

GOVERNMENT REPORT ON THE STATE OF LABOR MARKET COMPETITION CONFIRMS FOCUS OF BIDEN ADMINISTRATION AND ANTITRUST AGENCIES

Labor was a key focus of President Biden's antitrust-related Executive Order 14036, *Promoting Competition in the American Economy* (the "Executive Order"), signed on July 9, 2021. The Executive Order called for a report on "the effects of [a] lack of competition on labor markets" prepared by the Department of the Treasury's Office of Economic Policy, in consultation with the Attorney General, the Secretary of Labor, and the Chair of the FTC (the "Report"). On March 7th, the Department of the Treasury released the Report and introduced it at a roundtable consisting of Secretary of the Treasury Janet L. Yellen, Attorney General Merrick Garland, Secretary of Labor Marty Walsh, Chair of the Federal Trade Commission Lina Khan, Chair of the Council of Economic Advisors Cecilia Rouse, and Director of the National Economic Council Brian Deese.

During the roundtable discussion, Secretary Yellen, Attorney General Garland, Secretary Walsh, and Chair Khan each expressed their organization's commitment to working together to mitigate anticompetitive practices that are affecting labor markets. Each commented on what they saw as an imbalance of power between employers and workers—focusing on what they believe to be the detriments that non-competes have on labor markets, specifically on lower-income workers. Secretary Yellen suggested four "straightforward" actions that can be taken to provide a more equal playing-field, which include:

- Making it more difficult for employers to enforce non-competes;
- Loosening licensing requirements, or even eliminating requirements for certain occupations;
- Addressing the unjustified use of mandatory arbitration; and

- Increasing enforcement of the current antitrust laws.

Attorney General Garland emphasized the Justice Department's undertaking of a full public review of the federal merger guidelines to ensure that the merger guidelines fully address the potential for mergers that harm labor market competition. Chair Khan echoed the Attorney General's sentiments and added that the FTC has updated its practices, in accordance with the findings of the Report, to consider the effect on labor markets when investigating potentially illegal mergers. She added that the FTC treats labor markets under the antitrust laws like any product or service market when reviewing whether a proposed merger could lessen competition. She also noted that the FTC is committed to strengthening competition through its enforcement and rulemaking capabilities.

This Report explores some theories of labor market power (e.g., "search and matching," and monopsony models), as well as certain behavior or trends it claims can harm workers—fissuring of the workplace through outsourcing and other organizational changes, the rise of platforms and regulatory arbitrage (i.e., the emergence of platforms has created new opportunities for regulatory arbitrage with respect to labor regulations), and the misclassification of workers.

Additionally, the Report outlines other factors that affect labor markets and impact labor market power—restrictive employment agreements, mandatory pre-dispute arbitration and class action waivers, occupational licensing, and skill-biased technical change. Restrictive employment agreements discussed in the Report include non-compete agreements, non-solicitation agreements, non-recruitment agreements, training repayment agreements, non-disclosure agreement, and no-poach agreements.

In short, the Report concludes that there is convincing evidence that labor market power exists, and this market power suppresses wages. Based on a review of numerous studies, the Report claims that labor market power results in suggested wage losses of 15% minimum.

The Report admits that labor market power and market concentration are not necessarily linked, and some studies suggest that labor market concentration is not an accurate proxy for labor market power. Given the increasingly popular discourse that concentration reflects a competition issue, that statement is notable.

SPECIFIC INDUSTRY EXAMPLES

The Report highlights three specific industries as examples of labor markets that experience competition issues: hospitals and nursing, agriculture, and minor league baseball. The first two examples are markets that have already received significant scrutiny by antitrust authorities, so it is no surprise that these labor markets are also the focus of the Biden Administration. While the Report addresses competition issues, it is apparent from the examples provided that various factors differentiate labor market issues between industries.

Hospitals and Nurses

The Report notes that a recent wave of hospital consolidation has likely increased hospitals' monopsony power in labor markets. The Report discusses a recent study that determined that mergers causing a significant increase in hospital

concentration also decrease wage growth among skilled workers, and nursing and pharmacy workers. Interestingly, the study did not find that wages were negatively affected by smaller mergers or for hospital workers in jobs requiring little training. This finding suggests that the labor market effects found among larger mergers are caused by an increase in hospital monopsony power post-merger, instead of characteristics common to most mergers.

Agriculture

The agriculture industry, as the Report suggests, is notable for being highly concentrated nationally and geographically as food processing generally occurs in non-urban, low-density areas. The Report argues that workers in this industry have little to no bargaining power as "both tacit and explicit collusion between employers has led to highly concentrated markets." In particular, the Report highlights the increased use of "temporary agricultural workers" through the H-2A visa program, which allows agricultural employers to sponsor and employ non-immigrant foreign workers on a temporary or seasonal basis. The Report suggests that this program could harm competition by allowing employers to coordinate hiring operations and decisions, including wage decisions, through professional associations concentrating labor demands.

Minor League Baseball

The Report uses the minor league baseball industry as an interesting example of how a monopsonist can limit worker mobility, pay, and effectively lobby for legislation that further advances their dominance over employees. Minor league players routinely work sixty or more hours a week, receiving low salaries, well below the required minimum wage. Major League Baseball ("MLB") lobbied Congress to include, as part of spending package, a retroactive exemption for workers in Minor League Baseball ("MiLB") from minimum wage requirements. In addition, minor league players are typically unable to receive unemployment insurance benefits during the off-season because they are classified as seasonal workers. These workers have not unionized primarily for fear of retaliation by MLB but also due to other factors such as high turnover of MiLB players, geographic dispersion of MiLB players, and low salaries that discourage existing unions from expanding their membership.

These differing factors for each industry further complicate any potential government action or effort that would be taken to mitigate competition issues in labor markets. Whether any one effort or course of action would benefit the labor market remains to be seen.

PROPOSALS TO IMPROVE COMPETITION IN LABOR MARKETS

In addition to identifying that labor markets in the United States have competition problems, the Report sets forth a number of proposals to address these issues. The proposals exemplify the whole-of-government approach that the Biden Administration has committed to in its efforts to address competition issues (i.e., not all of the proposals are antitrust related). These suggested proposals include legislation, increased criminal enforcement by the DOJ Antitrust Division, civil enforcement by the DOJ Antitrust Division and FTC, rulemaking by the FTC, and revised guidance from the agencies.

Legislative proposals referenced include the Richard L. Trumka Protecting the Right to Organize Act, and the Public Service Freedom to Negotiate Act to allow for greater worker organization; proposals to increase the federal minimum wage; restrict the use of mandatory arbitration and class action waivers; and other labor rights proposals. The Report also supports other proposals not tied to traditional antitrust actions, including reforms to occupational licensing requirements and Department of Labor initiatives.

The Report proposes that both the FTC and the DOJ Antitrust Division have a significant role to play in improving competition in labor markets. As the Report notes, the DOJ Antitrust Division has been investigating and pursuing criminal cases involving wage fixing and no-poach agreements and has recently challenged at least one merger primarily on the grounds that it would harm competition for labor. According to the Report, the antitrust agencies are considering whether to address more explicitly the application of antitrust principles to labor markets in the revised Horizontal Merger Guidelines. The Report also announced that the FTC and the DOJ Antitrust Division are working to revise their joint Antitrust Guidance for Human Resource Professionals, which was published in 2016.

The Report echoed the Executive Order's recommendation that the Chair of the FTC, along with the rest of the Commission, exercise rulemaking to curtail the use of non-competes and other restrictive clauses that impede worker mobility. As noted in the Report, the FTC has the "authority to identify and prohibit unfair methods of competition through a rulemaking process that follows the Administrative Procedure Act."

CONCLUSION

This Report confirms that the labor markets will continue to be a focus for the Biden Administration, and we can expect additional scrutiny by the FTC and the DOJ Antitrust Division. The proposals to increase competition in the labor markets could be one of the most impactful actions by the Biden Administration in its whole-of-government approach to increasing competition in the American economy. It is unclear whether any of the legislative proposals set forth in the Report will become law. However, it is apparent that companies should be aware of updated guidance that will be forthcoming from the antitrust agencies regarding the agencies' approach to labor market practices. Employers should also be aware of what type of restrictive employment agreements they enter into and expect additional scrutiny of such restrictive agreements in the context of merger review.

CONTACTS

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell
@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti
@cliffordchance.com

Sharis Pozen
Partner

T +1 202 912 5226
E sharis.pozen
@cliffordchance.com

Brian Concklin
Counsel

T +1 202 912 5060
E brian.concklin
@cliffordchance.com

Abigail Cessna
Associate

T +1 202 912 5452
E abigail.cessna
@cliffordchance.com

Eva Kurban
Associate

T +1 202 912 5074
E eva.kurban
@cliffordchance.com

Timothy Lyons
Associate

T +1 202 912 5910
E timothy.lyons
@cliffordchance.com

Jordan Passmore
Associate

T +1 202 912 5416
E jordan.passmore
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington, DC 20006-1001, USA

© Clifford Chance 2022

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Delhi •
Dubai • Düsseldorf • Frankfurt • Hong Kong •
Istanbul • London • Luxembourg • Madrid •
Milan • Moscow • Munich • Newcastle • New
York • Paris • Perth • Prague • Rome • São
Paulo • Shanghai • Singapore • Sydney •
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement
with Abuhimed Alsheikh Alhagbani Law Firm
in Riyadh.

Clifford Chance has a best friends relationship
with Redcliffe Partners in Ukraine.