www.justice.gov/atr/file/903511/download>)

³⁴ The use of FTC rulemaking authority to deal with non-compete cases has been advocated before: Alan B. Krueger & Eric A. Posner. *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*. The Hamilton Project. February 2018. (https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf); and FTC Commissioners Chopra (https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf), and Slaughter (https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf).

³⁵ 15 U.S.C. Sec. 46.

³⁶ FTC Men’s and Boy’s Tailored Clothing Rule, 16 C.F.R. § 412 (1968). Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994).

³⁷ Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 Tex L Rev 1247, 1288–89 (2011); Hemphill, 109 Colum L Rev at 673–82; Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U Pitt L Rev 209, 250–52 (2014); Sandeep Vaheesan, *Resurrecting ‘A Comprehensive Charter of Economic Liberty’: The Latent Power of the Federal Trade Commission*, 19 U Pa J Bus L 645, 651–57 (2017); Rohit Chopra, Lina Khan, *The Case for “Unfair Methods of Competition” Rulemaking*. 87 The University of Chicago Law Review, 87 U. Chi. L. Rev. 357, 357–380 (2020). See also: Federal Trade Commission, *FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts* (Dec 5, 2019), available: <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-hold-workshop-non-compete-clauses-used-employment-contracts>.

³⁸ *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

procedure.³⁹ The statutory ground for the presumptive ban on non-competes would be section 5 of the FTC Act.⁴⁰ The burden-of-proof should be allocated to the employers which are better positioned to provide evidence of the reasonableness of enforcing non-compete contractual clauses and that have increased bargaining power in general. Moreover, this presumption and shifting of the burden-of-proof would be an additional instrument against unenforceable non-compete contractual provisions.

Rulemaking should read:

It is presumed unfair methods of competition in labor markets:

- (a) the agreement and enforcement of non-compete clauses in employment contracts.

Employees that seek enforcement of contracted non-compete clauses have the burden-of-proof, under a rule-of-reason standard, for determining their legality.

Legislative Action:

- **Eliminate All No-Poach Agreements:** Franchise no-poach agreements likely already violate Section 1 of the Sherman Act. However, an explicit ban on no-poach agreements between franchisees would make enforcement substantially easier. If passed, the End Employer Collusion Act (<https://www.congress.gov/bill/116th-congress/senate-bill/2215/text>) would implement many of our recommendations for legislation eliminating no-poach agreements. The following amendments to the language of that bill would strengthen protections for workers and improve enforcement of the law:
- **Eliminate Nearly All Non-Compete Agreements:** The administration should follow through on the proposal in the Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions to ban all but a narrow subset of non-compete agreements.⁴¹ Several states have had success banning non-compete agreements and the proposed Workforce Mobility Act of 2019 provides a starting point for federal legislation.⁴² Since states have struggled to protect employees by applying vague standards of reasonableness to non-competes, the administration should follow the lead of California and categorically ban all non-compete agreements other than those in i) the sale of a business, ii) separation of a partner, or iii) dissolution of a company.⁴³

³⁹ Some requirements are “(b) General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include — (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S. Code § 553. This is even more important considering that litigation is likely to follow the rule issuance, considering the underuse of this authority and questions about if it encompasses this shifting of presumption on non-competes, besides “hard look” agency review, and potential the substantive debate about anticompetitive effects of non-competes.

⁴⁰ 15 USC §45.

⁴¹<https://joebiden.com/empowerworkers/>

⁴² See the proposed “Workforce Mobility Act of 2019”. <https://www.congress.gov/bill/116th-congress/senate-bill/2614/text>

⁴³ See California Business and Professions Code, Sections 16600 - 16602.5

- **Require Payment of Attorney’s Fees and Statutory Penalties by Employers Violating Bans on No-Poach and Non-Competes:** Even if no-poach and non-compete clauses are made unenforceable, employers may still include them in contracts to deceive workers, resulting in the negative effects described above. To encourage use of an individual right to action to enforce bans on no-poach and non-compete agreements and to discourage employers from purposely deceiving workers, a ban on non-compete and no-poach agreements should require statutory penalties and attorney’s fees be paid to a successful plaintiff enforcing the right. Both the Clayton Act and the proposed Workforce Mobility Act of 2019 include language to award attorney’s fees to successful plaintiffs.⁴⁴ Leading scholars have suggested also using penalties to deter manipulative behavior by firms and Washington has implemented mandatory fines for violators of its recent ban on many non-competes on top of an award of attorneys’ fees.⁴⁵ Including both attorneys’ fees for plaintiffs and mandatory fines for willful violators would ensure that a ban on these contracts does in fact “[g]ive businesses incentives to write contracts that are enforceable under the law.”⁴⁶

Workforce Mobility Act

If passed, the Workforce Mobility Act of 2019 (<https://www.congress.gov/bill/116th-congress/senate-bill/2614/text>) would implement many of our recommendations for legislation eliminating noncompete agreements. The following amendments to the language of that bill would strengthen protections for workers and improve enforcement of the law by implementing statutory damages for violation of the act and providing employees with notice of the available remedies:

Amend Section 5(a) to read:

(a) NOTICE.—Any person who engages an individual who performs work for the person in commerce or in the production of goods for commerce (or employs an individual in an enterprise engaged in commerce or in the production of goods for commerce) shall take each of the following steps:

(i) Post notice of the provisions of this Act in a conspicuous place on the premises of such person.

(ii) Inform any employee whose contract contains a noncompete agreement made inoperative by section 3(a)(1) that the noncompete agreement under their contract is inoperative and provide such employee with a copy of the text of their contract omitting the text of noncompete agreement.

This amendment closes a loophole in Section 3(a)(1) that would otherwise allow employers to leave in place the text of unenforceable noncompete agreements. Without this amendment, employers may benefit from employees lacking full knowledge of their rights despite the awareness efforts of Section 5.

Amend Section 6(b)(2) to read:

⁴⁴ 15 U.S.C. § 4304; Workforce Mobility Act of 2019 (<https://www.congress.gov/bill/116th-congress/senate-bill/2614/text>)

⁴⁵ Alan B. Krueger & Eric A. Posner. *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*. The Hamilton Project. February 2018; RCW 49.62.080 (<https://app.leg.wa.gov/RCW/default.aspx?cite=49.62.080>)

⁴⁶ Joe Biden. *We heard your stories. It’s time to #LetUsCompete*. Medium, Oct. 25, 2016. (<https://medium.com/@VPOTUS44/we-heard-your-stories-its-time-to-letuscompete-1b440782a8ae>)

(2) CIVIL FINES.—In an action described in paragraph (1)(B), the court of competent jurisdiction described in such paragraph shall impose a civil fine on any person described in paragraph (1)(A) who violates section 3 or 5(a), in an amount not to exceed \$5,000 per week for each employee affected by such violation. Such fine shall be paid to the individuals aggrieved by such violation.

This will clarify that fines will be assessed on a per-employee basis. Assessing fines on a per-employee basis will ensure that large companies have an incentive to follow the law.

Amend Section 6(d) to add:

(3) CIVIL FINES.—In any action in which relief is provided under paragraph (2), a court shall impose a civil fine on any person who violates section 3 or 5(a), in an amount not to exceed \$5,000 per week for each employee affected by such violation. Such fine shall be paid to the individuals aggrieved by such violation.

Adding civil fines under the private right of action will increase enforcement of the law, encourage workers with small claims to vindicate their rights, and incentivize businesses to draft contracts that are enforceable.

Add a Section specifying:

SEC. 9. ADJUSTING DOLLAR AMOUNTS.

A court assessing fines under Sections 6(b)(2) and 6(b)(3) shall adjust the dollar amounts for civil fines under those sections to account for inflation utilizing the CPI-U, rounded to the nearest cent.

This will ensure that the statute's remedies do not become outdated due to inflation.

Add a Section specifying:

SEC. 10. RESTRICTIVE EMPLOYMENT AGREEMENTS.

Nothing in this Act may be construed to reduce the amount of damages otherwise available to a plaintiff in a case involving a noncompete agreement that is determined to be unreasonable or otherwise unenforceable.

End Employer Collusion Act

If passed, the End Employer Collusion Act would implement many of our recommendations for legislation eliminating no-poach agreements.⁴⁷ The following amendments to the language of that bill would strengthen protections for workers and improve enforcement of the law by implementing statutory damages for violation of the act:

Amend Section 2(d)(2)(A) to add:

(iii) CIVIL FINES.—In any action in which relief is provided pursuant to this section, a court shall impose a civil fine in an amount not to exceed \$5,000 per week for each employee affected by such violation. Such fine shall be paid to the individuals aggrieved by such violation.

⁴⁷ <https://www.congress.gov/bill/116th-congress/senate-bill/2215/text>

- **Use Grants to Encourage Enforcement:** In 2020, the Department of Labor provided states with more than \$1.3 billion in Employment Services grants.⁴⁸ Future funding for these grants should require that recipient states either 1) pass and enforce their own bans on no-poach agreements and covenants not to compete, or 2) create a plan to enforce the suggested federal legislation suggested above. Adding a restriction to the allocation of these funds such that states receiving the funds must have a plan to enforce guidance and rules against noncompete and no-poach agreements will improve enforcement of these policies. There are three potential paths by which this may be accomplished: 1) rulemaking by the Secretary of Labor, 2) provisions in an appropriations bill, or 3) amending the Workforce Innovation and Opportunity Act.

Rulemaking

It may be possible for the Secretary of Labor to implement a rule requiring states to implement these requirements under the Secretary’s 102(b)(2)(E) authority. Section 102(b)(2)(E) states that the Secretary may implement requirements “regarding such other matters as the Secretary of Labor or the Secretary of Education, as appropriate, determines to be necessary for the administration of the core programs”. This would be the easiest route if available. The rule should read:

This Rule applies to grants to States under subtitle B of title I Workforce Innovation and Opportunity Act.

To ensure that funds for the core programs of the Act increase access to and opportunities for the employment, education, training, and support services they need to succeed in the labor market, States must:

- (i) submit to the Secretary of Labor a plan to enforce Department of Labor, Federal Trade Commission, and Department of Justice rules against noncompete and no-poach agreements; and
- (ii) have the plan approved by the Secretary.

Appropriations Legislation

Alternatively, it may be possible to insert the funding restrictions into an appropriations bill. In the portion of the title for the Department of Labor Employment and Training Administration Training and Employment Services that specifies “grants to States for adult employment and training activities, youth activities, and dislocated worker employment and training activities”, include:

Provided, That the Secretary shall withhold the amount required to be apportioned to any State under subtitle B of title I Workforce Innovation and Opportunity Act until such time as (i) the State submits to the Secretary a plan to enforce Department of Labor, Federal Trade Commission, and Department of Justice rules against noncompete and no-poach agreements; and (ii) the plan is approved by the Secretary.

Statutory Amendment

⁴⁸ These grants support state and local agencies for workforce development and are separate from the more than \$10 billion in grants to states for unemployment administration and pandemic relief. (https://www.usaspending.gov/federal_account/016-0179)

Since few states have strong laws or enforcement against noncompete and no-poach agreements, this may be excessively coercive to implement immediately. Amending the Workforce Innovation and Opportunity as follows should avoid this issue.⁴⁹

Amend Sec. 102(b)(2)(E) to add:

(xi) that the State shall take action to enforce Department of Labor, Federal Trade Commission, and Department of Justice rules against noncompete and no-poach agreements.

Part III: Problem: Combatting Market Power in the Gig Economy’s Labor Markets

The so-called gig economy has seen explosive growth over the last decade and a half: today, 36% of the entire US labor force is involved in the gig economy, and this number is only growing.⁵⁰ While the gig economy has created a valuable, flexible source of income for many, its workers often face low and unpredictable wages, lack health insurance and other critical benefits, and are at the mercy of changing platform standards and the threat of removal.

The precarious nature of this work results from a significant asymmetry between the platforms that dominate these markets and the individual workers that provide services. Dominant platforms exercise meaningful market power, benefiting from indirect network effects and a treasure trove of historic data. By contrast, workers are denied collective action rights, making them effectively powerless to negotiate with platforms. Here we propose policies that focus on the specific challenges facing on demand drivers, a major segment of the gig economy. However, these policies are also relevant for other platforms that rely on workers providing closely managed services, such as dog walking or home cleaning.

Uber, Doordash, and other major platforms argue that their drivers are independent contractors, rather than employees, and they have spent hundreds of millions of dollars pushing policies that maintain this classification⁵¹, arguing it is critical to giving drivers the flexibility many value. In addition to allowing platforms to skimp on benefits and payroll related costs, this classification denies workers collective action rights: under antitrust laws, any attempt by independent contractors to bargain for higher wages is considered an illegal price fixing conspiracy.

While the platforms claim its workers are individual businesses competing with one another, many of these workers are denied the ability to compete on price—most driving platforms set the prices at which all their drivers must provide services. If it is illegal for drivers to coordinate on price, it cannot be legal for platforms to facilitate price coordination. We argue this coordination constitutes a “hub-spoke-and-rim” price fixing conspiracy, prohibited under §1 of the Sherman Act. The status quo allows an artificial asymmetry of bargaining power and is inconsistent with antitrust law.

To fix this imbalance, antitrust authorities could sue platforms that fix prices among independent contracts. Such a case would be strong: platforms will not argue that drivers are anything other than independent drivers, and it is clear that they set a single price. Indeed, it is unclear why the

⁴⁹ Note: The language of the restriction is adapted from 23 USC 158. That statute only withheld a portion of the funds involved, which may be necessary to prevent the statute from being interpreted as coercive.

⁵⁰ Gallup. The Gig Economy and Alternative Work Arrangements, 2018.

⁵¹ Wired. With \$200 Million, Uber and Lyft Write Their Own Labor Law, Nov 4, 2020.

platform rideshare model has not already come under antitrust scrutiny. An enforcement action may create enough leverage to reach an agreement that expands the rights and protections for drivers. However, we argue that a better solution is to empower gig drivers to engage in collective action. This approach preserves the benefits of charging a single price, namely the convenience provided to consumers. Moreover, it is preferable to antitrust enforcement because it directly addresses the challenges faced by drivers, avoids the uncertainty associated with extended litigation, and ensures coverage for the greatest swathe of workers. We also argue for robust enforcement and legislation where necessary to maintain competition among gig platforms.

Core Proposal: Collective Action Rights for Gig Economy Drivers

Our core proposal is collective action rights for drivers and other workers central to gig economy platforms. These rights include protection from antitrust liability for collective bargaining and protection for engaging in strikes as provided by the National Labor Relations Act. Allowing workers to organize and strike would enable them to negotiate meaningfully with Uber and other platforms. Through collective bargaining, workers could secure those benefits and changes most beneficial to them. Given the immaturity of the gig economy and the potential for continued innovation, such an approach is nimbler than advocating specific benefits and allows greater expression of worker preferences, such as flexible hours. Moreover, this approach provides protection to a broader swathe of gig economy workers than enforcement against a single platform.

- **“ABC Test”:** Replace the current employee/independent contractor test under the National Labor Relations Act with the “ABC test.”
 - This test places the burden on employers to show that their workers are not employees, by demonstrating that they are free from control or direction in the provision of work, that work takes place outside the company’s usual course of business, and the work constitutes an independent business or trade.
 - This provides a much more flexible definition of employee that should protect both drivers and other core workers on gig economy platforms.
- **Industry-Specific Designation:** Adopt industry-specific language that designates app-based drivers as employees under the National Labor Relations Act.
 - This definition should cover all drivers that (a) use an internet-based application to provide short-term delivery or transportation services, (b) connect to clients through this application, and (c) are subject to standards set by the platform.
 - As we saw after the passage of AB5 in California, platforms may still try to misclassify even under a more stringent “ABC” test. While platforms alone cannot block workers from organizing, the threat of litigation over worker classification may have a chilling effect on efforts to organize.
 - This legislation may be adopted in addition to, or as a less ambitious alternative to, a broader labor reclassification scheme.
- **Robust Strike Protections:** Update the NLRA to explicitly protect additional forms of striking more effective in the gig economy, such as intermittent strikes, rolling strikes, and digital sit-ins, like unified driver service request denials while remaining on the app.
- **Prohibit Short Term Fare Increases During Strikes:** Complement protections for collective bargaining with a prohibition on short term fare increases or rewards programs during recognized strike periods intended to attract strikebreakers.

Alternative Proposal: Enforcement Action Against Platform Price Fixing

If Uber, Lyft, and other gig platforms successfully oppose meaningful legislative action on the federal and state level or continue to deny workers legal rights to which they are entitled, antitrust authorities should be prepared to bring enforcement action to challenge the core platform business model.

An enforcement action may serve the cause of greater driver rights in a number of ways. A fully litigated case that found Uber in violation of antitrust laws would most likely present the firm with one of two choices: reclassify its drivers as employees or implement a pricing mechanism that allows drivers to compete and set their own prices. The former would guarantee drivers collective action rights, while the outcome of the latter is less certain.⁵² However, both outcomes would be extremely costly for Uber.⁵³

The risk of such a judgment as well as the cost and uncertainty of litigation would put meaningful pressure on Uber to support a less drastic solution. Uber could expand the scope and power of worker representation through organizations like the “Independent” Drivers Guild.⁵⁴ Uber could also commit to drop its opposition to—or even actively support—efforts to expand collective bargaining rights to drivers. Neither directly guarantees drivers full collective bargaining rights, and the degree to which these could be binding commitments in a settlement is a question, but this would represent some progress, and could create the political space for more meaningful driver rights.

Here we lay out the legal case to challenging Uber as an illegal price fixing conspiracy. While the legal doctrine may be complicated, the case can be made intuitively: If it is illegal for rideshare drivers to coordinate independently, a business model built around facilitating that coordination cannot be legal under antitrust law. However, this is precisely what Uber and Lyft’s rideshare platforms and pricing algorithms do. Rather than require drivers to compete on price, Uber and Lyft set a single price.

Uber’s Pricing and Matching Algorithm Harms Drivers and Riders Alike

With its massive user base and powerful network effects, Uber can use price coordination among drivers to extract monopoly rents, harming both sides of its network.

Uber monetizes the rideshare business by charging a number of service and platform fees. Uber’s take rate on a given ride is impacted by a number of factors and varies ride by ride. In a simple profit maximization problem, Uber can maximize its profits by setting rideshare prices (i.e., prices paid by consumers) in accordance with its market power, which, in many geographies, is

⁵² Professor Sanjukta Paul argues that a loss for Uber in a price fixing case would drive down worker pay even further. Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications (August 2, 2016), 243. Berkeley Journal of Employment and Labor Law, Vol. 38, No. 1, 2017, <https://ssrn.com/abstract=2817653>. Note also that any price fixing suit would include drivers as “co-conspirators.”

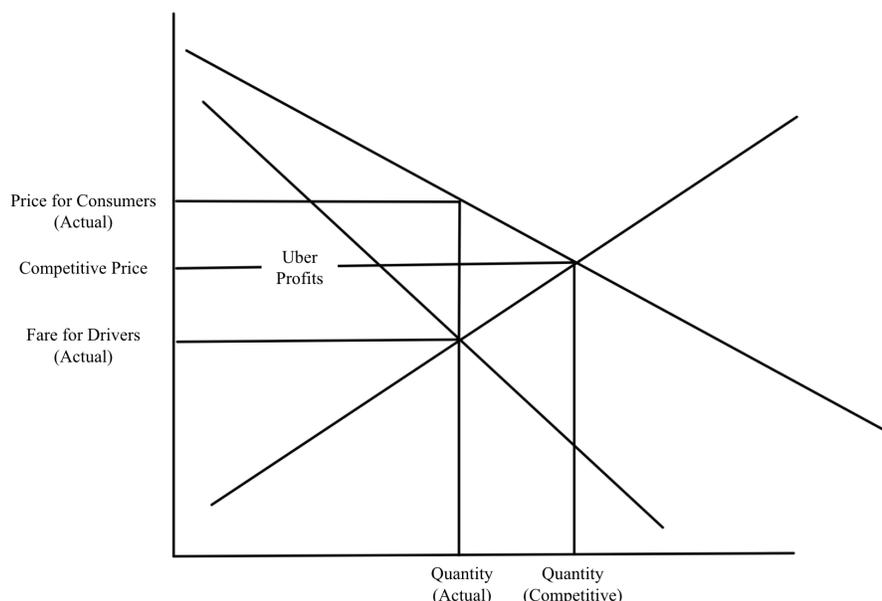
⁵³ Sandler, Rachel. Uber Won’t Let California Drivers Set Their Own Prices Anymore After Rider Cancellations Increased 117%. Forbes. April 9, 2021.

⁵⁴ Scheiber, Noam. Uber Has a Union of Sorts, but Faces Doubts on its Autonomy. New York Times. May 12, 2017.

considerable. Not only does Uber have market power in the consumer rideshare market, Uber also exercises monopsony in the driver market. As a result, Uber can extract as fees the entire difference between marginal willingness of consumers to pay and marginal willingness of drivers to drive, on each ride it facilitates. *See* Figure 1.

Here consumers pay higher prices for a lower quantity and significant consumer surplus is lost. Because of Uber’s monopsony power, the additional profits typically captured by the monopolist are instead captured by Uber. Drivers receive *lower* fees for fewer drives. Uber’s ability to capture this monopoly rent is a direct result of the unequal application of antitrust law.⁵⁶

Figure 1



Whether Uber’s pricing algorithm and fee structure does in fact serve to extract monopoly rents is a question of fact. Both the “winner-takes-all” nature of multi-sided platform markets and Uber’s investor base have led the company to prioritize growth over all else. This means that Uber has subsidized both sides of its rideshare product—lowering rates for consumers and raising fares for drivers—to grow both the size of the rideshare market and to compete aggressively with competitors over the course of its history. As the company matures, its position grows more dominant, and it must focus more on profitability, it is more likely that we will see more extractive pricing.

Hub-Spoke-and-Rim Price Fixing Conspiracy

We advocate for a primary claim of antitrust liability based on a hub-spoke-and-rim price fixing conspiracy. This is a conspiracy where a single central party, the “hub,” coordinates an agreement among many independent parties, the “spokes.”⁵⁷ This horizontal agreement among the parties is

⁵⁶ As Paul explains, the status quo “implies that Uber is entitled to derive an economic benefit from a premium from coordination in the price of ride services, at the expense of Uber riders, while Uber drivers are not entitled to benefit from the premium.” *Id.* at 239.

⁵⁷ *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir.2015), cert. denied, Mar. 7, 2016.

known as the “rim.” While the “rim” is necessary to establish a hub-and-spoke conspiracy, only circumstantial evidence, such as a “common motive to conspire,” is required to prove the existence of the “rim.”⁵⁸ A hub-spoke-and-rim price-fixing case is a particularly powerful tool because such conduct is generally “per-se” illegal.⁵⁹

We argue that Uber’s vertical relationships with its drivers facilitated a conspiracy *among* its drivers in which they agreed to charge minimum fares and to use a pricing mechanism that enables “surge-pricing.” At least one federal court has found a claim of a conspiracy to fix prices through the Uber platform’s pricing mechanism to be plausible, relying on a hub-spoke-and-rim theory.⁶⁰

Vertical Agreements Between Hub-and-Spokes

The relationship between the Uber platform and individual drivers establishes the vertical agreements in the hub-and-spoke conspiracy. The relationship is initially established when drivers sign-up for the platform and agree to its written terms, including Terms of Use (“TOU”) and Platform Access Agreement (“PAA”). Each time a driver accepts a ride, they reaffirm this agreement.

The PAA sets out the terms of the relationship between Uber and its drivers. The agreement notes that Uber “enables” drivers to charge a fare for each ride, “calculated as a base amount plus amounts based on the Ride’s distance and/or time.” This fare may also include adjustments for supply and demand (i.e., surge pricing).⁶¹ The base rates are set on a city-by-city basis, while surge prices are based on temporary, localized spikes in demand.⁶² The PAA notes that drivers are free to “accept, decline, or ignore” requests through the app, but does not allow drivers to set fares, nor does the app provide any mechanism to do so. Note that both agreement to actual specified fares and agreement to a common pricing mechanism (e.g., surge pricing) are “price-fixing” under antitrust law.⁶³

One important feature of the relationship Uber purports to have with both its drivers and consumer users is the nature of the services it provides. Uber is careful to describe itself as a multi-sided digital marketplace platform.⁶⁴ The company claims to provide services to facilitate users connections to “independent third party providers, including drivers” to buy transportation and other services. Uber is clear to disclaim that it is not a “provider of transportation” and “does not transport” the user.⁶⁵ Thus, Uber is not “buying services” from drivers and reselling them to consumers, which likely would not constitute an antitrust violation.

⁵⁸ *Id.* at 315.

⁵⁹ “[T]he Supreme Court has for nearly 100 years held that horizontal collusion to raise prices is the ‘archetypal example’ of a *per se* unlawful restraint of trade.” *Id.* at 326.

⁶⁰ *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 824 (S.D.N.Y. 2016) (denying a motion to dismiss). This case was ultimately forced into arbitration before a consideration of facts and full decision on the merits. See *Meyer v. Kalanick*, 291 F. Supp. 3d 526 (S.D.N.Y. 2018).

⁶¹ Avedian, Sergio. Uber’s Alphabet Soup For Drivers Deciphered. February 5, 2020. <https://theridshareguy.com/ubers-new-terms-of-service/>.

⁶² Uber, How much can drivers make with Uber? <https://www.uber.com/us/en/drive/how-much-drivers-make/>.

⁶³ See, e.g., *Apple*, 791 F.3d (applying per se liability to a conspiracy to switch to an agency pricing model).

⁶⁴ Uber. U.S. Terms of Use. January 18, 2021. <https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=general-terms-of-use>.

⁶⁵ *Id.*

Horizontal Agreements: Establishing the Rim

The most critical and challenging step in proving a hub-spoke-and-rim conspiracy is establishing the rim—i.e., the agreement among the spokes. A rimless hub-and-spoke conspiracy is just a series of vertical agreements, subject only to the rule of reason. We argue that by entering individual agreements with Uber, drivers also enter a tacit horizontal agreement with other drivers.

In a hub-spoke-and-rim conspiracy, a horizontal agreement can be proved by showing that the spokes' agreement to the hub's terms only occurred because the spokes knew others were agreeing to the same thing.⁶⁶ A price-fixing claim against Uber could establish a horizontal agreement by showing that drivers sign up for Uber *because* other drivers sign up to the platform and agree to its pricing mechanism, and it would be against their own interests to sign up if they were acting independently.⁶⁷ The significant indirect network effects of the Uber platform provide support for this argument. Drivers only sign up because there are rideshare gigs available. Consumers only sign up for Uber because there are many drivers on the platform. Thus, the platform only provides value to each individual driver precisely because there are other drivers signing up and agreeing to the platform's pricing mechanisms. The fact that there are other reasons drivers may sign up for the app—such as matching with passengers and payment processing—does not negate the possibility of a horizontal agreement as one of the reasons for joining.⁶⁸

The horizontal agreement at issue here is similar to conspiracies in cases involving independent contractors and organizing bodies. Like these cases, the question is not whether each individual contractor thought of themselves as part of a horizontal conspiracy in restraint of trade—it was enough that they each agreed to a set of collectively-binding policies, at least one of which constituted an unreasonable restraint on trade.⁶⁹ In *Meyer*, Uber argued that a conspiracy of the size alleged, involving hundreds of thousands of independent drivers, is “wildly implausible” and “physically impossible.”⁷⁰ However, cases such as *Professional Engineers* found similarly wide-scale, anticompetitive agreements involving tens of thousands of independent contractors. Moreover, a capacity for wide-scale organization is precisely the “genius” of Uber.⁷¹

Ultimately, the question of whether there is a horizontal agreement is a finding of fact. Given the novelty of Uber's business model, it is important that the enforcing agency show that the Supreme Court has already addressed agreements similar in nature and scope to Uber. *Goldfarb v. Virginia State Bar* is analogous: there, the Court found that a county bar organization which had published a minimum fee schedule for legal services—enforced through state bar professional responsibility requirements—had engaged in illegal price-fixing.⁷² Here, Uber sets the minimum price and enforces it through its application. If they unhappy with the price schedule, the attorneys in

⁶⁶ *Apple*, 791 F.3d at 314.

⁶⁷ *Meyer*, 174 F. Supp. 3d at 824.

⁶⁸ *Id.* at 825.

⁶⁹ See, e.g., *Nat'l Soc. of Pro. Engineers v. United States*, 435 U.S. 679 (1978) (holding that an ethics requirement that prevented competitive bidding among professional engineers constituted an illegal agreement among competitors).

⁷⁰ *Meyer*, 174 F. Supp. 3d at 825.

⁷¹ *Id.* (“The advancement of technological means for the orchestration of large-scale price-fixing conspiracies need not leave antitrust law behind.”)

⁷² 421 U.S. 773 (1975).

Goldfarb—like Uber drivers—can simply decline to offer services. Even in the absence of a finding of a horizontal agreement, the vertical agreements between Uber and drivers still constitute an unreasonable restraint of trade that should be evaluated under the rule of reason.

Hub-Spoke-and-Rim Price Fixing is *Per Se* Illegal

A horizontal agreement that seeks to fix prices is the paradigmatic example of an unreasonable restraint on trade under the Sherman Act that is *per se* illegal. In a hub-spoke-and-rim conspiracy, a hub that helps facilitate horizontal price-fixing is similarly subject to *per se* liability.⁷³

The price-fixing conspiracy orchestrated by Uber does not fall into the narrow exceptions to *per se* liability available under antitrust law. These exceptions have been upheld only in a narrow set of cases where “restraints on competition are essential if the product is to be available at all.”⁷⁴ The primary examples of such products include amateur athletics⁷⁵—where the product is itself defined by limitations on player pay and other sport regulations—and blanket licenses for broadcasting music⁷⁶—where the transaction costs would be prohibitively high in the absence of such agreement.

Uber’s product could easily allow drivers to set their own fares and reservation wages. In fact, they have already demonstrated this: in response to California’s efforts to reclassify drivers as employees, Uber did require their drivers in the state to set their own fares and continued the policy successfully for several months—until beating back reclassification through a hundred million dollar lobbying campaign.⁷⁷ In such a model, consumers could pick drivers based on their price, distance, and rating. Drivers would develop their own independent pricing strategies and compete to attract more rides. In such a model, transaction costs would be slightly higher, as consumers would need to choose between drivers, but these costs would not be prohibitive. Consumers already make similar decisions when checking rideshare prices across multiple apps or when ordering delivery.

The foregoing should make clear that a coordinated pricing model is (1) not essential to the product’s existence, and (2) does not create prohibitive transaction costs. While we believe the inquiry should end there, the novelty of the Uber platform and pricing model might lead the court to consider potential procompetitive justifications and apply a “quick look” analysis.⁷⁸

Quick Look and Rule of Reason Analysis

In a typical hub-spoke-and-rim price-fixing conspiracy, there is no need to balance anticompetitive impact with procompetitive justifications. However, given the challenge of proving horizontal

⁷³ *Apple*, 791 F.3d at 322.

⁷⁴ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101 (1984).

⁷⁵ *Id.*

⁷⁶ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

⁷⁷ Uber. California Drivers: Set your own fares when you drive with Uber. January 25, 2020. <https://www.uber.com/blog/california/set-your-fares/>.

⁷⁸ *See, e.g., Apple*, 791 F.3d at 329 (“I am mindful of Apple’s argument that the nascent ebook industry has some new and unusual features and that the *per se* rule is not fit for ‘business relationships where the economic impact of certain practices is not immediately obvious.’”).

agreement and the novelty of rideshare model, it is likely that any enforcement action against Uber would require some consideration of procompetitive reasons for the price coordination, either under a detailed rule of reason analysis—if no horizontal agreement is found—or under an abbreviated quick look analysis—if a horizontal restraint is found critical to the functioning of the rideshare market. Here we will provide a high-level discussion of the analysis these frameworks require.

Under a full rule of reason analysis, there is a three-step process. First, antitrust regulators need to prove that the price agreements have a substantial anticompetitive conduct. Then, the burden shifts back to Uber to show a procompetitive justification for the restraint. Then, the burden falls back to regulators to show that procompetitive efficiencies could be achieved through less anticompetitive means.⁷⁹ Under a quick look analysis, the burden to show anticompetitive impact is much lower.⁸⁰

Anticompetitive Effect

The anticompetitive effect of price coordination is plain from the nature of the restrictions imposed. By requiring its drivers to agree to a minimum price and pricing mechanism and giving drivers no way to deviate from coordinated prices, Uber entirely eliminates price competition among drivers. The only means by which drivers can indicate a price preference is by leaving the Uber market altogether or refusing to give rides.

The theoretical impact should be sufficient for a quick look analysis, but under a full rule of reason analysis, antitrust enforcers would likely need to supplement this analysis with evidence of actual harm. One way to do so is through evidence that Uber's price controls lower output. Because Uber exercises both monopsony and monopoly power, it may not be the case that prices are higher, but lower output is expected under both.

This will also require choices around which geographic markets to focus on. Because rideshare services are inherently local—a ride in Dallas is no substitute for a ride in Seattle—markets must be defined regionally. Regulators should focus on less competitive regional markets where they can demonstrate price or output effects more clearly. The product market should be defined as the rideshare market. Note that this is not a two-sided transaction market, and the focus is only on the impact of agreements made by drivers on the price paid by consumers.⁸³

Procompetitive Justifications and Less Anticompetitive Alternatives

Uber will present a number of procompetitive justifications and efficiencies for its coordinated pricing model. Above we explained that the product could operate off a simple model in which consumers chose drivers based on price. However, there are some significant efficiencies present in the current model, even if the product could still exist without it. These include the ease of using

⁷⁹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

⁸⁰ *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830 (3d Cir. 2010).

⁸³ Contrast with the focus on both consumer and merchant prices as part of a multi-sided marketplace in *Ohio v. Am. Express Co.*, 138 S. Ct.

the app for both driver and rider, the ability to quickly and easily find a driver or rider, and the convenience of getting a predictable up front price.

The product could allow drivers to compete on price while maintaining a simple user experience. Drivers could set reservation wages and distances they are willing to drive in their settings. Consumers could set certain preferences such as the amount they are willing to pay (perhaps with reference to average prices), the quality of the vehicle they would like, and the amount of time they are willing to wait either when requesting a ride or in settings. Drivers or riders could also request “best available” pairing. The application could take into account these preferences and match drivers and consumers. This would keep the application streamlined while enabling a simple experience.

As we described above, many users—both riders and drivers—already switch between multiple applications to compare prices and the best available rides. By allowing both sides to indicate more of these preferences within a single app, users might significantly benefit. Moreover, Uber’s product offering already includes several competing options for users, allowing consumers to select between shared, standard, and premium products, and allowing drivers to switch between ride types and food delivery.

The ability to quickly and easily find a driver can also be maintained through less anticompetitive product features. Surge pricing would still be a feature, and would come into effect naturally, with drivers that only want to work for higher wages setting higher wage preferences in the app, and providing services only at peak times. Large liquid markets could introduce significantly greater consumer choice while still seamlessly matching rides. The “best available” rides feature could ensure matches still occurred in smaller, more constrained markets. Moreover, this analysis does not suggest that *any* attempts by Uber to shape service are unreasonably anticompetitive. Uber could likely justify removing certain kinds of user choice and flexibility in the interest of ensuring easy matching.

Some of the features discussed above might require consumers to accept some uncertainty around the cost of a given trip. However, Uber experimented with precisely this change in California in January 2020 when it switched upfront guaranteed prices for consumers to estimated prices.⁸⁴ Consumers did not leave the app en masse. Thus, it is unlikely that providing a singular upfront price provides a meaningful efficiency.

In conclusion, Uber’s current pricing model does present some efficiencies. However, the platform could achieve these efficiencies through less anticompetitive means than fixing prices among its hundreds of thousands of drivers.

Drawbacks to Enforcement Action

There are drawbacks to antitrust action: enforcement is a blunt tool, and remedies don’t provide the same space for thoughtful policymaking that brings all stakeholders to the table. Moreover,

⁸⁴ Bellon, Tina. Uber stops upfront ride pricing in response to California worker law. Reuters. January 8, 2020. <https://www.reuters.com/article/us-uber-california/uber-stops-upfront-ride-pricing-in-response-to-california-worker-law-idUSKBN1Z731Z>.

there are many potential benefits for drivers in facilitating coordination, and it is not clear potential remedies in a price-fixing case will ultimately result in better outcomes for drivers. There is also uncertainty in any enforcement action: the novelty of the rideshare model and approach will present a challenge for regulators navigating a judiciary generally skeptical of antitrust action. However, we believe that a price fixing case can provide a powerful tool to force dominant rideshare platforms to the table, particularly as they invest millions lobbying against expanded bargaining rights for drivers.

Alternative Proposal: State Level Sectoral Bargaining Rights

If drivers cannot be reclassified as employees at the federal level, one option to give them collective bargaining rights would be through statutes passed at the state level allowing sectoral bargaining. This is the solution that Uber and Lyft are currently negotiating for in California,⁸⁵ and some unions and labor law research groups have endorsed the possibility.⁸⁶ Such a statute would use the state-action immunity doctrine to get around the potential antitrust violations that would result from workers classified as independent contractors bargaining collectively. Established in *Parker v. Brown*,⁸⁷ this doctrine states that states and private parties are immunized from antitrust liability for anticompetitive actions that result from actions taken pursuant to state regulations. It has two requirements: the state must have clearly articulated a desire for the anticompetitive effects to occur, and the state must actively supervise these effects to ensure they are within the intended purpose of the underlying statute.⁸⁸

The Ninth Circuit held that a Seattle ordinance that allowed drivers to collectively bargain was not immune under this doctrine.⁸⁹ The ordinance failed the clear articulation prong because the only state statute addressing municipal regulation of rideshare companies was a general one that did not address collective bargaining.⁹⁰ It failed the active supervision prong because the only supervisor was a city official, rather than a state one.⁹¹ This indicates that a court would likely rule differently if the state itself, rather than a city, were to pass a statute to this effect. An example that would likely have passed antitrust scrutiny is a bill recently proposed in the Connecticut legislature. SB 1000 would have created a complicated sectoral bargaining structure under which drivers would be allowed to unionize and negotiate with rideshare companies over wages and other benefits.⁹²

However, the bill failed to advance out of the committee stage. Labor organizations were divided over whether such an approach would actually benefit drivers, or whether it would calcify a

⁸⁵ <https://www.marketplace.org/shows/marketplace-tech/prop-22-ballot-measures-gig-companies-have-the-upper-hand-so-why-are-they-still-negotiating>.

⁸⁶ <https://www.bloomberg.com/news/features/2021-02-17/gig-economy-coming-for-millions-of-u-s-jobs-after-california-s-uber-lyft-vote>; <https://www.cleanslateworkerpower.org/about>; <https://americancompass.org/discussions/sectoral-bargainings-promise-and-peril/#top>.

⁸⁷ 317 U.S. 341, 350 (1943).

⁸⁸ See *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

⁸⁹ *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

⁹⁰

⁹¹

⁹² S.B. 1000, 2021 Leg. (Conn. 2021). A disclaimer: one of the authors is currently representing a group of rideshare drivers, who publicly opposed this bill in the form it was drafted.

harmful understanding of drivers as independent contractors rather than employees.⁹³ Moreover, some argued that the bill failed to provide minimum benefits from which the drivers could bargain, effectively making the process more begging than bargaining.⁹⁴ These concerns were rooted in the worries some scholars have articulated that unless sectoral bargaining is carefully implemented to follow certain principles, it could end up hindering workers more than helping.⁹⁵ It is theoretically possible that a version of such a bill could be drafted that would ensure enough statutorily guaranteed minimums to provide a solid floor from which drivers could bargain. However, this would involve reassembling the bundle of rights that the traditional employment relationship already confers. Given the convoluted and controversial nature of such bills, they should likely be treated as a back-up plan for if more straightforward national fixes such as the PRO Act fail to pass.

Additional Policy Approaches: Maintain Competition Among Gig Platforms

Even with collective bargaining, competition among platforms is critical to maintaining competitive service fees and fares for drivers. Multihoming by both riders and drivers is the key to a good outcome. As the on demand driving market matures and pressure grows for platforms to turn a profit, regulators must remain vigilant. Any proposed mergers or acquisitions among platform players must be closely scrutinized with an eye to the impact on the market for drivers, not simply consumers. Antitrust authorities also must be prepared to take vigorous action against anticompetitive conduct vis a vis gig workers. This would include practices that restrict multihoming, a practice in which either drivers or consumers use more than one competing digital platform and switch between them easily. For example, a driver might drive for Uber and Lyft, and a consumer might order food from Uber Eats and DoorDash. In the context of the ride sharing industry, multihoming grants drivers the flexibility to meet their desired driving time and wages, which likely fluctuate on an hourly basis.⁹⁶ These fluctuations in a drivers' reservation wages and shifts are significant motivations for multihoming given subtle variations among apps in rider demand and pickup locations. While economic literature suggests that multihoming might yield greater benefits for riders than drivers,⁹⁷ firm actions that limit this behavior will have harmful outcomes for drivers' earnings and flexibility and riders' choice and convenience.

Uber uses a number of tools to encourage drivers to single-home. Drivers on the Uber platforms can make up to 6% more⁹⁸ on their time and distance earnings as a Diamond Level member. Drivers can become a Diamond Level member by completing a certain number of rides on the platform over a 3-month period. Uber also differentiates between drivers by assigning "pro" title next to their name for those that meet certain minimum ride requirements. This also acts as an incentive to drivers as consumers tend to prefer "pro" drivers over non-pro and leave better ratings and tips.

⁹³ <https://www.vice.com/en/article/v7mwk3/two-paths-to-reigning-in-gig-companies-are-going-head-to-head-in-connecticut>

⁹⁴ https://www.newhavenindependent.org/index.php/archives/entry/driver_union_bill/

⁹⁵ <https://concerned-sectoral-bargaining.medium.com/sectoral-bargaining-principles-for-reform-7b7f2c945624>

⁹⁶ <https://www.nber.org/papers/w23296>

⁹⁷ <https://economics.missouri.edu/sites/default/files/wp-files/ride-hailing-2017-05-15.pdf> (3)

⁹⁸ <https://www.hyreacar.com/blog/what-is-uber-pro-for-rideshare-drivers/>

There are pro-competitive justifications for many of programs. For example, the “pro” program also likely improves the quality of service for customers by also setting minimum standards. There are also some benefits to encouraging more regular driving schedules and greater loyalty to the Uber platform.

However, both these programs may also have the effect of strongly incentivizing drivers to single-home, i.e., work only for Uber. Given Uber’s dominant market share, this can effectively drive out competition, making it harder for Lyft to compete in certain regional markets and driving eventual exit where Uber’s share is great enough. Thus they have the potential to be anticompetitive.

We propose a number of enforcement actions to encourage robust competition between platforms. Where existing antitrust law is unable to provide an effective remedy, policymakers must be prepared with new legislation.

- **Challenge Anti-Competitive Rewards Programs:** Challenge driver reward programs with §2 enforcement action in local markets that threaten multihoming among drivers. Gig drivers are often dependent on driver rewards programs that effectively tie them to a single platform to make a reasonable income. Such programs may be used to hinder competition from other platforms, a potential §2 violation. Antitrust authorities should look at concentrated rideshare markets to determine where reward programs do actually have the effect of locking out competitors, and bring enforcement action where there is sufficient evidence for a §2 case.
- **Monitor Additional Programs:** Along with driver rewards programs, antitrust enforcers should carefully monitor any programs that can lock-in drivers and be prepared to bring §2 claims, such as vehicle leases that require de-facto exclusivity.
- **Robust Merger Review:** Review any proposed mergers or acquisitions in the broader on demand driving market (rideshare, grocery delivery, food delivery, package delivery) to determine impact on labor market for individual service providers (ie. Drivers).
 - This is consistent with our proposal for updated horizontal merger guidelines.