UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rohit Chopra

September 18, 2019

The Honorable Makan Delrahim
Assistant Attorney General
Antitrust Division, Department of Justice
950 Pennsylvania Avenue N.W.
Washington, DC 20530

RE: Department of Justice Initiative on Competition in Labor Markets

Dear Assistant Attorney General Delrahim:

Policing the marketplace for anticompetitive conduct often focuses on our narrow identity as consumers. But, Americans are not simply shoppers searching solely for a cheap price. We also work hard and devote much of our daily lives to financially support our families and our communities. Our jobs and our consumption are interconnected. We must recognize that many business models seek to magnify their margins by suppressing wages and compensation, rather than relying on hiking prices. Antitrust enforcers need to sharpen our focus on harm to workers by halting misconduct that hits the paychecks of American families.

The Department of Justice (DOJ) is currently exploring several topics as part of an initiative on competition in labor markets.[1] These topics include the role of employer collaboration and contractual arrangements between employers on competition for workers, anticompetitive no-poach and wage-fixing agreements, and antitrust exemptions for collective bargaining.

I believe these issues warrant close attention. While there is a broad range of challenges policymakers must address, this comment letter focuses on four specific issues: (1) the need for the Department of Justice to prosecute illegal collusion on wages and compensation, (2) the benefits of a Federal Trade Commission (FTC) rulemaking proceeding on non-compete covenants, (3) an extension of the antitrust labor exemption for workers in the "gig economy," and (4) stronger DOJ and Department of Agriculture (USDA) enforcement against abuses of market power targeting farmers and ranchers.

I. The Department of Justice Must Prosecute Illegal Collusion on Wages and Compensation.

In a labor market free of anticompetitive conduct, Americans can more easily climb the economic ladder by obtaining a job that pays more than their current one. The mere threat of an employee departing to a competitor makes an employer more likely to offer a pay increase. However, when companies secretly collude to fix wages or agree not to solicit a competitor's employees, this is unlawful and can constitute criminal misconduct.

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[*] This comment reflects my own views and not necessarily those of the Commission or any other individual Commissioner.
[1] The Federal Trade Commission also hosted hearings on topics relevant to competition in labor markets. *See* FED. TRADE COMM'N, Hearing #3 on Competition and Consumer Protection in the 21st Century (Oct. 16, 2018), https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century.

In 2016, the Department of Justice took an important step by announcing it would criminally investigate companies that collude on compensation or other terms of employment. In its announcement, the DOJ noted that these illegal agreements "eliminate competition in the same irredeemable way as agreements to fix the prices of goods or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct."[2]

Because the Federal Trade Commission[3] does not have the authority to seek criminal sanctions, the Department of Justice is better suited to address illegal collusion on wages and compensation. However, since this 2016 announcement, there have been few criminal enforcement actions by the Department of Justice.

This limited enforcement adds to my concern that collusion by employers against workers is already prevalent. Moreover, the problem is likely to get worse in the future, as employers have more and more tools to gain information that facilitates collusion on wages, including pervasive surveillance of employee communications and a greater availability for employers to purchase salary histories from companies like Equifax. In addition, today's markets have more digital platforms that fix compensation and terms on a wide range of services, including ride hailing and food delivery, and generate data that can facilitate algorithmic collusion.

Federal law enforcement should send a strong signal to the markets that illegally undermining fair competition will not be tolerated. To do that, the Department of Justice should prioritize investigations of large firms that wield substantial power in the labor market. DOJ should pursue violators aggressively, including individual executives and business decision-makers, using both criminal and civil authorities. In addition, enforcers should investigate the use of big data for wage-setting purposes and should closely scrutinize operators of digital platforms that set wages and compensation.

II. The Federal Trade Commission Should Launch a Participatory Rulemaking Proceeding Regarding the Use of Non-Compete Covenants in Worker Contracts.

Another way that employers restrict job prospects and earnings is by forcing prospective employees to agree to certain terms in a non-negotiable, take-it-or-leave-it contract. One of these terms is the non-compete covenant, which bans employees from leaving to work for a competitor. This clause reduces, or even eliminates, the ability for employees to seek more lucrative or attractive employment. It dries up opportunities for employees to find better jobs using their skills and takes away their bargaining leverage in negotiations for advancement.

The number of people affected by non-compete agreements is extensive. Recent research shows that 18 percent of all workers – nearly 30 million people – are subject to a non-compete restriction.[4] Yet less than half of workers who are bound by non-competes possess trade secrets, one of the primary purported

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[2] Press Release, U.S. Dept. of Just., Just. Dept. and Fed. Trade Comm'n Release Guidance for Human Resource Profs. On How Antitrust Law Applies to Emp. Hiring and Compensation (Oct. 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

[3] In July 2018, the FTC reached a proposed settlement regarding a naked wage-fixing agreement between home health care staffing agencies. The proposed settlement essentially had no consequences, as the agreement included no money, no notice to clients and contractors, and no admission or finding of liability. The resolution in this matter may send a signal to the marketplace that violators will not face meaningful consequences. *In the Matter of Your Therapy Source, LLC, Neeraj Jindal and Sheri Yarbray*, F.T.C. File No. 171-0134 (Decision and Order, July 31, 2018), https://www.ftc.gov/enforcement/cases-proceedings/171-0134/your-therapy-source-neeraj-jindal-sheri-yarbray.

[4] U.S. DEPT. OF TREASURY, NON-COMPETE CONTRACTS: ECON. EFFECTS AND POL'Y IMPLICATIONS (2016) [hereinafter "Treasury Dept. Rept."], https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf.

justifications for non-competes.[5] There are also a number of negative consequences for the broader economy. For example, in 1985, when the state of Michigan inadvertently legalized non-competes worker job mobility fell by eight percent.[6] Worker mobility yields benefits for destination firms and helps disseminate improvements in technologies, best practices, and creativity.[7] Reduced job switching results in poorer matching of workers and firms, which leads to lower productivity. Non-competes may also have the effect of inducing workers to leave their occupations altogether, sacrificing accumulated training and expertise in their fields. Strict enforcement of non-compete contracts is also associated with both lower wage growth and lower initial wages.[8] Beyond wages, there may be consequences for job quality. When Americans cannot leave their jobs to seek new opportunities, they will be more susceptible to abuse, harassment, or degrading treatment.

As I noted in a contribution to the FTC's hearings on competition and consumer protection last year, the Commission can define "unfair methods of competition" using participatory rulemaking procedures pursuant to the Administrative Procedure Act.[9] I noted that rulemaking might be particularly fruitful when private enforcement is unlikely to remedy misconduct. Given the prevalence of forced arbitration provisions in many contractual agreements, private enforcement is almost non-existent with respect to clauses and other restraints that may harm competition.

A rulemaking proceeding that defines when a non-compete clause is unlawful is far superior than case-by-case adjudication. The proceeding would allow a broad array of stakeholders, not just a plaintiff and a defendant, to contribute to the development of the law. Earlier this year, the Commission received a petition for rulemaking on non-compete clauses.[9] I strongly support opening up a docket for public comment on this petition to aid the Commission in crafting any potential rulemaking proposals.[10]

III. Congress Should Extend the Antitrust Labor Exemption to Cover Certain "Gig Economy" Workers.

Rather than investing in meaningful innovation to improve products and services, many investors have allocated capital into business models that rely on eroding workplace protections and fair compensation. Many of these businesses are deeply intertwined with the growing "gig economy."

Today, more than one quarter of the American labor force is dependent on alternative work arrangements.[11] These Americans often rely on a very small number of firms, like a digital platform or a staffing agency, to connect them to work. These digital platforms, staffing agencies, and other intermediaries may have considerable market power, which they can exploit to reduce wages and

[5] *Id.* at 4. Some believe that forced non-compete clauses provide incentives for innovation and worker training, by protecting intellectual property and increasing employee retention. There is little empirical support for these claims. In addition, they could likely be achieved though less restrictive alternatives.
[6] Matt Marx & Lee Fleming, *Non-compete Agreements: Barriers to Entry … and Exit?*, 12 INNOVATION POL'Y AND THE ECON. 39-64 (2012), https://www.nber.org/chapters/c12452.pdf.
[7] Treasury Dept. Rept, *supra* note 4, at 22.
[8] *Id.* at 19-21.
[9] Comment of Fed. Trade Commn'r Rohit Chopra, Hearing #1 on Competition and Consumer Protection in the 21st Century, Docket ID No. FTC-2018-0074, at 4 (Sept. 6, 2018) (the Case for Rulemaking Under "Unfair Methods of Competition"), https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf.
[9] *See* Open Markets Institute et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses (Mar. 15, 2019), https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf.
[10] It is worth noting that several states are addressing these concerns. For example, Washington Attorney General Bob Ferguson has successfully pursued enforcement and legislative initiatives on non-compete agreements.
[11] *How many gig workers are there?*, GIG ECONOMY DATA HUB, https://www.gigeconomydata.org/basics/how-many-gig-workers-are-there, (last visited Sept. 16, 2019).

compensation in the pursuit of maximizing their own profits. Since gig workers may be dependent on them for their livelihood and consumers may have few other options, these companies can use their leverage to increase their cut of any transactions or make more demands of workers. Even in markets where employers do not have much market power, unions provide substantial benefits to workers, and the benefits of being represented by a union should be available as widely as possible. Unlike employees who have the legal right to organize together to collectively bargain, gig workers that are not classified as employees risk running afoul of antitrust law when banding together.

Our country has long recognized that powerful firms can easily exploit individual workers. Over time, antitrust law was amended to ensure that employees could band together to bargain against these firms.[12] Importantly, it was not only employees that received these protections. Congress also ensured that independent farmers could also cooperate against agribusiness through a limited antitrust exemption.[13]

A tailored extension of the labor antitrust exemption would complement other efforts to prevent abuses of gig workers, like worker misclassification. The California Legislature recently approved a measure requiring companies like Uber and Lyft to classify their workers as employees rather than contractors.[14] This is a step in the right direction. Congress should ensure that all workers, regardless of whether they are technically an employee, are the beneficiaries of antitrust law, not the victims of it.

IV. The Department of Justice and the United States Department of Agriculture Must Do More to Address Unfair Practices and Anticompetitive Conduct That Harm American Farmers and Ranchers.

Family farmers and ranchers frequently have little to no bargaining power when it comes to negotiating with multinational agricultural corporations. For many farmers and ranchers, there may only be a handful – or even just one – buyer of their production, giving that individual buyer extraordinary leverage over a family farmer's livelihood. These farmers and ranchers are more akin to individual workers than independent businesses that can chart their own destiny. The unequal bargaining power between producers, packers, and processors has been a concern in our country for generations, and the Capper-Volstead Act has not eliminated problems in this marketplace.

After the Federal Trade Commission's reports on the meatpacking industry a century ago, Congress passed the Packers and Stockyards Act, which bans unfair and unjustly discriminatory practices by packers, processors, and others in the agricultural supply chain. While the law was an important step forward for competitive agricultural markets, Congress decided to strip the FTC of some of its authorities in this sector. Now, the Department of Justice and the USDA's Grain Inspection Packers and Stockyards Administration (GIPSA) are primarily responsible for policing against abuses of market power in the agricultural sector.

[12] After the passage of the Sherman Act in 1890, there was concern that antitrust laws were being wielded against those without bargaining leverage, rather than large, powerful corporations exploiting their dominant position. When the Clayton Act was enacted in 1914, it ensured that collective bargaining through labor unions would not be subjected to antitrust scrutiny. Section 6 of the Clayton Act exempts lawful labor activity from the Sherman Act (declaring that labor "is not a commodity or article of commerce"), and § 20 of the Clayton Act prohibits injunctions in labor disputes except where necessary "to prevent irreparable injury to property or to a property right." Because of judicial rulings weakening §§ 6 and 20 of the Clayton Act, Congress passed the Norris-LaGuardia Anti-Injunction Act in 1932, which prohibited injunctions in any case involving or growing out of a labor dispute.

[13] Following reports by the FTC investigations by the DOJ of anticompetitive practices in the agriculture industry, in 1922 Congress passed the Capper-Volstead Act, which provides a limited antitrust exemption to farmer cooperatives and associations.

[14] Cal. State Leg., A.B-5, *Worker status: employees and independent contractors*, http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5 (amended Sept. 6, 2019).

The Department of Justice has generally acted as the primary enforcer of the antitrust laws in the agricultural sector. While USDA's GIPSA is also a critical regulator, many farmers and ranchers are concerned about the agency's lack of action to address increasing concentration in the agricultural industry. GIPSA has now been subsumed into the Agricultural Marketing Service, which is largely a promotional agency, not an enforcement agency. A decade ago, the Attorney General Eric Holder and Secretary of Agriculture Tom Vilsack announced a series of workshops on competition in the agriculture industry. The agencies held forums in Iowa, Alabama, Colorado, and Wisconsin to hear from a broad range of perspectives.[15] While many farmers and ranchers took great risks to speak publicly about abuses of market power on their industry and their communities, their situation has not improved.

In particular, enforcers should closely scrutinize contracts between large agricultural corporations and contract growers. For example, in poultry, contract growers are given chicks and feed, but must invest in all major capital costs, often leading to substantial debt accumulation. Many of these contracts are "flock to flock," where the large agricultural corporation makes no long-term commitments. Because there is limited competition and few buyers, contract growers have almost no bargaining leverage when it comes to unfair contract terms.

If the USDA does not energetically enforce the law, other agencies must step up to the plate. As the Department of Justice, the Federal Trade Commission, and others examine labor market competition, it should not ignore the anticompetitive practices that disrupt fair and functioning agricultural markets. Absent more close attention, family farmers, rural communities, and the quality of our food supply will continue to suffer.

Conclusion

While there are many drivers of wage stagnation in the United States, we cannot deny that powerful firms have a strong incentive to suppress wages. When firms can collude to fix wages and compensation, coerce individuals to agree to restrictive contract terms, or illegally exploit their market power, our entire economy and society suffers. It is critically important that all agencies, especially antitrust enforcers, aggressively attack these abuses.

Respectfully submitted,

Rohit Chopra

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Commissioner

[15] *See* U.S. Dept. of Just., *Public Workshops: Agric. and Antitrust Enforcement in our 21st Century Econ.*, https://www.justice.gov/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10.