



A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony

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The United States has a labor monopsony problem. A labor monopsony exists when lack of competition in the labor market enables employers to suppress the wages of their workers. Labor monopsony harms the economy: the low wages force workers out of the workforce, suppressing economic growth. Labor monopsony harms workers, whose wages and employment opportunities are reduced. Because monopsonists can artificially restrict labor mobility, monopsony can block entry into markets, and harm companies who need to hire workers. The labor monopsony problem urgently calls for a solution.

Legal tools are already in place to help combat monopsony. The antitrust laws prohibit employers from colluding to suppress wages, and from deliberately creating monopsonies through mergers and other anticompetitive actions.² In recent years, the Federal Trade Commission and the Justice Department have awoken from their Rip Van Winkle labor-monopsony slumber, and brought antitrust cases against employers and issued guidance and warnings.³ But the antitrust laws have rarely been used by private litigants because of certain practical and doctrinal weaknesses. And when they have been used—whether by private litigants or by the government—they have been used against only the most obvious forms of anticompetitive conduct, like no-poaching agreements. There has been virtually no enforcement against abuses of monopsony power more generally. With wage stagnation a significant problem, Congress should take action with competition-friendly policies that promise to increase wages. We propose draft legislation that would strengthen the law so that workers, aggrieved competitors, antitrust agencies and attorneys general can more easily bring lawsuits against labor monopsonists.

I. WHAT IS LABOR MONOPSONY?

A. The Economics

When employers set wages and working conditions, they seek to minimize their labor costs while attracting the workers they need in the production process. In a perfectly competitive

² As the Supreme Court has observed, the “kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.” *Weyerhaeuser Co. v. Ross–Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 322 (2007). While that case did not involve labor monopsony, many other courts have recognized that the antitrust laws apply to labor monopsony. See, e.g., *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

³ Department of Justice, Antitrust Division, and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (2016), <https://www.justice.gov/atr/file/903511/download>.

labor market, where workers can at no cost quit and obtain comparable work at alternative employers, the employer pays a wage equal to the worker's marginal revenue product—the amount of value that the worker adds to the employer's bottom line. Such a wage “clears” the market, attracting all workers willing to work in return for it, and thus can be taken as a baseline for evaluating actual labor market conditions.

Real-world wages deviate from the competitive ideal for many reasons, but our focus is the problem of employer monopsony—the ability to set wages below the marginal revenue product. There are three major sources of monopsony: concentration, search frictions, and job differentiation.

Concentration means that only one or a few employers hire a particular kind of worker in an area where workers reside and commute. When few employers exist, a worker who is underpaid by her existing employer lacks the ability to quit and work for an alternative employer for a higher wage. This allows the incumbent employer to suppress the wage. Employer concentration also facilitates overt or tacit collusion, for example, where one firm acts as a “wage leader” by periodically announcing wage increases that other firms match.

Search frictions refer to the difficulty faced by workers with finding new jobs if they are unsatisfied with their existing employer or are fired or laid off. Search frictions exist because workers may be unaware of alternative employment opportunities in the area or elsewhere; or, while they may know that other employers are hiring, they may have trouble comparing jobs because of various intangibles like the work environment. Even in the presence of good information and comparable jobs, there is a coordination problem that leads to search frictions: workers do not know which firms other workers are applying to, so workers will end up over-applying to some jobs and under-applying to others. Workers who just happen by chance to have applied to popular jobs have a low probability of getting hired, which increases the time it takes to find a job. If finding a job is hard and risky, then workers will settle for a low wage offer rather than keep searching.

Job differentiation refers to the way that different employers can offer a worker different packages of amenities—including, for example, shift flexibility, childcare, vacation and sick time, and the overall atmosphere at work, such as whether it is intense, relaxed, noisy, collegial, or competitive. Workers sort themselves across employers according to the amenities that are offered, but as a result they may become vulnerable to wage suppression because they cannot credibly threaten to leave one job for another where the amenities are quite different.

Employers with monopsony power, whatever its source, can suppress wages (and degrade working conditions) in order to save labor costs. While some workers will quit as a result, an employer with monopsony power gains more in reduced labor costs than it loses from lower production. Both types of workers—those who continue working and those who quit—suffer from this state of affairs, and there is also harm to the economy as a result of the lower level of production.

B. Recent Empirical Work

Monopsony prevails in a large number of US labor markets. Recent empirical work has documented this phenomenon by using the Herfindhal-Hirschman Index (HHI), which is widely used to assess monopoly power in the product market. The HHI for a product market equals the sum of the squares of the market share (e.g., 30^2 for a firm with 30% market share) of the firms that compete within that product market, multiplied by 100. An HHI of zero represents the theoretical ideal of perfect competition, while an HHI of 10,000 represents a product market dominated by a single monopolist. The value of the index is higher when there are fewer firms selling a product or when one firm dominates the market (for example, for two firms the HHI is higher when one firm sells 90 percent of products and the other 10 percent than when each of the two firms sells 50 percent of products)—as these are the conditions in which the competitive harm caused by market concentration is greatest.

The Department of Justice and the Federal Trade Commission’s Horizontal Merger Guidelines uses the HHI to establish the conditions under which mergers and acquisitions among competitors are lawful.⁴ An HHI above 1,500 means that a market is “moderately concentrated,” and an HHI above 2,500 means that a market is “highly concentrated.” When firms seek to merge in a market with a high HHI and when the merger would significantly increase the HHI, the government presumes that the merger is anticompetitive and may block it.

The HHI for a labor market is calculated in the same way as the HHI for a product market, except that the market share is the firm’s share of a labor market, rather than its share of a product market. To measure labor market concentration, we look at the number of vacancies in a particular labor market, and calculate the HHI based on each firm’s share of those vacancies. A market where four firms post 25% of jobs each is highly concentrated with an HHI of 2,500. But before we go further, we should explain how labor markets are defined.

⁴ U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (2010),

<https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

The labor market definition has three elements: type of job (or skills); geographic scope; and time. First, we define a labor market by the type of job. The empirical literature relies on a list of “Standard Occupational Classifications” (SOC) maintained by the Bureau of Labor Statistics,⁵ and more specifically an occupation at the 6-digit SOC level, which represents a fairly specific definition of a job or occupation. Unfortunately, even the detailed 6-digit SOC level is probably too broad for labor market definition. For example, “accountants and auditors” (13-2011) may be excessively broad because an experienced accountant may consider only a “senior accountant” job title rather than the position of a junior or entry-level accountant.⁶ Still, the SOC level is convenient for empirical work; because the SOC level is probably too broad, it also serves as a conservative assumption, with the result that the literature likely understates the degree of labor market concentration.

One may object that the SOC level is in fact also too narrow, at least for some workers. An accountant may tire of accounting and apply for a job as a manager of a business, or go to medical school and start over as a doctor. However, the key question is: when faced with lower wages, how likely is a worker to apply to a different job, or to quit a current job? The evidence shows that workers are not very sensitive to wages when choosing where to apply⁷ or whether to quit a current job.⁸ This limited sensitivity of workers to wages implies that employers have the latitude to lower wages below workers’ marginal productivity without causing a large number of workers to quit. It may be possible to define labor markets more precisely, for example, by classifying workers based on very specific skills. But the existing empirical evidence on the impact of labor market concentration on wages is robust, and more refined labor market definition would likely have a limited impact on the results.

Second, we define the geographic scope of the market as the area where most workers work and live, and more specifically a commuting zone (CZ). Commuting zones are geographic area definitions comprising clusters of counties that were developed by the

⁵ See United States Dept. of Labor, Occupational Employment Statistics (2016), available at https://www.bls.gov/oes/current/oes_stru.htm.

⁶ Ioana Marinescu and Ronald Wolthoff, Opening the Black Box of the Matching Function: The Power of Words, National Bureau of Economic Research (Working Paper #22508, 2016), available at <https://doi.org/10.3386/w22508>.

⁷ Ibid.

⁸ Alan Manning, Imperfect Competition in the Labor Market 973, in 4 Handbook of Labor Economics (Orley C. Ashenfelter & David Card, eds., 2011), <http://www.sciencedirect.com/science/article/pii/S0169721811024099>

United States Department of Agriculture (USDA),⁹ based on patterns of commuting between counties. As we will discuss below, CZs are only approximations because some workers may commute across CZs, while others may refuse to take a job at the far end of the CZ in which she currently works. But again the results of the studies analyzing the impact of labor market concentration on wages are robust to different definitions of the geographic scope of the labor market, which suggests that the precise definition does not matter.

Third, the labor market must be limited in time because job seekers can afford to be unemployed only for a limited period of time. The median duration of unemployment was about a quarter in 2016. In sum, we define a labor market by a 6-digit SOC occupation, a commuting zone, and a quarter, for example, accountants and auditors in Philadelphia in the first quarter of 2016.

We can now turn to the results of the empirical literature. According to a leading study, in 2016, labor market concentration exceeded the high concentration threshold of 2,500 Herfindhal-Hirschman Index in 60% of US labor markets.¹⁰ These highly concentrated markets account for 20 percent of U.S. employment. Larger cities generally have lower labor market concentration while labor markets are more concentrated in rural areas. Labor market concentration also varies across regions of the country, with higher concentration across a broad swath of the middle of the country, and concentration also varies by occupation. Among the 30 largest occupations, the least concentrated occupation is “registered nurses” while the most concentrated is “marketing managers.”

Higher concentration is associated with lower wages¹¹ for workers: an increase in concentration by 10% in a given labor market is associated with a decrease in job vacancies’ posted wages by 0.4% to 1.5%. Furthermore, this effect is larger in smaller cities. To illustrate, a legal secretary is looking for a job in Columbus, Ohio. The average pay there is about \$33,000 a year, and the HHI is 2,969, already above the high concentration threshold. Suppose that, following a merger of law firms, the HHI increases by 27% to 3,762, which is the average HHI in Wichita, Kansas. This means that the wage for a legal secretary would decrease by up to $1.5\% \times 2.7 \times 33,000 = \$1,337$. Therefore, after this increase in labor market

⁹ See U.S. Dept. of Agriculture, *Commuting Zones and Labor Market Areas* (2012), available at <https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/>.

¹⁰ Jose Azar, Ioana Marinescu, Marshall Steinbaum, and Bledi Taska, *Concentration in US Labor Markets: Evidence From Online Vacancy Data*, NBER working paper 24395 (2018).

¹¹ Jose Azar, Ioana Marinescu, and Marshall Steinbaum, *Labor Market Concentration*, NBER working paper 24147 (2017).

concentration, new legal secretary jobs in Columbus, Ohio would pay \$31,663 per year instead of \$33,000.

The negative relationship between labor market concentration and wages in the US has been confirmed using different data sources, time periods, and definitions of the labor market.¹² Given the negative relationship between labor market concentration and wages, and the prevalence of labor market concentration in the US, it is appropriate for antitrust enforcement to become more vigorous in this area.

C. Antitrust Law and Its Failures

Antitrust law is embodied in statutes that broadly prohibit anticompetitive practices in any kind of market. The most important of these statutes are section 1 of the Sherman Act, which prohibits “restraints of trade,” and section 2, which prohibits monopolization. The courts have acknowledged that the law applies to labor markets as well as to product and other markets, and on a number of occasions employers have been held liable for anticompetitive labor market practices or settled lawsuits that challenged such practices.¹³

However, antitrust cases involving labor market abuse have been exceedingly rare, far less common than product market cases.¹⁴ Indeed, while thousands of product market cases have been brought, only a handful of section 1 cases can be found in the case reports; and the number of section 2 cases is close to zero. The data shows that that 60% of U.S. labor markets have an HHI above 2,500, and 25% of labor markets have an HHI above 7,200.¹⁵ With so many highly concentrated labor markets, one would expect a significant level of antitrust enforcement. Yet there is hardly any.

¹² See Efraim Benmelech, Nittai Bergman, and Hyunseob Kim, Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?, NBER working paper 24307 (2018); Kevin Rinz, Labor Market Concentration, Earnings Inequality, and Earnings Mobility, Center for Economic Studies, US Census Bureau Working Paper 2018-10 (2018).

¹³ Most famously, in 2010 various tech companies, including Apple and Google, settled a Justice Department case accusing them of agreeing not to poach each other’s highly skilled workers.
<https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.

¹⁴ See Suresh Naidu & Eric A. Posner, Labor Monopsony and the Limits of the Law, working paper (2018).

¹⁵ Azar, et al., Concentration in US Labor Markets, *supra*.

There are various possible reasons for this state of affairs. Worker class actions are difficult to put together because of the complexity and variation of employment relationships, and the relatively small number of workers in any given labor market. Wage information is usually kept confidential, preventing workers and their lawyers from gathering evidence of wage suppression. The federal government has almost never investigated allegations of anticompetitive behavior in labor markets; as a result, follow-on private litigation is also rare. And, finally, possibly because of the unfamiliarity of labor market litigation, courts have struggled with the few cases that have been brought, and in a number of cases have simply denied standing to workers in circumstances where they would normally grant standing to other types of antitrust plaintiffs. As a result, the doctrine has not developed to a point where the outcome of a case can be predicted with reasonable confidence. Private lawyers and antitrust agencies are reluctant to take on the challenge of labor market antitrust litigation in such adverse conditions.

In response to recent proposals to enhance antitrust enforcement of labor market abuse, a few critics have expressed skepticism. The major criticisms are that labor markets are complex and hard to define, and that efficiencies may justify mergers.¹⁶ Of course, the same criticisms can be directed against antitrust enforcement on the product-market side. The answer is not to eliminate the law, or to dismiss proposals for improving it, but to evaluate antitrust challenges carefully.

II. THE PROPOSAL

To address these problems, we propose that Congress pass a bill that would facilitate antitrust litigation against labor market monopsonists. As will become clear, we do not propose a radical change to existing antitrust law. Instead, we suggest that Congress should make clear that existing principles of antitrust law protect workers as well as consumers and corporations. Thus, our proposal might be considered a “codification” of existing law, with the idea that if the U.S. Code spells out, in a clear language, the antitrust protections for labor markets, lawyers, attorneys general, and antitrust agencies would be less reluctant to bring class actions on workers’ behalf. At the same time, we seek to overturn cases that have misapplied antitrust law in the labor market context.

Our focus is the problem of monopsony in the sense of employer power over labor markets, while we put to the side the various forms of collusion that are addressed by section

¹⁶ See David P. Wales, Tara L. Reinhart, Anjali B. Patel, and Danielle D. Drory, *The Unlikely Role of Labor Markets in Merger Antitrust Review*, Bloomberg (2018), <https://www.bna.com/insight-unlikely-role-n57982094106/>.

1 of the Sherman Act. We do this because there has been some success in using section 1 against explicit forms of collusion like no-poaching agreements,¹⁷ while problems of concentration in labor markets have been ignored. Thus, we use section 2 as our model.

A. The Prohibition

We begin with a simple restatement of section 2 of the Sherman Act, except we replace “monopolize” and related words with “monopsonize,” and add the term “labor market.” Although the Supreme Court has already recognized that section 2 applies to monopsonization of labor markets, we do not think that the symmetrical nature of product market monopoly and labor market monopsony has been appreciated by the courts.¹⁸

§ 1. Labor Market Monopsony

It shall be unlawful for any employer engaged in commerce, in the course of such commerce, to monopsonize, attempt to monopsonize, or combine or conspire with any other person or persons to monopsonize, a labor market.

Section 1 of our proposed bill, by analogy to section 2 of the Sherman Act, creates liability for attempted monopsony and conspiracy to monopsonize.

B. Labor Markets and Labor Market Power

In a traditional monopolization case, a plaintiff must prove that the defendant can directly control prices or (more commonly) that the defendant has a large share of a concentrated product market. We allow for direct proof of wage control in section 3(c) but focus on labor market definition because that is more likely to be the normal approach as it is in product market cases.

In economics, a labor market is typically defined rather loosely, as the people who work in a particular occupation in a particular area. Rigorous labor market definition is tricky because people can move between occupations, and they can also move across broader and narrower geographic areas as they seek employment. We address this problem by offering two simple rule-based approach, and a more complex standard that is similar to the product-market method.

¹⁷ See, e.g., *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1123 (N.D. Cal. 2012).

¹⁸ As demonstrated by the standing cases, which we discuss below.

§ 2. Labor Market Definition

a. A labor market shall be defined as:

(1) Workers who share a 6-digit Standard Occupational Classification (SOC) code and reside in a single commuting zone as defined by the U.S. Department of Agriculture;

(2) Workers who share a 6-digit SOC code and reside in an area broader or narrower than a commuting zone in which they can find employment with the same or similar conditions in the same occupation at reasonable cost;

(3) An occupation (job title, 6-digit SOC or group of SOC codes) over an area where a hypothetical profit-maximizing firm that was the only employer of the employees defined by the job title, SOC code or codes, could impose on the employees a small but significant and non-transitory reduction in wage (“SSRIW”) without causing a substantial number of the employees to quit.

b. The defendant may rebut a plaintiff’s labor market definition by providing statistical evidence that that the actual labor market in which the plaintiff is employed is different from the plaintiff’s definition.

Section 2(a)(1) provides a very simple approach in order to minimize evidentiary problems. As noted above, the SOC divides the universe of employment into hundreds of standardized occupational codes.¹⁹ It currently lists 867 such codes. Under this section, a plaintiff can define the occupation in a labor market simply by reference to one of the codes (e.g., “lawyer,” which is 23-1010). The plaintiff can further define the area of a labor market by reference to a CZ.²⁰ One CZ is Cook County (17031) in Illinois, so a plaintiff could define a labor market as lawyers who reside in Cook County.

As noted earlier, labor market definitions based on SOCs and CZs may be too broad or too narrow. It is possible for a labor market area to encompass more than one CZ, or parts of more than one CZ. The labor market for chief executive officers, for example, may well be national. A large factory that lies on the border of one CZ may hire workers from another. Cook County covers a vast area, 1,635 square miles, including Chicago and several suburbs. Not all people in this area are willing to commute across it, yet bedroom communities in

¹⁹ https://www.bls.gov/soc/2018/soc_2018_class_prin_cod_guide.pdf.

²⁰ <https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/>.

Indiana, which lies outside Cook county, supply numerous commuters to Chicago. To address these problems, sections 2(a)(2) and 2(a)(3) allow plaintiffs more flexibility in defining the labor market area. Section 2(a)(2) defines the labor market area as the area in which the plaintiff can find a similar job at reasonable cost. Section 2(a)(3) defines the labor market area as the area in which the defendant draws its workforce—based on the assumption that if the defendant lowered wages, workers with long commutes would be the first to quit. This section adapts the “hypothetical monopolist test” used in the Horizontal Merger Guidelines to evaluate the product-market effects of mergers.²¹

A similar point can be made about the use of the SOC to define “occupation.” An SOC is too narrow if most workers who suffer a slight wage reduction would quit and take a job defined by a different SOC. An SOC is too broad if most workers who suffer a slight wage reduction would *not* quit and take another job within the same SOC but that has different characteristics or conditions. Many lawyers, for example, would not move from (say) a large law firm to a small law firm (or vice versa), from a firm that specializes in bankruptcy to a firm that specializes in white collar defense, in response to a drop in wages, suggesting that the labor market is more differentiated than the SOC indicates. And yet it is also possible that people will frequently shift across SOCs—lawyers may be willing to become judges (21-0123) or law professors (25-1112), for example, if given the chance. Section 2(a)(3) allows the plaintiff to define the occupation more flexibly. The occupation for the purpose of labor market definition consist of all jobs that are close substitutes—meaning that employees would be able to switch among them in response to small wage changes.

Section 2(b) allows the employer to rebut the plaintiff’s labor market definition by offering statistical evidence that the plaintiff’s labor market definition is incorrect. An employer might, for example, offer data that shows that workers with the relevant skills frequently take jobs across multiple SOCs, or that they routinely take jobs outside their CZ. In order for the employer’s rebuttal to be acceptable, such movements across SOCs and CZs should be large enough to demonstrate that the elasticity of labor supply exceeds the critical elasticity needed for a well-defined labor market under the hypothetical monopsonist test.²² In effect, the employer may rebut the plaintiff’s reliance on the bright-line approaches of sections 2(a)(1) and 2(a)(2) by showing that the resulting labor market definitions violate the hypothetical monopsonist test.

²¹ Horizontal Merger Guidelines, § 4.1.

²² Azar, et al., Concentration in US Labor Markets, *supra*.

Monopsony power refers to the power to set wages below marginal revenue product, which is the wage level in a competitive market. In product-market cases, plaintiffs typically try to prove monopoly power by reference to the seller's share of the market. As a rough approximation, and all else equal, a seller with greater than 90% market share will be treated as a monopolist, while a seller with less than 50% market share will not be.²³ The range from 50 to 90% is a gray area. As a starting point for discussion, we suggest a similar approach for labor markets. If the employer has more than a 90% share, we say that the employer has "significant" monopsony power (§3b(1)). If the employer has between 50% and 90% market share, we say that it has "moderate" monopsony power (§3b(2)).²⁴ This distinction will play a role in determining liability in section 4, as we discuss below. The employer may rebut the allegation of moderate or significant monopsony power by showing that it has no control over wages (§3c).

§ 3. Labor Market Power

a. An employer has labor market power if it can lower wages of its employees below what would be charged in a competitive market.

b. In the absence of evidence of labor market power under section a, an employer that

(1) employs more than 90% of workers or posts more than 90% of job vacancies in a labor market presumptively possesses significant labor market power;

(2) employs between 50% and 90% of the workers or posts between 50% and 90% of job vacancies in a labor market presumptively possesses moderate labor market power.

²³ See, e.g., *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n. 18 (10th Cir.1989).

("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share between 70% and 80%.").

²⁴ An interesting question arises when a small number of employers dominate a labor market but individually have less than 50% of the market. An argument could be made that they should be subject to antitrust liability based on their market power. On the product market side, however, courts have been reluctant to accept this argument in section 2 cases, and we so put it aside for now.

c. An employer can rebut the presumption of significant or moderate labor market power under section b by showing that if it imposed a SSRIW on its employees, a substantial number of employees would quit.

Note that under section 3(b), we refer both to the percentage of “workers” and the percentage of “job vacancies.” These terms refer to slightly different conditions. A firm might, for example, employ 50% of the workers under a particular job title in a particular labor market area, but post only 10% of the vacancies in a given quarter. The likely reason is that the firm is expanding less rapidly than its competitors. From the standpoint of economic theory, we should focus on vacancy share rather than employment share. If there are no or few vacancies, then employers possess significant market power, as their workers have no other options. However, we suspect that in practice employment share and vacancy share are fairly similar, and employment share may be more available. Where the two measures diverge, the court may need to work out with the aid of experts the more accurate measure in a given case.

C. Anticompetitive Behavior

Just as in the product market case, a plaintiff must prove that the defendant both has market power and has engaged in anticompetitive behavior. Possession of market power by itself is not illegal. If the defendant has significant market power, a prima facie case for liability is established through proof of one or more anticompetitive acts (§4a(1)). If the defendant has moderate market power, the plaintiff must prove that wages are below the competitive level and that the defendant has committed an anticompetitive act (§4a(2)). The competitive level is the wage that would prevail in a competitive market, that is, where a large number of firms compete against each other for workers. This level is not necessarily equal to the theoretical ideal of marginal revenue product. As noted earlier, wages are likely to fall below marginal revenue product because of search frictions and job differentiation. Thus, if we defined competitive level to mean marginal revenue product, this additional condition would have no meaning. Antitrust law cannot fix the search friction and job differentiation problems.

§ 4. Anticompetitive Behavior

a. A person shall be liable for monopsonizing a labor market if

(1) it has significant labor market power, or

(2) it has moderate labor market power and has reduced wages below the competitive level; and

(3) it has engaged in anticompetitive acts.

b. Anticompetitive acts include but are not limited to:

(1) Merger with another employer that hires from a common labor market where at least one labor market from which the employers hire has a vacancy-based Herfindahl-Hirschman Index (HHI) that exceeds 2500 and the merger increases the vacancy-based HHI level in this labor market by more than 200 points.

(2) Use of non-compete clauses, non-solicitation clauses, and other clauses that restrict employee mobility in the contracts of the employees in the labor market, other than clauses that establish a reasonable term for employment;

(3) Restrictions on employees' freedom to disclose information about wages and benefits;

(4) Any unfair labor practice as defined under the National Labor Relations Act and amendments;

(5) Misclassification of employees as independent contractors;

(6) No-poaching agreements, wage-fixing agreements, agreements to share wage and salary information, and related horizontal agreements with other employers;

(7) Prohibition on class and other collective actions; or

(8) Any other action that has the effect of significantly reducing competition in the labor market through constraints on employee mobility, other than reasonable employment terms, or enhancement of concentration of the labor market.

Two items on the list of anticompetitive acts are straightforward: section 1 and section 6. Section 1 treats mergers in concentrated markets as anticompetitive acts. The FTC and DOJ routinely treat such mergers as anticompetitive acts and evaluate their product market effects under the Horizontal Merger Guidelines. The FTC's chairman Joseph Simons recently announced in Congressional testimony that he had instructed the agency's staff to look at

the labor market impact of every merger the agency reviews, and he further elaborated that market definition in labor markets for antitrust enforcement purposes should be guided by the elasticity of labor supply to the individual firm.²⁵

The other straightforward provision is section 6. Horizontal agreements are already illegal under section 1, but we include them here because it will sometimes be easier to litigate against a single monopsonist than a group of conspirators.

The other items on the list are more novel. Noncompetes (section 2) are typically evaluated under the common law, but recent evidence that they are abused suggests that common law enforcement is inadequate.²⁶ The problem is that in the common law, the remedy for a noncompete is simply nonenforcement; an employer who uses a noncompete unlawfully does not pay a price for it. Moreover, the common law analysis is not sensitive to problems of market concentration. Thus, subsection (2) covers noncompetes and related provisions like non-solicitation clauses, but it excludes clauses “that establish a reasonable term for employment,” for example, a requirement that an employee work until the end of a project, like a theater tour, or work for a reasonable period of time where employment conditions call for it.

Employers frequently forbid their workers to share wage information with other workers (section 3). While the practice may have a business justification, non-disclosure requirements also prevent workers from learning the wages of workers at other firms, which raises search costs and reduces their bargaining power. Moreover, we are concerned that the absence of pay information has hindered labor-side antitrust litigation.

Unfair labor practices (section 4) are defined by labor law; they normally include actions by employers to interfere with union organization. Because union organization can

²⁵ U.S. Congress, Senate Judiciary Committee, Oversight of the Enforcement of the Antitrust Laws, testimony of Joseph Simons (2018).

²⁶ Evan Starr, J.J. Prescott, and Norman Bishara, Noncompetes in the U.S. Labor Force (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714; Daniel Wiessner, Jimmy John’s Settles Illinois Lawsuit over Non-compete Agreements, Reuters (2016), <https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA>.

counter monopsony power,²⁷ we believe that unfair labor practices should be treated as an antitrust violation when undertaken by monopsonists.

We include misclassification (section 5) as an anticompetitive act because firms frequently misclassify in order to avoid minimum wage laws that otherwise prevent monopsonists from suppressing wages of low-skill workers.

Class and other collective actions (section 7) are an important method that workers can use to aggregate their labor power in order to challenge legal violations by employers. Thus, we include prohibitions on class actions, including mandatory arbitration provisions, as anticompetitive acts.

Finally, we include a catchall provision (section 8) that encompasses any other action that reduces labor market mobility and increases concentration.²⁸ However, we make an exception for “reasonable employment terms,” by which we mean contracts in which an employee commits to work for an employer for a period of time—say, six months or one year. These contracts may be necessary to ensure that the employer recovers its costs in training a worker as in the case of reasonable noncompetes.

D. Defenses

In product-market cases, firms can usually defend themselves by showing that apparently anticompetitive behavior like a merger actually produces efficiencies (typically, economies of scale) that will lead to lower prices. We would allow a similar defense in labor monopsony cases. For example, an employer could try to show that noncompetes allow the employer to train workers, which in turn should lead to higher wages; or that a merger creates efficiencies that the employer passes on, at least in part, to workers. Of course, the employer would be required to present evidence, statistical or otherwise, to prove its claim. The final clause addresses the risk that an employer might maintain the wage but reduce the

²⁷ Efraim Benmelech, Nittai Bergman, and Hyunseob Kim, Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?, NBER working paper 24307 (2018).

²⁸ An interesting possible example is the hiring of undocumented workers in order to undermine the bargaining power of incumbent workers. Interestingly, this practice has been challenged under RICO, but it is better understood as an anticompetitive action that should be evaluated under antitrust law. See, e.g., *Trollinger v. Tyson Foods, Inc.*, 543 F. Supp. 2d 842 (E.D. Tenn. 2008).

quality of working conditions (for example, offering less shift flexibility) or impose new restrictions (like demanding that workers sign noncompetes).

5. Defense

An employer is not liable for an antitrust violation against an employee or employees if it can show that an alleged anticompetitive action has led to higher wages for its employees without any offsetting harms including restrictions to employee mobility and reductions in employment.

E. Damages and Other Matters

Section 6(a)(1) replicates the traditional measure of damages in antitrust law. Section 6a(2) creates statutory damages, which are necessary in light of the difficulty of proving damages and the importance of addressing labor monopsony. Statutory damages are thus needed to motivate litigation. Section 8(a) confirms that workers have standing to bring antitrust cases challenging labor market monopsonies; this section would be unnecessary but for a line of cases that inexplicably deny standing.²⁹ Section 8(b) authorizes employers to sue on account of antitrust injuries. We have in mind here employers who suffer a competitive disadvantage as a result of a violation—for example, if a defendant, by monopolizing the labor market or tying up workers with noncompetes, prevents a rival firm from hiring workers as needed to enter the product market. As another example, consider construction companies that lose bids to employers who misclassify workers as independent contractors and can therefore offer lower prices. Finally, §9 makes clear that our proposed bill would not restrict the rights of workers to bring antitrust or other legal cases; it does not implicitly or explicitly override claims they might have under section 1 of the Sherman Act, for example.

§ 6. Damages

a. An employer found liable under this Act must pay the greater of:

(1) Three times the harm imposed on an employee or employees; or

²⁹ See, e.g., *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, Local Lodge No. 1821 v. Verso Paper Corp.*, 80 F. Supp. 3d 247, 276 (D. Me. 2015) (holding that former employees who lost their jobs as a result of a merger lacked standing to challenge the merger on antitrust grounds).

(2) \$10,000 for every employee affected by the employer's anticompetitive conduct.

b. An employer found liable must pay the employee's reasonable attorneys' fees and costs.

§ 7. Definition of employee

For purposes of this Act, an employee and employer are defined under 29 U.S.C. § 203. A person who misclassifies employees as independent contractors is an employer for the purposes of this Act.

§ 8. Standing

a. Employees, and unions that represent them, shall have standing to challenge violations of this Act, sections 1 and 2 of the Sherman Act, and section 7 of the Clayton Act.

b. Employers who have been harmed by illegal behavior by an employer under this section have standing to sue that employer to the extent they have suffered an antitrust injury.

c. The U.S. Attorney and the Attorneys General of the States shall have standing to challenge violations of this Act.

§ 9. Relation to Other Laws

Nothing in this Act supersedes, narrows, or in any other way limits the rights and protections of workers under the Sherman Act, the Clayton Act, or any other law.

Conclusion

Our proposed bill would greatly enhance private antitrust litigation against labor market monopsonies by codifying, clarifying, and in some cases strengthening the law. It does not represent a radical departure from existing law. Instead, we have for the most part taken doctrine and concepts that have been developed by courts for product-market litigation and applied them to the labor market side. Where we go beyond existing law, we do so mainly by establishing presumptions in favor of workers that employers are allowed to rebut. In this way, we preserve the unity and coherence of antitrust law.

We should emphasize, however, that by confining our attention to monopsonization and related practices that are analogous to the product-market abuses that are typically litigated under section 2 of the Sherman Act, we do not mean to imply that we think that other areas of antitrust law do not need reform. We also believe, for example, that the Federal Trade Commission and the Department of Justice should take the lead by incorporating labor market effects into merger review under the Horizontal Merger Guidelines.³⁰ Our proposed bill is meant to target one particular problem with labor markets, and the remedy it offers is not meant to be to the exclusion of others. But our proposal, if adopted, would go a long way toward addressing a major type of anticompetitive behavior that harms workers.

³⁰ See Herbert Hovenkamp and Ioana Marinescu, Anticompetitive Mergers in Labor Markets, *Indiana L.J.* (forthcoming 2018); Suresh Naidu, E. Glen Weyl, and Eric A. Posner, Antitrust Remedies for Labor Market Power, *Harvard L. Rev.* (forthcoming 2018); Eric A. Posner, Why the FTC Should Focus on Labor Monopsony, *ProMarket*, Nov. 5, 2018, <https://promarket.org/ftc-should-focus-labor-monopsony/>.

Appendix: A Proposed Bill to Protect Workers from Labor Market Monopsony

§ 1. Labor Market Monopsony

It shall be unlawful for any employer engaged in commerce, in the course of such commerce, to monopsonize, attempt to monopsonize, or combine or conspire with any other person or persons to monopsonize, a labor market.

§ 2. Labor Market Definition

a. A labor market shall be defined as:

(1) Workers who share a 6-digit Standard Occupational Classification (SOC) code and reside in a single commuting zone as defined by the U.S. Department of Agriculture;

(2) Workers who share a 6-digit SOC code and reside in an area broader or narrower than a commuting zone in which they can find employment with the same or similar conditions in the same occupation at reasonable cost;

(3) An occupation (job title, 6-digit SOC or group of SOC codes) over an area where a hypothetical profit-maximizing firm that was the only present and future employer of the employees defined by the job title, SOC code or codes, could impose on the employees a small but significant and non-transitory reduction in wage (“SSRIW”) without causing a substantial number of the employees to quit.

b. The defendant may rebut a plaintiff’s labor market definition by providing statistical evidence that that the actual labor market in which the plaintiff is employed is different from the plaintiff’s definition.

§ 3. Labor Market Power

a. An employer has labor market power if it can lower wages of its employees below what would be charged in a competitive market. [add in text a discussion]

b. In the absence of evidence of labor market power under section a, an employer that

(1) employs more than 90% of workers or posts more than 90% of job vacancies in a labor market presumptively possesses significant labor market power;

(2) employs between 50% and 90% of the workers or posts between 50% and 90% of job vacancies in a labor market presumptively possesses moderate labor market power.

c. An employer can rebut the presumption of significant or moderate labor market power under section b by showing that if it imposed a SSRIW on its employees, a substantial number of employees would quit.

§ 4. Anticompetitive Behavior

a. A person shall be liable for monopsonizing a labor market if

(1) it has significant labor market power, or

(2) it has moderate labor market power and has reduced wages below the competitive level;
and

(3) it has engaged in anticompetitive acts.

b. Anticompetitive acts include but are not limited to:

(1) Merger with another employer that hires from a common labor market where at least one labor market from which the employers hire has a Herfindahl-Hirschman Index (HHI) that exceeds 2500 and the merger increases the HHI level in this labor market by more than 200 points.

(2) Use of non-compete clauses, non-solicitation clauses, and other clauses that restrict employee mobility in the contracts of the employees in the labor market, other than clauses that establish a reasonable term for employment;

(3) Restrictions on employees' freedom to disclose information about wages and benefits;

(4) Any unfair labor practice as defined under the National Labor Relations Act and amendments;

(5) Misclassification of employees as independent contractors;

(6) No-poaching agreements, wage-fixing agreements, agreements to share wage and salary information, and related horizontal agreements with other employers;

(7) Prohibition on class and other collective actions; or

(8) Any other action that has the effect of significantly reducing competition in the labor market through constraints on employee mobility, other than reasonable employment terms, or enhancement of concentration of the labor market.

§ 5. Defense

An employer is not liable for an antitrust violation against an employee or employees if it can show that an alleged anticompetitive action has led to higher wages for its employees without any offsetting harms including restrictions to employee mobility and reductions in employment.

§ 6. Damages

a. An employer found liable under this Act must pay the greater of:

(1) Three times the harm imposed on an employee or employees; or

(2) \$10,000 for every employee affected by the employer's anticompetitive conduct.

b. An employer found liable must pay the employee's reasonable attorneys' fees and costs.

§ 7. Definition of employee

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§ 8. Standing

a. Employees, and unions that represent them, shall have standing to challenge violations of this Act, sections 1 and 2 of the Sherman Act, and section 7 of the Clayton Act.

b. Employers who have been harmed by illegal behavior by an employer under this section have standing to sue that employer to the extent they have suffered an antitrust injury.

c. The U.S. Attorney and the Attorneys General of the States shall have standing to challenge violations of this Act.

§ 9. Relation to Other Laws

Nothing in this Act supersedes, narrows, or in any other way limits the rights and protections of workers under the Sherman Act, the Clayton Act, or any other law.