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PERSPECTIVE

Federal Government Enhances Focus on Labor in Antitrust Reform

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Interest in antitrust reform continues to run high in the federal government, with the focus most recently on the intersection of antitrust and labor. In September, a subcommittee of the House Judiciary Committee held a hearing focused on the harms posed by labor market concentration. This followed a wide-ranging executive order on competition issued by President Joe Biden in July that similarly emphasized labor issues.

The order, and some of the witnesses and members of Congress at the hearing, asserted that a lack of focus on workers from federal antitrust enforcers has permitted increased consolidation across a number of industries, enabling firms to wield power in labor markets. According to this group, as a result of increased employer power, workers have seen depressed wages, diminished benefits, increased incidence of noncompete agreements, excessive occupational licensing requirements, and misclassification of employees as independent contractors. Other witnesses and members disagreed with the premise that federal antitrust enforcers have not sufficiently evaluated the impact of transactions on labor markets, pointing to state enforcers as better positioned than the federal government to address some of the issues raised at the hearing.

Noncompetes, occupational licensing, and classification of workers as independent contractors are all topics that have special resonance for California. For each of these issues, we will discuss the takeaways from the hearing, explain California's approach, and consider what federal actions might be forthcoming.

Noncompetes

At the hearing, Eric Posner of the University of Chicago Law School and Brian Callaci of the Open Markets Institute testified that noncompetes make it harder for workers to leave their jobs. Without the leverage the ability to leave provides, they argued, workers can be forced to accept lower compensation and fewer benefits. The executive order asked federal agencies to crack down on the use of such agreements, and the Federal Trade Commission has signaled that it may issue new rules on the legality of noncompetes.

But noncompetes have historically been governed by state law, and there is debate on whether the FTC would have the legal authority to regulate them. FTC Commissioner Christine Wilson pointed out at the hearing that state attorneys general are already active in this space. Moreover, as Bruce Kobayashi, a law professor at George Mason University, testified, the economic evidence on the impact of noncompetes on consumers and workers is mixed. Commissioner Wilson explained that noncompetes can incentivize firms to invest in training workers and in research and development.

With some exceptions, California has long prohibited the use of most noncompetes. In 2016, California enacted Section 925 to the Labor Code, which specifies that firms cannot force workers to have their labor contracts governed by other states' laws, given that other states do enforce noncompetes. Though California remains in the minority of states with a ban on most noncompetes, the executive order and FTC interest in rulemaking may embolden more state legislatures to follow California's lead.

Occupational Licensing

While the views at the hearing on noncompetes broke along traditional partisan lines, opposition to excessive occupational licensing appears to be bipartisan. Though they acknowledge that occupational licensing has an important role in protecting health and safety, the executive order and both Democrats (including the subcommittee chair, Dave Cicciline) and Republicans (including FTC Commissioner Wilson and California Representative Darrell Issa) at the hearing all expressed concern that state occupational licensing has gone too far. Commissioner Wilson pointed out that state licensing boards can be captured by market leaders, preventing new entrants to certain professions.

California has an extensive occupational licensing regime, covering more than 200 different occupations. Rep. Issa submitted evidence at the hearing suggesting that the state's licensing requirements cost jobs, are significantly more demanding than requirements in other states, and can lead to higher prices for consumers. It appears that California may be taking a closer look at its licensing practices. In 2020, the state Legislature passed new legislation limiting the extent to which a criminal record can be the basis for denying licensure. And in October of this year, new legislation was signed into law that would make it easier for the spouses of service members to use out-of-state licenses to satisfy in-state licensing requirements.

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It is unclear whether reforms in California and other states will go far enough to dissuade the FTC, if it is intent on issuing rules governing occupational licensing requirements. As with noncompetes, however, there is debate about the extent of the FTC's power to regulate this space. Not only is the regulation of occupational licensing the traditional province of the states, but licensing boards themselves can be considered state actors — if operating pursuant to a clearly articulated state policy and under the supervision of the state — and thus be given fairly broad immunity from the antitrust laws. Accordingly, an FTC rulemaking on occupational licensing, even with bipartisan support, could face some significant legal headwinds.

Worker Classification

One person not at the hearing but who made her presence felt was FTC Chair Lina Khan. She has taken an aggressive stance on a number of issues, and labor markets are no exception; her written testimony pledged a greater focus on labor issues in merger review as well as increased scrutiny on noncompetes and other employment contract terms. It also drew attention to the status of independent contractors.

In order to preserve the ability of workers to bargain collectively, the Clayton Act specifies that the antitrust laws are not meant to apply to "labor organizations," a term left undefined. Chair Khan and others have observed that this leaves open whether the Clayton Act protects workers classified as independent contractors. Absent clarity, independent contractors attempting to negotiate jointly could be sued by private parties who see such an agreement as a horizontal conspiracy in violation of a different antitrust law, the Sherman Act. Even if they were ultimately not found to have violated the law, some argue the threat of protracted litigation could be a deterrent to organizing. Chair Khan urged Congress to take up legislation to clarify this area and indicated the FTC would be looking to take action as well.

California, of course, has been on the forefront of the debate over the status of workers in the "gig economy." Earlier this year, Proposition 22, which would have designated drivers for companies such as Uber and Lyft independent contractors, was held unconstitutional by a judge in Alameda County. That ruling is now being appealed, so California law will remain uncertain for the time being. Efforts by Congress or the FTC to bring independent contractors within the Clayton Act exemption could be a first step toward greater federal involvement in worker classification issues.

Conclusion

While there was some bipartisan agreement at the hearing, most Republican members exhibited skepticism about the importance of the issues discussed, so congressional action seems unlikely. The FTC, however, appears primed to act and does not need bipartisan approval to do so. While the FTC may face legal challenges to its authority — and indeed, may lose such challenges — the spotlight that it and Congress have brought to the intersection of antitrust and labor may cause lawmakers in California and other states to re-evaluate some of their own labor policies.