BEFORE THE
FEDERAL TRADE COMMISSION
Washington, D.C.

Solicitation for Public Comments on Contract Terms that May Harm Competition
Docket No. FTC-2021-0036

Comments of Service Employees International Union, International Brotherhood of Teamsters, and Strategic Organizing Center

September 30, 2021

SEIU

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The Service Employees International Union (SEIU), the International Brotherhood of Teamsters (IBT) and the Strategic Organizing Center (SOC) submit these comments in response to the Federal Trade Commission's (FTC) Request for Public Comment Regarding Contract Terms That May Harm Fair Competition. SEIU is a labor union that represents over 2.2 million working men and women in health care, the public sector, and workers in other service and care jobs such as homecare workers, child care providers, janitors, security guards, and airport workers. Founded in 1903 by the merger of the two leading team driver associations, IBT is one of America's largest and most diverse unions and proudly represents 1.4 million hard-working men and women employed as public defenders, sanitation workers, healthcare workers, and secretaries, in addition to delivery and warehouse workers, throughout the United States, Canada and Puerto Rico. SOC is a democratic federation of labor unions including SEIU and IBT that together represent 4 million working people. Together, we strive to ensure that every worker has a living wage, benefits to support their family, dignity in retirement, and safe, equitable workplaces where all employees meaningfully participate in the decisions affecting their employment.

Labor market concentration, along with corporate concentration in buyer and seller markets generally, is at troubling levels. This concentration is one source of increased employer power over workers and should be addressed in part through measures such as revising how the FTC and the Department of Justice (DOJ) review mergers by including consideration of labor market concentration. However, employers have wielded increasing power over workers in several additional ways, using a range of specific contractual restraints. These restraints further amplify employers' hold over workers and make it even harder for workers to switch jobs, act collectively regarding wages and working conditions, assert or protect their rights, or organize to counter their employer's power. In tandem with the rise of these restraints, employers have also increasingly de-integrated, or fissured, the workplace through models such as gig platforms and franchising. Employers use these models—which rely heavily on vertical restraints—to avoid basic responsibility for workers while continuing to closely control them, making their jobs and well-being increasingly precarious even as they work harder and harder to make ends meet.

Corporation concentration has grown significantly over the last several decades, with troubling effects on the economic health of businesses, workers, and consumers. In the last two decades, 75 percent of

U.S. industries have become more concentrated,[1] and in many sectors of the economy, the four largest firms have significantly increased their share of sales,[2] reducing innovation.[3] Concentration issues are even more acute in labor markets. Research indicates the majority of U.S. local labor markets are overly concentrated,[4] and that U.S. labor markets are, on average, highly concentrated, according to FTC and DOJ merger guidelines.[5] Twenty percent of all U.S. workers currently work in highly-concentrated labor markets.[6] Labor monopsony power can lead to negative outcomes for U.S. workers, including suppressed wages,[7] lower non-wage compensation in the form of health benefits,[8] and a higher likelihood of labor rights violations.[9] Such negative impacts fall much more heavily on workers of color, exacerbating existing problems of inequality and ongoing racism in our economy.

A vertical restraint is a "contractual provision or mode of operation that restricts the autonomy of the counterparty in the case where each party operates at a distinct segment of the supply chain."[10] At the same time that labor markets have become more concentrated, firms have increasingly used vertical restraints to shift power to themselves and away from workers. These restraints have taken the form of specific anticompetitive restrictions on workers such as non-compete restrictions, as well as corporate models that are based on vertical arrangements such as those based on misclassification and models in which corporate control is based entirely on external contracts, such as gig platform companies.

The weakening of antitrust laws and lax antitrust enforcement have played a key role in increased market concentration and the proliferation of multiple types of vertical restraints, including restraints placed on producers, suppliers, and workers. One of the original purposes of antitrust law was to preserve the independence of smaller businesses, particularly in dealing with larger corporations.[11] How

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[1] Gustavo Grullon, Yelena Larkin and Roni Michaely, *Are U.S. Industries Becoming More Concentrated?* REV. OF FINANCE Vol. 23, Issue 4 at 697 (July 2019), https://doi.org/10.1093/rof/rfz007.

[2] Ufuk Akcigit and Sina Ates, *Slowing Business Dynamism and Productivity Growth in the United States,* Fed. Reserve Bank of Kansas City, Oct. 8, 2020, at 45, https://www.kansascityfed.org/documents/4952/aa_jh_201008.pdf. The sectors are manufacturing, retail trade, wholesale trade, services, utilities and transportation, and finance. *Id. See also* David Dayen, MONOPOLIZED: LIFE IN THE AGE OF CORPORATE POWER at 3 (2020) (noting that in the markets for airlines, commercial banking, and phone, wireless, cable and internet services, four companies control the market).

[3] Akcigit & Ates, *supra* note 2 at 4, 31; John Haltiwanger, *Entry, Innovation and Productivity Growth in the U.S. Economy,* Federal Reserve Bank of Dallas, May 31, 2018, at 9, https://www.dallasfed.org/-/media/Documents/research/events/2018/18ted-haltiwanger.pdf (indicating that the entry rate of new firms into the U.S. market has fallen sharply, particularly since 2007, while firm exit rates have remained relatively flat).

[4] José Azar, Ioana Elena Marinescu, Marshall Steinbaum and Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data,* Nat'l Bur. Econ. Rev., Aug. 10, 2018, at 2, https://www.nber.org/system/files/working_papers/w24395/w24395.pdf.

[5] José Azar, Ioana Elena Marinescu, and Marshall Steinbaum, *Labor Market Concentration,* Nat'l Bur. Econ. Rev., Dec. 10, 2018, at 2, https://www.nber.org/system/files/working_papers/w24147/w24147.pdf.

[6] Azar et al, *supra* note 4 at 2.

[7] Azar et al, *supra* note 5 at 3.

[8] Yue Qiu and Aaron J. Sojourner, *Labor-Market Concentration and Labor Compensation,* IZA Institute of Labor Economics, Jan. 8, 2019, at 5, https://ssrn.com/abstract=3312197.

[9] Ioana Elena Marinescu, Yue Qiu, and Aron J. Sojourner, *Wage Inequality and Labor Rights Violations,* IZA Institute of Labor Economics, Aug. 13, 2020, at 4-5, https://ssrn.com/abstract=3673495.

[10] Marshall Steinbaum, *Antitrust, the Gig Economy and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45, 48 (June 12, 2019), https://ssrn.com/abstract=3347949 or http://dx.doi.org/10.2139/ssrn.3347949.

[11] Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960-1980,* Enterprise & Society, Feb. 28, 2020, at 7, https://doi.org/10.1017.eso.2019.58. *See also* Sanjukta Paul, *Hearing on Antitrust and*

large corporations treated suppliers was of particular concern,[12] and this concern extended to labor.[13] A firm that wished to control another entity or employee could do so only if they were within the boundaries of the corporation.[14] Attempting to exercise control over other ostensibly independent firms—including through vertical restrictions on relationships between the firms—violated antitrust laws because such control was illegal coordination or coercion of an independent third party.[15] Subsequent cases, adopting a law and economics viewpoint championed by the University of Chicago School and Robert Bork in his book, *The Antitrust Paradox*,[16] eroded legal limits on vertical restraints.[17]

As a result, vertical restraints have proliferated, and nowhere is this more true than in the employment context. Research has linked wage stagnation in the last several decades to specific worker-related policies and practices, including certain vertical restraints and fissuring workplace practices.[18] These restraints—such as non-compete restrictions, no-poach agreements among employers, and non-disclosure restrictions—include measures that directly interfere with worker mobility and workers' ability to seek and compete for new or better jobs. They also include misclassification, mandatory arbitration, and class action restrictions—vertical restrictions placed on workers that systematically shift power to employers at the expense of workers' agency and rights. Finally, they include the vertical arrangements on which fissuring models of employment are based—including gig platforms, franchising, and similar structures—that employers use to shift costs and liability away from themselves while still retaining control over workers, prices, and other aspects of work.

As we detail below, these vertical restraints harm competition in the traditional sense in which it was understood: they allow large, powerful firms to control multiple smaller, ostensibly independent firms or workers and thus allow large firms to amplify and insulate their own power. The anticompetitive effects of these restraints—in the form of lower wages, the inability to switch jobs or vindicate on-the-job rights, unfairness to law-abiding businesses, and increased accumulation of power by the employers imposing these restraints—is also well-documented. For these reasons, as further explained below, we urge the Commission to regulate these vertical restraints as unfair or deceptive acts, or unfair methods of competition, under Section 5 of the Federal Trade Commission Act.

Economic Opportunity: Competition in Labor Markets, Testimony Before the Comm. on the Judiciary, Subc. on Antitrust, Comm'l, and Admin. L., Oct. 29, 2019, at 4 (arguing that the Sherman Act's original purpose—to protect workers and small businesses from "unfair bargains" imposed by much more powerful parties—has been inverted, "treating economic coordination that takes place within large, powerful corporations with deference, while making the cooperation of small players, including workers beyond the bounds of employment, an enforcement priority").

[12] Paul, *supra* n. 11 at 2-3.

[13] One reason Senator John Sherman gave for legislating against monopoly was that "[i]t commands the price of labor without fear of strikes, for in its field it allows no competitors." Congressional Record 2457 (1890), https://appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf. *See also* Paul, *supra* n. 11 at 2-3.

[14] *United States v. Richfield Oil Corp.,* 99 F. Supp. 280 (S. D. Cal., 1951), aff'd, 343 U.S. 922 (1952).

[15] *Id*.; Steinbaum, *supra* note 10 at 49-50.

[16] Robert Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[17] *See* Callaci, *supra* note 11 (citing cases).

[18] Lawrence Mishel and Josh Bivens, *Identifying the policy levers generating wage suppression and wage inequality,* Economic Policy Institute, May 13, 2021, at 3. The authors conclude wage stagnation is the result of several policies and practices, including the weakening of labor law, *id*. at 27-21, as well as the increasing use of restraints imposed on workers such as misclassification, arbitration and class action restrictions. *Id*. at 39-49.

Non-compete and exclusivity restrictions

Non-compete restrictions are "employment provisions that ban workers at one company from going to work for, or starting, a competing business within a certain period of time after leaving a job."[19] Although agreements not to compete were traditionally viewed with hostility by courts and upheld only with respect to a small subset of employees[20]—for example, high level executives with highly sensitive proprietary information—these agreements have expanded drastically in number and scope in recent decades. Now, these agreements are ubiquitous: a recent study found that 49 percent of all businesses use noncompetes, and nearly one-third—32 percent—of businesses bind *all* their employees, regardless of role or duties, with noncompetes.[21] These clauses are widespread, "affecting anywhere between 36 million and 60 million workers."[22]

Moreover, low-wage workers—in spite of the fact they rarely possess trade secrets or similar proprietary information—have not escaped this phenomenon. A recent study found that approximately 29 percent of low-wage workers are restricted by non-compete clauses.[23] Further, companies often aggressively enforce non-compete restrictions against workers through legal action.[24] This means that many low-wage workers are barred from switching jobs or job locations for no reason other than keeping wages low or conditions subpar. If workers could freely move between jobs, the increased competition for high-quality, experienced employees would likely result in higher wages and/or improvements in working conditions, basic labor market incentives used to induce high-quality workers to change jobs.

The anticompetitive effects of noncompetes—on innovation, job creation, and workers' wages—are well-documented. Economists have found that for the median U.S. state, enforcing non-competes more strictly results in 200 fewer new firms being formed each year.[25] Similarly, research shows that greater enforceability of noncompetes reduces the formation of new firms by 12 percent.[26] Another study found that states enforcing noncompetes gain 16 jobs when venture capital investment increases by 1 percent, while states that do not enforce such provisions (such as California) gain 56 jobs—3.5 times as many—in response to the same increase in venture capital investment.[27] Research has also found wage effects from non-compete provisions: Workers in states that enforce noncompetes earn less than similar

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[19] Alexander J.S. Colvin and Heidi Shierholz, *Noncompete Agreements,* Economic Policy Institute, December 10, 2019, at 1, https://www.epi.org/publication/noncompete-agreements/.
[20] Michael J. Garrison and John T. Wendt, *The Evolving Law of Employee Noncompete Agreements*, 45 AM. BUS. L.J. 107, 110-111 (Spring 2008), https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1020&context=ocbeblpub.
[21] Colvin & Shierholz, *supra* note 19 at 4.
[22] *Id*. at 2. *See also* Andrea Hsu, "Biden Moves to Restrict Noncompete Agreements, Saying They're Bad for Workers," NPR (July 9, 2021), https://www.npr.org/2021/07/09/1014366577/biden-moves-to-restrict-non-compete-agreements-saying-theyre-bad-for-workers.
[23] Colvin and Shierholz at 7 ("more than a quarter—29.0%—of responding establishments where the average wage is less than $13.00 use noncompetes for ***all*** their workers.") (emphasis added).
[24] Sally Herships and Stacey Vanek Smith, "The Rise of the Blue-Collar Noncompete," NPR (June 24, 2019), https://www.npr.org/2019/06/24/735534276/the-rise-of-the-blue-collar-noncompete.
[25] Jessica S. Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship,* (December 24, 2019), http://dx.doi.org/10.2139/ssrn.3040393.
[26] *Id*.
[27] Sampsa Samila and Olav Sorenson, *Non-compete covenants: Incentives to innovate or impediments to growth?* (October 5, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411172.

workers in states that do not enforce noncompetes.[28] Some link the well-documented stagnation of wages in the U.S. to the increasingly widespread use of non-compete agreements, noting that "worker bargaining power is reduced after a non-compete is signed."[29]

Non-compete provisions impair the ability of labor markets to generate efficient matches between employers and workers, known as the "goodness of fit" between employer and employee. By constraining the ability of individual workers to seek out new opportunities, employers artificially limit the pool of potential matches available to them. In effect, the recruiting difficulties many employers report and attribute to a "skills shortage" is much more plausibly explained by the limits on workers' mobility that employers themselves impose.[30] Workers are similarly deprived of jobs that are a good "fit" for them: jobs that provide the best combination of pay, fringe benefits, and nonpecuniary benefits like proximity to home or day care or a non-hostile work environment.

Workers in a range of industries and positions are subject to non-compete restrictions. For example, physicians who work for University of Pittsburgh Physicians (UPP), which is a part of the University of Pittsburgh Medical Center (UPMC) health system, are compelled to sign agreements with non-compete covenants. Under these covenants, physicians "agree" that for a full year after they leave UPP they will not take their staff with them or practice internal medicine within Allegheny County nor within 10 miles of any location where they worked for at least 30 percent of their time with UPP. They are also barred from working for Highmark Health, which owns UPMC's primary competitor in the region, the Allegheny Health Network, or for any firm that has a contract with UPMC. If a physician violates the covenant, they agree that UPP has a right to an injunction preventing them from such work and that they will pay damages to UPP equal to a year's revenue generated by that doctor or a year's salary and benefits, whichever is greater. As the dominant health system in the Pittsburgh area, UPMC already has significant power in the labor market for healthcare workers. Adding non-compete clauses to its physicians' contracts in combination with its market dominance essentially prevents its medical staff from leaving their jobs by foreclosing any viable exit or alternative employment options anywhere in the region.[31]

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[28] Evan Starr, *Consider This: Training, Wages and the Enforceability of Covenants Not to Compete*, 72 ILR REVIEW NO. 4, August 2019, at 783-817. *See also* Colvin and Shierholz, *Noncompete Agreements,* at 2-3.

[29] *E.g.*, *Non-compete Contracts: Economic Effects and Policy Implications*, U.S. Dep't of the Treas., March 2016, at 3-4, 10. *See also* Colvin & Heidi Shierholz, *supra* note 19 at 2-3.

[30] As Jordan Weissman notes, an actual skills shortage should be associated with rapid wage increases (as employers compete for workers), not extremely slow-to-non-existent wage increases, as the U.S. has experienced over the past decade. Jordan Weissman, *After All the Talk About a Skills Shortage in the U.S. Job Market, the Real Problem May Be an Employer Shortage,* Slate, January 17, 2018, https://slate.com/business/2018/01/after-all-the-talk-about-a-u-s-skills-shortage-the-real-problem-may-be-an-employer-shortage.html.

[31] *See* Jim Martin, *Allegheny Health Network, UPMC Hillman cancer centers serving Erie patients,* ERIE TIMESNEWS, Oct. 1, 2020 (because of non-compete, UPMC doctor cannot practice medicine in Pittsburgh area for one year); John Beauge, *Fired obstetrician accuses UPMC Susquehanna of illegal conduct involving rural Pa. medical care provider*, PennLive Patriot News, Sept. 21, 2020, https://www.pennlive.com/news/2020/09/fired-obstetrician-accuses-upmc-susquehanna-of-illegal-conduct-involving-rural-pa-medical-care-provider.html; Bill Toland, *Highmark vs. UPMC: The recruitment begins for doctors and practices,* PITTSBURGH POST-GAZETTE, May 5, 2013, https://www.post-gazette.com/business/businessnews/2013/05/05/Highmark-vs-UPMC-The-recruitment-begins-for-doctors-and-practices/stories/201305050198 (Highmark and UPMC routinely require contracts that prevent doctors from working in the relevant area for "a year or more" after they leave); *Doctors' flight from UPMC to Highmark leaves patients scrambling*, DistillInfo, Dec. 27, 2012,

Similarly, some workers are subject to exclusivity requirements that prevent them from working for more than a single employer. These restrictions are similar to non-compete restrictions except that they bind workers to a single employer *while* they are working rather than after they leave. Such restrictions are often applied to workers who are part-time or classified as independent contractors. At the University of Southern California (USC), for example, staff who teach on an adjunct basis are barred from teaching at other institutions while employed with the school. This is the case even though adjunct faculty are hired by the course as part-time instructors, sometimes for a single course. This means someone teaching a single course for three hours of classroom time and six hours of preparation and grading time per week, or nine hours total, is restricted from pursuing other similar teaching opportunities in order to make a living. These restrictions also unfairly limit worker choice, mobility, and livelihood.

Non-compete clauses and exclusivity requirements are inherently anti-competitive. The right to leave a workplace for better pay and working conditions is fundamental for workers and our economy. Non-compete restrictions reduce worker mobility, help employers keep wages and wage growth down, deter small business formation, entrench potentially abusive, discriminatory, or hostile work environments, and fortify market power to the detriment of workers, rivals, consumers, and broader society. There is already a trend in favor of banning non-compete restrictions at the state level,[32] but a blanket federal rule would be a more reasoned and uniform approach. For these reasons, the FTC should use its statutory authority under Section 5 of the Federal Trade Commission Act to promulgate a rule banning non-compete restrictions as unfair methods of competition, and similarly ban exclusivity requirements on workers who are not full-time, direct employees as unfair methods of competition. Further, because many employers impose non-compete restrictions even in states where noncompetes are prohibited, which still deters workers from switching jobs, employers who impose noncompetes in the face of contrary law should be subject to statutory penalties and attorneys' fees for prevailing plaintiffs.[33]

Nondisclosure restrictions

Non-disclosure restrictions, or restrictions on workers disclosing, even to each other, terms of work which may include pay, benefits, or prior treatment at work such as sexual harassment, are increasingly common. Recent data reported by *Harvard Business Review* show that one-third of workers are bound by non-disclosure agreements (NDAs).[34] Such provisions are also increasingly expansive, covering more subjects of work, which makes it more difficult for workers to change jobs. Expansive NDAs can thus operate as another form of non-compete restriction.[35]

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https://www.distilnfo.com/provider/2012/12/27/doctors-flight-from-upmc-to-highmark-leaves-patients-scrambling/.

[32] *Multiple States Join Emerging National Trend Banning Noncompete Agreements with Low-Wage Workers*, JD Supra, Aug. 14, 2019, https://www.jdsupra.com/legalnews/multiple-states-join-emerging-national-13841/.

[33] David Bassali et al, *Updating Antitrust and Competition Policy: Labor Issues,* Thurman Arnold Project at Yale University, May 2021, at 16, https://som.yale.edu/sites/default/files/TeamLabor-Final.pdf.

[34] Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, Harvard Bus. Rev., Jan. 30, 2018, https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change.

[35] *Id*.

Like noncompetes, non-disclosure restrictions impede workers' ability to bargain and compete fairly for better wages and working conditions by preventing workers from even learning about pay and working conditions. Preventing workers from knowing the wages of co-workers or those at other firms raises search costs and reduces their bargaining power, and may "hinder[] labor-side antitrust litigation."[36] Prohibiting the exchange of wage and benefit information among employees exacerbates existing information asymmetries, a quintessential market distortion, and keeps workers from having the information necessary to make informed decisions about their own economic futures. Non-disclosure restrictions also keep issues out of the courts and the public eye and prevent workers or the public from holding corporations accountable for abusive or subpar working conditions. Therefore, non-disclosure restrictions should be recognized as a restraint on worker power and mobility similar to non-compete restrictions. Accordingly, NDAs should be regulated as an unfair restraint on workers, and banned as an unfair method of competition.

No-poach agreements

Like non-compete agreements, no-poach agreements restrain competition in labor markets and thus restrict workers' ability to change jobs and press for higher pay and other improved conditions of employment such as more hours, preferred work schedules, or similar benefits. Some no-poach agreements are purely horizontal, among multiple employers who compete horizontally for employees. No-poach agreements are also ubiquitous in franchised industries, where franchisors may impose no-poach agreements on all franchise units in a franchise chain, including units owned by the franchisor, to prevent units within the chain from competing with each other for employees. These arrangements are both vertical and horizontal.

President Biden's Executive Order on Promoting Competition in the American Economy encouraged the FTC and DOJ to consider whether to revise their Antitrust Guidance for Human Resource Professionals.[37] That Guidance stated the agencies would proceed to criminally enforce antitrust laws against naked no-poach agreements,[38] but the Guidance failed to include no-poach agreements that may have a vertical aspect, such as those used in franchise chains. Since 2016, the DOJ filed statements of interest in several franchise cases advocating the application of the rule of reason, rather than treating these agreements as *per se* illegal under the Sherman Act.[39] Both forms of no-poach agreements should be treated as *per se* illegal under antitrust laws as an unfair method of competition.

No-poach agreements harm workers by locking them into jobs and limiting their opportunities as well as serving to suppress competition in labor markets and workers' wages as a result. When workers are prevented from seeking employment in certain businesses, they are more likely to stay in their current

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[36] *See* Ioana Elena Marinescu, and Eric A. Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony,* Roosevelt Inst., Dec. 21, 2018, at 15, https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_ProposalToEnhanceAntitrustProtection_workingpaper_201812.pdf.

[37] Exec. Order No. 15069, 86 Fed. Reg. 36,987 (July 14, 2021), https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy.

[38] *Antitrust Guidance for Human Resource Professionals,* Fed'l Trade Comm'n and Dep't of Justice Antitrust Div., Oct. 2016, at 3, https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

[39] *Corrected Statement of Interest* filed in *Stigar v. Dough Dough Inc.*, No. 2:18-cv-00244-SAB (E.D. Wa.), https://www.justice.gov/atr/case-document/file/1141721/download.

jobs and lack any implicit or explicit bargaining power to negotiate higher wages or other improvements. No-poach agreements are, simply put, naked restraints on competition that are indistinguishable from non-compete restrictions, except workers never go through the pretense of "agreeing" to the restriction because their employers make the agreement directly.

Examples of egregious "no-poach" cases include both high profile and current examples. In 2010, the Department of Justice sued Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar, alleging the companies had entered into a series of bilateral agreements not to solicit certain technology employees from each other in violation of Section 1 of the Sherman Act, and employees brought their own civil suit against their tech employers in 2011 under California state law.[40] It is an indication of how banal no-poach agreements have become that some of the richest and purportedly most attractive employers in the world nevertheless sought to restrain their employees in such a bold and coercive manner.

There are also current examples of companies using no-poach agreements, including where they blatantly violate local laws. Planned Companies, a large building services firm spanning several states, includes no-poach agreements in its contracts with building owners. Typically, in this industry, when a building changes building services contractors, janitors, security guards, and other service workers in the building seek to remain at the same place of employment. This allows current workers to continue working in a place where they have transportation to work, have a suitable shift, are familiar with their coworkers and tenants, and know the peculiarities of the building. Allowing buildings to retain current workers during contractor turnover reduces labor market friction and creates stability in the industry because it allows workers to bring their skills and know-how to multiple contractors in the industry.

Planned's no-poach agreements stipulate that if a building owner engages another building services firm, the new firm cannot hire Planned's workers without paying a substantial fee. Its no-poach agreement makes existing workers dependent on Planned, resulting in job instability, frequent changes in working conditions, or layoffs if Planned loses the account and does not have sufficient work in the market after a contract ends. Further, if the incoming contractors cannot hire incumbent workers, this results in workers losing important seniority benefits and could weaken existing bargaining units. Moreover, it creates instability for clients who come to rely on continuity of service in their buildings with workers who know the facilities and routines and have institutional knowledge.

Not only do these contract terms hurt building owners, other building services providers, and workers, they also violate displaced worker protections in several cities. Many cities, including New York, Philadelphia, and Washington, DC—all cities where Planned conducts business—have adopted displaced worker protection laws in order to protect the stability of labor markets when building service contracts turn over.[41] These laws protect service workers when their employers lose a contract by establishing a transition period "during which the previous contractor's employees cannot be fired without cause" and at the end of which "the successor contractor [is required to]…rehire employees whose performance was satisfactory."[42] The no-poach clauses in Planned's customer contracts undermine these laws by making adherence to them impossible under their agreements.

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[40] *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements*, Press release, Dep't of Justice, Sept. 24, 2010; Melissa Lipman, *Judge Koh OKs $415M Google, Apple Anti-Poaching Deal*, Law360, Sept. 3, 2015, https://www.law360.com/articles/677683.

[41] Jessica Harris, *Displaced Worker Protection Laws: An Explainer*, On Labor (January 13, 2014), https://onlabor.org/displaced-worker-protection-laws-an-explainer/

[42] *Id*.

No-poach agreements are particularly prevalent in franchise systems. Typical no-poach provisions in franchise chains prohibit franchisees from employing workers from other locations in the same franchise system, sometimes for a period as long as six months. Some provisions are limited to managers, but most cover all workers at the franchise location regardless of position.[43] It is estimated that up to 58 percent of franchise chains use no-poach agreements.[44]

These agreements result in egregious unfairness to workers. The plaintiff in a pending case against McDonald's has a typical story, which the court described as follows:

> Plaintiff's story is one of employment success: she started as an entry-level crew member paid $7.00 per hour at a McDonald's franchise and worked her way up into management. When she applied for a better-paying position with a competing McDonald's restaurant, she was foiled by a no-hire agreement which forbid the competing McDonald's restaurant to hire both current employees of other McDonald's restaurants and anyone who had worked for a competing McDonald's restaurant in the last six months. Given that most individuals in the low-skill employment market do not have the luxury of being unemployed by choice for six months, the no-hire provision effectively prevented competing McDonald's franchises (as well as the company-owned stores) from competing for experienced, low-skill employees.[45]

In the absence of clear federal rules or enforcement, the center of activity is the courts, and courts sometimes view no-poach agreements in the franchise systems differently from no-poach agreements in other contexts. Franchisors assert these agreements are merely vertical restraints on trade, in spite of the fact that the agreements restrain the hiring of employees between competing stores, a clear horizontal restriction. Courts are divided on how to treat these arguments. In a case against McDonald's pending in federal court in Illinois, *Deslandes v. McDonald's USA*, the court held the plaintiff had adequately alleged the non-poach agreements constituted a horizontal restraint:

> The Court agrees that the restraint has vertical elements, but the agreement is also a horizontal restraint. It restrains competition for employees among horizontal competitors: the franchisees and the McOpCos [corporate-operated stores]. Plaintiff has alleged that McOpCos run McDonald's-brand restaurants and, thus, compete directly with franchisees for employees. Plaintiff has also alleged that the McOpCos are subsidiaries of defendant McDonald's and that the restraint explicitly restricts franchisees from hiring employees of McDonald's subsidiaries, i.e., the franchisees' competitors. Thus, McDonald's, by including the no-hire provision in its agreement with franchisees, was protecting its own restaurants (i.e., itself) from horizontal competition for employees.[46]

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[43] Alan B. Krueger and Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, Princeton University and Nat'l Bur. Econ. Rev., July 18, 2017, at 5-6, https://www.nber.org/system/files/working_papers/w24831/w24831.pdf.

[44] *See id.* at 4; Evan Starr, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts*, Economic Innovation Group, February 2020, at 4, https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf.

[45] *Deslandes v. McDonald's USA, LLC*, 2018 U.S. Dist. LEXIS 105260 at *2 (N.D. Ill., June 25, 2018). *See also* Sharon Johnson, *Hell No, You Can't Go,* THE PROGRESSIVE, April 2, 2020, https://progressive.org/magazine/hell-no-you-cant-go-johnson/.

[46] *Deslandes,* 2018 U.S. Dist. LEXIS 105260 at *15-16.

The court in *Deslandes* nevertheless took the view that the agreement was not *per se* illegal, because it was ancillary to the franchise agreement, which has the pro-competitive effect of increasing the output of restaurants' food production/sales. It instead applied a "quick look," under which it held the no-poach provision was unreasonable because, it found, dividing the market for employees stifles interbrand competition rather than promoting intrabrand competition. In so holding, the court emphasized that the relevant market—in which the agreement must foster rather than hinder competition—was the market for employees of McDonald's, not the market for burgers.[47]

In contrast, however, the court in a case brought by workers against Burger King viewed the franchise as a single entity, akin to a corporation separated into divisions or a parent-subsidiary structure, which therefore could not engage in concerted activity between two or more entities as required under Section 1 of the Sherman Act.[48] Accordingly, it viewed Burger King's no-poach agreement as merely "an internal 'agreement' to implement a single, unitary firm's policies," which did not implicate antitrust principles.[49] In so holding, the court failed to address how preventing labor competition between franchise locations enhanced interbrand competition.

The court in *Burger King* relied on *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) in viewing the franchise system a "single entity." However, if the franchisor and franchisees are a single entity with respect to employment, it is hard to see how they are not also jointly liable as employers, or as a single employer—a conclusion franchisors have been at pains to reject.[50] A franchisor's claim to be a single entity with its franchisees for the purposes of competition law on the one hand, but separate, independent entities for the purposes of labor law, allows franchisors to claim to be unitary entities for the purposes of controlling workers, and separate entities for purposes of avoiding employer liability to those same workers.[51] Nevertheless, many courts take this view.

The McDonald's case also illustrates the uphill battle faced by workers in private no-poach cases: in spite of their initial win when the court held plaintiffs adequately alleged the no-poach agreements were illegal restraints, plaintiffs recently lost their bid for class certification.[52] The court held that in spite of the national policy of no-poaching, the workers were not all part of the same national labor market and that instead, the only relevant markets were thousands of individual local labor markets where workers were employed. But bringing thousands of smaller no-poach cases is not economically feasible or rational for low-wage workers.

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[47] *Id*. at *23. Although plaintiffs prevailed, this decision also reflected a misguided view of competitive harm: that pro-competitive effects may justify anticompetitive restraints. This type of balancing is particularly prevalent when restraints on workers are considered, to the frequent detriment of workers and labor markets. *See, e.g.*, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig*., 958 F.3d 1239, 1266 (9th Cir. 2020) (M. Smith, Cir. J., concurring).

[48] *Arrington v. Burger King*, 2020 U.S. Dist. LEXIS 51852 at *16-17 (S.D. Fla., March 24, 2020) ("this case presents a paragon example of the type of unity decision-making untouched by §1.").

[49] *Id*. at *19-20 (citations omitted).

[50] *See, e.g., Salazar v. McDonald's Corp*. 939 F.3d 1051 (9th Cir. 2019).

[51] Krueger & Ashenfelter, *supra* note 43 at 7; Andrew Elmore, *The Future of Fast Food Governance*, 165 U. PENN. L. REV. ONLINE at 74; David Seligman, *Having Their Cake and Eating It Too: Antitrust Laws and The Fissured Workplace,* in INEQUALITY AND THE LABOR MARKET 163, (Sharon Block & Benjamin H. Harris, eds. 2021), https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_seligman_june_13_2018.pdf.

[52] McDonald's Workers Lose Cert. Bid in No Poach Case, Law360, July 28, 2021, https://www.law360.com/articles/1407759/mcdonald-s-workers-lose-cert-bid-in-no-poach-dispute.

The Commission and several state attorneys general have taken notable action to halt the use of no-poach agreements in franchise businesses,[53] but this patchwork of progress falls short of a uniform federal rule prohibiting no-poach agreements.[54] Indeed, even for major chains such as McDonald's, Dunkin' Brands Group, and La Quinta that have promised to stop using no-poach agreements,[55] franchise agreements that pre-date the franchisors' promise (McDonald's was made in 2016, for example) are still in effect and typically have terms of 20 years.

A clear position by the FTC—including that no-poach agreements are *per se* illegal whether they are purely horizontal, such as in the high tech collusion case, or both horizontal and vertical, as in the franchise industry—would address the uncertainty and unfairness currently surrounding no-poach restrictions. For these reasons, we urge the Commission to ban these anticompetitive restrictions on workers, their wages, and fair labor market competition.

Misclassification

Misclassification—treating workers as independent contractors when they should be treated as employees—is a rampant, growing problem that imposes heavy costs on workers and broader society.[56] It also provides an unfair competitive advantage to employers that misclassify their workers.

Workers should not be classified as independent contractors unless they operate "an independent business, with specialized skill, capital investment, and the ability to engage in arms-length negotiations over the terms of a job."[57] This definition has become all but meaningless, however, as misclassification of workers as independent contractors rather than employees has become ubiquitous. Estimates of the proportion of all employers who misclassify their employees range between 10 and 30 percent.[58] Independent contractors, on-call workers, and workers for temporary staffing agencies accounted for 94 percent of job growth in the 10 years prior to 2017.[59]

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[53] Numerous state attorneys general have targeted non-compete and no-poach agreements in the past, including in Massachusetts, New York, Illinois, and Washington. Mike Curley, *State AGs Take Aim At Fast Food Noncompete Clauses*, Law360, July 9, 2018, *available at* https://www.law360.com/articles/1061177/state-ags-take-aim-at-fast-food-noncompete-clauses; https://ag.ny.gov/press-release/2019/attorney-general-letitia-james-joins-multistate-settlement-cease-fast-food-usage (announcing settlement between 14 states and 4 fast-food chains not to impose non-compete agreements on workers); Terry Gerstein, *Workers Rights Protections and Enforcement by State Attorneys General*, Economic Policy Institute, Aug. 27, 2020, *available at* https://www.epi.org/publication/state-ag-labor-rights-activities-2018-to-2020/. The office of Washington Attorney General Ferguson has been the most active in fighting no-poach agreements in the franchise industry, announcing it has reached agreements with 225 franchise chains to cease using no-poach agreements. *See* https://www.law360.com/articles/1268426/wash-enforcer-calls-doj-somewhat-misguided-on-no-poach.

[54] Matthew Perlman and Bryan Koenig, *Where Franchise No-Poach Agreements Stand Today*, Law360, Aug. 15, 2019.

[55] *Id*.

[56] *See* Catherine Ruckelshaus, *Independent Contractor v. Employee: Why Misclassification Matters and What we can do to Stop It,* National Employment Law Project, May 9, 2016, at 1, https://www.nelp.org/publication/independent-contractor-vs-employee/.

[57] *Id*.

[58] *Id*. at 4.

[59] Eduardo Porter, *Shaky Jobs, Sluggish Wages: Reasons Are at Home,* The NY Times (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/business/economy/economy-labor-wages-subcontracting.html.

Misclassification is particularly pervasive in low-wage, labor-intensive industries.[60] Workers classified as independent contractors are paid less than direct (properly-classified) employees.[61] In addition, women and people of color are overrepresented in the jobs and industries where misclassification predominates.[62]

Employers use misclassification to save on labor costs by sidestepping minimum wage and overtime pay obligations, employment taxes, and workers' compensation premiums. Firms that misclassify workers are at a competitive advantage compared to firms that do not because they decrease both their costs and legal liabilities relative to competitors who comply with the law.[63] A 2010 study estimated that misclassifying employers shifts $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums to employers that do not violate employment classification laws.[64]

Workers classified as independent contractors lack not only job security but also the protection of wage and hour laws, labor laws, and other on-the-job protections. They lack bargaining power with respect to employers and face take-it-or-leave-it work terms. These vulnerable workers are often subject to additional vertical restraints such as non-compete restrictions, non-disclosure restrictions, or exclusivity restrictions. And under the FTC's recent approach to workers classified as independent, these workers may be subject to antitrust enforcement if they attempt to engage in collective activity to improve their working conditions.[65] Thus, misclassification clearly puts law-abiding businesses at a disadvantage to employers who misclassify, and harms workers who are misclassified.

Misclassification also constitutes a vertical restraint according to the original understanding of antitrust law. The contracts employers maintain with misclassified workers are attempts to control workers external to the employer's actual legal structure; such attempts, as explained above, were previously considered illegal vertical restraints.[66] Ensuing antitrust jurisprudence that eroded limits on vertical restraints and improperly elevated efficiency and consumer harm over mitigating the over-accumulation of economic power in large firms' hands paved the way for new businesses models that rely on or are fundamentally based on misclassification and other fissuring practices.[67]

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[60] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, Oct. 2020, https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/.

[61] Porter, *supra* note 59 (discussing studies showing contingent workers earn less, have fewer benefits, and a substantial portion live in poverty); Gov't Accountability Office, *Contingent Workforce: Size, Characteristics, Earnings, and Benefits,* Apr. 20, 2015, https://www.gao.gov/products/GAO-15-168R; Ruckelshaus, *supra* note 54.

[62] NELP, *supra* note 60 at 1.

[63] *See id.*; *see also* Marinescu & Posner, *supra* note 36 at 16 ("[F]irms frequently misclassify in order to avoid minimum wage laws that otherwise prevent monopsonists from suppressing wages of low-skill workers.").

[64] Ruckelshaus, *supra* note 56 at 4.

[65] *E.g. Fed'l Trade Comm'n v. Sup. Ct. Trial Lawyers Ass'n,* 493 U.S. 411 (1990).

[66] *See infra* notes 11-17 and accompanying text; *see also* Congressional Record 2457 (1890), https://appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf (One reason Senator John Sherman gave for legislating against monopoly was that "[i]t commands the price of labor without fear of strikes, for in its field it allows no competitors.")

[67] *E.g.*, Callaci, *supra* note 11 at 12-14 (citing cases).

The added fact that workers classified as independent contractors who are misclassified may be subject to antitrust enforcement if they attempt to take collective action with their fellow workers puts them in a double bind and illustrates the unfairness of allowing employers to utilize external vertical restraints: workers have none of the protections of being employees, and are further deprived of the power to try to change that situation because they are viewed as independent entities under antitrust law who therefore cannot take collective action.[68] It puts workers in the "heads-I-win-tails-you-lose" situation in which a powerful employer can enter a series of external agreements controlling them—and their wages and working conditions—without antitrust liability, but workers cannot counter that power themselves with collective action.[69]

Further, the judicial decisions that undermined prior legal restrictions on external vertical restraints on workers and groups of businesses not only lack a basis in statutory antitrust law—they also fail to take a realistic view of competitive harm. As described above, the harms to workers and law-abiding businesses from these external contractual arrangements, through which employers control the work from which they profit, are costly and well-documented and include lower wages, vastly decreased legal protections, and reinforcement of inequities for workers, as well as increased costs on governments, taxpayers, and lawful employers.[70] A realistic view of antitrust law and harm would recognize the additional competitive harm on workers and businesses from vertical restraints and regulate them as anticompetitive.

To address this, the definition of employee should certainly be narrow enough to recognize the harms from independent employment relationships that shift substantial power to employers, and enforcement strong enough to detect and deter most instances of misclassification. However, the use of misclassification to lower labor costs and liabilities is so systematic that its effects on the relative power and well-being of workers also should be recognized and addressed in a systematic way. The best way to do this is to recognize (or re-recognize) the use of misclassification as an illegal external vertical restraint. This view would require that employers who wish to purchase labor services onboard its workers under traditional employment structures and would subject employers who use external vertical agreements to employ workers to potential antitrust liability. Further, workers who are classified as independent by their employer should be permitted to act collectively regarding their working conditions. This would mitigate the imbalance of power between employers and workers and remove an incentive for employers to misclassify workers.

In sum, employers' pervasive use of misclassification should be regulated by the FTC as an unfair method of competition. Employers' vertical restraints on workers, which are external to employers' own businesses, should be recognized as vertical restraints subject to antitrust regulation. Preventing employers from widespread use of these vertical restraints is an important way to prevent the

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[68] Paul, *supra* note 11 at n.33 and accompanying text. *See also id*. at n. 32 and accompanying text (regarding amicus brief filed by the FTC and DOJ in support of Cahmer of Commerce suit against challenging City of Seattle ordinance providing collective bargaining rights for gig workers) (citing U.S. Chamber of Comm. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018)).

[69] This is what David Seligman calls employers getting to "have their cake and eat it too." Seligman, *supra* note 51. Former FTC Chair Pitofsky expressed similar concern about franchise businesses—that franchisees were not sufficiently independent competitive entities to be considered protected under antitrust law, but they also were not covered by labor law in spite of the gross power imbalance between franchisees and the lead firm. Callaci, *supra* note 11 at 19.

[70] Ruckelshaus, *supra* note 56.

increasing accumulation of power in the hands of the largest corporate actors and the harms that such concentrated power produces for smaller players, especially workers.

Fissuring models

Business models that create and rely on fissuring of the workplace include platform application or "gig" employers such as Uber, Lyft, Instacart, and Flex by Amazon; companies that rely on networks of smaller companies they control such as Amazon's network of small "last mile" delivery companies; and franchised businesses.

Similar to misclassification—on which these models often rest—other fissuring models are based on series of vertical arrangements through which companies exercise their power outside their corporate boundaries to control other economic actors who are neither their employees nor their subsidiaries. But they go beyond misclassification to also arrange and control entire businesses through these models while still avoiding corporate responsibility for the people and entities they control.

In the case of gig platforms, the platform operator/owner claims each worker performing the gig service is an independent contractor. Yet several forms of control exercised by gig platform operators over these workers and their work raise anticompetitive concerns. Gig workers treated as independent contractors lack the protections of traditional labor and employment law. They are not covered by the Fair Labor Standards Act and thus are not required to be paid minimum wage or overtime, among other protections.[71] They lack rights of collective action under the National Labor Relations Act. They face higher costs and liabilities, because they are responsible for the full amount of payroll taxes, and are not covered by workers' compensation.

In spite of the costs and vulnerabilities of being classified as "independent," gig employers still often subject their gig workers to additional multiple restraints, many of which are nakedly anticompetitive when applied to workers who are not direct employees. These restraints include non-compete restrictions that may extend beyond the term of the working relationship, exclusivity requirements imposed through policy or practice that require supposedly independent contractors to work exclusively for that employer, [72] and non-disclosure agreements.[73]

These restraints are particularly at odds with treating workers as independent businesses. Exclusivity requirements deprive workers of a hallmark of independent work and one of the few benefits of non-traditional employment: the ability to work for others or set up their own business. And since many of these workers work only part-time or otherwise irregularly, exclusivity restraints that lock these workers into these arrangements can severely limit their earnings.[74] Similarly, non-compete and non-disclosure

[71] *E.g.*, Melissa Locker, *Instacart workers are striking over wages reportedly as low as $1 an hour,* Fast Company, Nov. 20, 2017, https://www.fastcompany.com/40498626/instacart-workers-are-striking-over-wages-reportedly-as-low-as-1-an-hour.

[72] Steinbaum, *supra* note 10 at 55-56 (describing the program that monitored whether Uber drivers drove for multiple apps and penalizing the drivers who did not drive exclusively for Uber).

[73] For example, Uber requires drivers to sign non-disclosure agreements to receive assistance after being carjacked: https://themarkup.org/working-for-an-algorithm/2021/08/03/uber-requires-nondisclosure-agreement-before-helping-carjacked-driver.

[74] Michelle Rodino-Colocino, *Uber drivers report 80-plus hour workweeks and a lot of waiting*, The Conversation, April 29, 2019, https://theconversation.com/uber-drivers-report-80-plus-hour-workweeks-and-a-lot-of-waiting-

restrictions on gig workers are gross overreaches by corporate entities that disclaim virtually every other form of employer responsibility. Gig workers may also be subject to additional abuses such as data collection and surveillance—a highly invasive form of employer control—but with no meaningful say in such practices.[75]

In addition, gig platform operators set the price that consumers pay for workers' service and the price that workers receive for performing the service, coordinating the transactions among these supposedly independent businesses and their customers.[76] For example, Uber sets the prices for every ride taken through the Uber app, and Uber also sets the prices that it pays every driver for providing those rides; drivers have no ability to negotiate prices with customers or, therefore, to compete against other drivers on price. Price restraints on gig platforms thus mirror classic—and illegal—hub-and-spoke arrangements.[77] They also reflect a current gap in antitrust regulation, because it is illegal for gig workers to "collude" on either wages *or* prices, but the gig platform operator is permitted to dictate both.[78]

There are other examples of fissuring models that are based on employers controlling work through a series of external vertical contracts. One prominent example is Amazon's use of a network of more than 2,000 "Delivery Service Providers" or DSPs,[79] which are small companies set up under an Amazon-designed program to provide "last-mile" delivery services, or the most labor-intensive, final stage of delivering Amazon packages to customers' doorsteps. Amazon not only controls the corporate set-up of these supposedly independent businesses, but also controls each delivery and the driver who makes them in minute ways: the order of deliveries, the route, and the progress and speed of each delivery.[80] The customer-facing features of the DPSs are Amazon-branded, from the logo on the sides of the delivery vehicles to the labels on drivers' uniforms. Amazon has even installed cameras in its DSP trucks

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115782; Podcast "The Uncertain Hour," Season 8, episode 5 (March 28, 2021); *Amazon Drivers are hanging smartphones in trees to get more work,* Bloomberg News, Sept. 1, 2020, https://www.bloomberg.com/news/articles/2020-09-01/amazon-drivers-are-hanging-smartphones-in-trees-to-get-more-work.

[75] Steinbaum, *supra* note 10 at 55 (describing Uber's surveillance of drivers); *Federal Trade Commission Gives Final Approval to Settlement with Uber*, Press release, Fed'l Trade Comm'n, Oct. 26, 2018, https://www.ftc.gov/news-events/press-releases/2018/10/federal-trade-commission-gives-final-approval-settlement-uber. *See generally* Sandeep Vaheesan and Matthew Buck, *Non-Competes and Other Contracts of Dispossession,* Michigan State Law Review, Forthcoming, https://ssrn.com/abstract=3727043 or http://dx.doi.org/10.2139/ssrn.3727043.

[76] Bassali, *supra* note 33 at 19.

[77] *See Toys "R" Us, Inc. v. Fed. Trade Comm'n,* 221 F.3d 928, 936-38 (7th Cir. 2000); *see also* Steinbaum, *supra* note 13at 53-55; Bassali *supra* note 32 at 19.

[78] Bassali, *supra* note 33 at 19 ("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.").

[79] Caitlin Harrington, *Some Amazon Drivers Have Had Enough. Can They Unionize?* Wired, March 19, 2021, https://www.wired.com/story/some-amazon-drivers-have-had-enough-can-they-unionize/ (there are approximately 2,000 DSPs in the U.S. and 2,500 worldwide).

[80] *Id*.; Hayley Peterson, *'Amazon has all the power': How Amazon controls legions of delivery drivers without paying their wages and benefits,* Bus. Insider, Oct. 4, 2018, https://www.businessinsider.com/amazon-controls-delivery-drivers-without-paying-wages-2018-9?r=MX&IR=T. S*ee also* Patricia Callahan, *THE DEADLY RACE How Amazon Hooked America on Fast Delivery While Avoiding Responsibility for Crashes*, ProPublica, Sept. 5, 2019, https://features.propublica.org/amazon-delivery-crashes/how-amazon-hooked-america-on-fast-delivery-while-avoiding-responsibility-for-crashes/.

that constantly record drivers, including driving speed, turns, and stops, and also highly personal biometric information such as eye movements.[81] Amazon also, unsurprisingly, dictates prices for each delivery. Moreover, there are reports that Amazon limits the size of DSPs by limiting their contracts, and terminates DSPs that attempt to reduce their drivers' grueling workload or increase their pay.[82] In spite of its high level of control, Amazon disclaims corporate responsibility for the DSPs and employment responsibility for DSP drivers.[83]

Franchised businesses are directly responsible for 5.6 percent of all private non-farm jobs in the U.S. economy.[84] As detailed in previous petitions to the FTC, franchised businesses are significant employers, but the franchise model and its effects on the economy are highly problematic. There is a gaping power disparity between large, often multinational franchisors, and their small business franchisees, who are dwarfed by the financial, informational, and legal asymmetries of their franchisor 'partners.' Franchisors exercise virtually unfettered control over every aspect of franchisees' business operations. Franchisees are often tied to exclusive supply contracts,[85] and franchisors can arbitrarily and unilaterally change contract provisions or other terms of the franchise relationship. Franchisors are also able to unfairly deny renewals, transfers, or sales of franchise operations, or unfairly terminate franchisees, which can bring financial ruin to franchisees who cannot easily migrate their operations to another competing business. In addition, franchisors often exploit their control and the threat of non-renewal or termination to exact unreasonable capital investments, whose timing and cost are at the sole discretion of franchisors. This power imbalance not only harms franchisees—who are often dominated through agreements that are essentially contracts of adhesion, with little financial or legal recourse—but also harms workers employed by franchised business who bear the brunt of the financial consequences in the forms of low wages, substandard working conditions and, in some instances, a lack of job mobility.

The role that franchising plays in the increasingly fissured workplace, as evidenced by the examples of 7-11[86] and Jan-Pro[87] treating their franchisees more as unofficial workers—with neither the protections of a business nor an employee—illustrate how long-standing issues with the Franchise Rule and the lack of substantive regulation in this area are increasingly destructive to our economy and workers. It is no

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[81] Harrington, *supra* note 79.

[82] Matt McFarland, *They took a stand against Amazon for their drivers. They say it cost them their businesses,* CNN Business, Sept. 22, 2021, https://www.cnn.com/2021/09/22/tech/amazon-dsp-portland/index.html.

[83] Caroline O'Donovan and Ken Bensinger, *Amazon's Next-Day Delivery Has Brought Chaos And Carnage To America's Streets— But The World's Biggest Retailer Has A System To Escape The Blame,* BuzzFeed News, Aug. 31, 2019, https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths.

[84] Study commissioned by IFA Education and Research Foundation, September 2016 (prepared by PWC) at E-1 https://www.franchise.org/sites/default/files/2016/09/Economic%20Impact%20Vol%20IV_Part%20I_20160908.pdf. Franchises are directly and indirectly responsible for 10 percent of private non-farm jobs in the U.S. if spillover effects, such as effects on franchisor suppliers, are included. *Id*.

[85] A recent article on the frequent problems with McDonald's ice cream/shake machines illustrates how franchisees are often tied to oppressive exclusive supply contracts. Heather Haddon, *McDonald's McFlurry Machine Is Broken (Again). Now the FTC Is On It,* WALL ST. J., Sept. 1, 2021, https://www.wsj.com/articles/mcdonalds-mcflurry-machine-is-broken-again-now-the-ftc-is-on-it-11630522266.

[86] *See, e.g., Patel et al. v. 7-Eleven et al.,* D. Ma. Case No. 17-11414, Dkt. 62 (Pl. Mtn. for Summ. Judgment at 1-2); Sam Harnett, *How Franchising Paved the Way for the Gig Economy,* KQED, March 18, 2021, https://www.kqed.org/news/11862641/how-franchising-paved-the-way-for-the-gig-economy#:~:text=Starting%20in%20the%201970s%2C%20franchising,misclassifying%20workers%20as%20independent%20contractors.

[87] *E.g., Vazquez v. Jan-Pro Franchising Int'l*, 923 F.3d 575, 579 (9th Cir. 2019).

surprise that gig platform companies such as Uber, for example, have threatened to shift to a franchise model to avoid employer liability in California.[88]

Many of franchisors' current practices described above should be regulated as unfair methods of competition under Section 5 of the FTC Act, because they cause substantial injury to franchisees and are not reasonably avoidable by the franchisees under the current, lopsided system. Indeed, the myriad set of restrictions and requirements franchisors impose on franchisees comprise a clear system of vertical restraints—external to the franchisor and through which it exercises control of franchisees—equally at odds with the original purpose of antitrust regulation as other fissuring models.[89]

Just like misclassification, fissuring models such as franchising, gig platforms, and networks of independent contractors established by a single corporation that controls nearly all aspects of work, including price, are vertical arrangements that have anticompetitive implications because they put power in the hands of the controlling firm over entities and networks of entities beyond their corporate boundaries. We urge the FTC to force corporations that rely on fissured employment models to make a choice: either recognize employees under their control by employing them in traditional employment relationships that fall within corporate boundaries or, alternatively, if the relationships are external, accept that they will be regulated as vertical arrangements that violate Section 5 of the FTC Act. We also urge the Commission to thoroughly review the problems raised by franchising and the current shortcomings of the Franchise Rule, with a particular eye towards the myriad vertical restraints through which franchisors control franchisees, and to undertake more protective and comprehensive regulation of franchisor conduct.

Forced arbitration and class action restrictions

Forced arbitration and its frequent partner, class or collective action restrictions, are additional restrictions that employers use to amplify their power over workers, with anticompetitive effects. These restrictions are imposed on workers as take-it-or-leave it conditions of employment and fall especially hard on low-wage workers and on workers who are commonly classified—or misclassified—as independent contractors. A recent report estimates that approximately 55 percent of all private-sector non-union employees, including 64.5% of workers earning less than $13 per hour, are currently subject to forced arbitration provisions.[90] This research also found that Black workers and women workers are the most likely to be subject to arbitration provisions.[91]

Forced arbitration and class action restrictions have been identified as one set of employer measures that has shifted power to employers and contributed to the gap between productivity growth and wages observed over the last several decades.[92] Mandatory arbitration deters workers from bringing workplace legal claims. Some estimate that arbitration deters up to 98% of all worker claims against their employer —that is, *nearly all* worker claims.[93] The National Employment Law Center estimates that

[88] Kate Conger, *Uber and Lyft Consider Franchise-Like Model in California,* NY TIMES, Aug. 18, 2020.
[89] Callaci, *supra* note 11.
[90] Hugh Baron and Elizabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 From Workers in Low-Paid Jobs*, DataBrief, National Employment Law Center, June 2021, at 1, https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf.
[91] *Id*. at 2.
[92] Mishel & Bivens, *supra* note 18 at 47-49.
[93] Cynthia Estlund, *The Black Hole of Mandatory Arbitration,* 96 N.C. L. REV. 679, 696 (2018),

forced arbitration cost workers $12.6 billion in 2019 in wage theft alone.[94] Workers are also less likely to succeed, and receive lower awards for wrongdoing, through arbitration.[95] Data show workers win in arbitration at a rate of 21.4% compared to 36.4% of claims brought to federal court, and 51% of claims in state court.[96] If they do win, workers' median award is substantially lower: $36,500 in damages under arbitration, compared to $176,000 in federal courts and $86,000 in state courts.[97]

Further, many forced arbitration provisions incorporate restrictions that bar workers from bringing claims together as a class or collective action. Restricting class action rights similarly prevents low-wage or even middleclass workers, whose individual damages tend to be relatively low, from pursuing claims through the only economically viable means available to them "because the cost of legal representation may exceed their lost wages."[98] Curtailing workers' rights in these ways substantially weakens enforcement of key worker protections, including wage and hour and employment discrimination laws.[99]

These restrictions unfairly constrain the rights of workers and exacerbate employer power in labor markets. Accordingly, the FTC should recognize arbitration and class action restrictions as unfair methods of competition or unfair conduct under Section 5 of the FTC Act when these restrictions are placed on workers, and regulate these restrictions under the Magnuson-Moss Warranty Act.[100] Some of the ways that the FTC could regulate arbitration include requiring such restrictions to be the product of collective bargaining, prohibiting class action bans in employment arbitration clauses, regulating fees and awards, and tracking and publicizing outcomes of claims forced into arbitration.

Conclusion

While antitrust enforcement and jurisprudence has never been particularly protective of workers,[101] the erosion of legal limits on vertical restraints has been especially brutal for workers because it has allowed the proliferation of misclassification and entire business models—including franchising and gig platform companies—based on misclassification and, more generally, based on tightly controlling workers while holding them at arms' length for the purposes of the traditional rights and protections of employment.

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https://scholarship.law.unc.edu/nclr/vol96/iss3/3/ ("Stated differently, well under two percent of the employment claims that one would expect to find in some forum, but that are covered by MAAs, ever enter the arbitration process.").

[94] Christopher Ingraham, *There's a little-known employment contract provision enabling billions of dollars in wage theft each year*, Wash. Post, Feb. 13, 2020, https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/.

[95] Mishel & Bivens, *supra* note 18 at 47-49.

[96] Ingraham, *supra* note 94.

[97] *Id*.

[98] *See* Mishel & Bivens, *supra* note 18 at 48.

[99] Amazon.com, Inc., is the largest user of forced arbitration, which it imposes on its third-party sellers. Some view these arbitration restrictions as essentially employment-related; they are certainly vertical restrictions imposed on sellers rather than negotiated that insulate Amazon from seller claims of wrongdoing. David Dayen, *The Biggest Abuser of Forced Arbitration is Amazon*, Am. Prospect, July 10, 2019, https://prospect.org/labor/biggest-abuser-forced-arbitration-amazon/.

[100] The Magnuson-Moss Warranty Act provides statutory authority for the FTC to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure." 15 U.S.C. § 2310(a)(2) (2018).

[101] Ioana Marinescu & Eric A. Posner, *Why has Antitrust Law Failed Workers?,* 105 ILR REV. 1343 (July 15, 2020), https://www.cornelllawreview.org/2020/07/15/why-has-antitrust-law-failed-workers/.

Economists Sandeep Vanheesan and Matthew Buck call these contracts "contracts of dispossession" because for workers, they result only in loss and unavoidable coercion: "loss of legal recourse for wrongdoing, loss of possessions, and the imposition of unaccountable private governments."[102] Antitrust law originally drew a line at a firm's boundaries and prohibited the firm from controlling entities—businesses and workers—outside those boundaries, because that would allow corporate control and profit without cost or responsibility, which in turn would permit larger corporations to accumulate power at the expense of smaller actors in the economy. The last several decades have produced ample evidence bearing out the harm of ignoring this boundary. It is time the harms of vertical restraints placed on workers outside a corporation's own borders are recognized, the line between corporate control and antitrust liability is restored, and the restraints on workers described above are regulated as unfair methods of competition.

[102] Vanheesan & Buck, *supra* note 75 at 1.