

Overall Philosophy

Antitrust law reform should be aimed at re-allocating coordination rights *away from* dominant firms—which currently direct and control the activities of workers and other less-powerful economic actors; and *toward* workers and other atomized economic actors—whose ability to directly cooperate should be encouraged and supported. Thus, firms should be constrained from engaging in vertical control beyond firm boundaries in ways that are oppressive, including but not limited to leveraging economic dominance to transfer a greater share of the surplus created by the bilateral economic relationship to themselves, or inappropriately constraining the decision-making of independent businesses (which tends to harm workers in those businesses, e.g., employees of franchisees).

The employment relationship can partially serve this aim of reallocating coordination rights, through the dual mechanisms of worker solidarity and autonomy. *Even for workers or other economic agents who remain outside the bounds of the employment relationship, the threat of obtaining that status works to ensure autonomy for those who want it.* This is contrary to the conventional wisdom that policies that enforce employment status, in situations where firms already exercise control over workers, somehow reduce worker autonomy. In the status quo, in which the bounds of employment are loosely enforced, firms frequently enjoy the ability to dictate terms and conditions of work, even outside employment. One aim of any dual labor-antitrust policy agenda must be to make sure that with control comes both responsibility (for the lead firm) and countervailing coordination rights (for workers): if a would-be employer or otherwise dominant firm attempts to evade responsibility for an economic activity, they should also be unable to exercise control over that economic activity.

Specific Recommendations

Within the framework of existing federal and state law

- The California Attorney General should file suit against one or more gig economy labor platforms for violating sections 1 and 2 of the Sherman Act and the California antitrust and unfair competition statutes. Such a suit would advance the contention that this conduct constitutes monopsonization assuming, *arguendo* (as the platform companies claim) that workers are not employees, but would not concede that issue for labor and employment law purposes. Nor does this recommendation reflect the Commissioners' view that such workers are not employees; rather the suit would be a way to call the companies' bluff, so to speak, and put pressure on them to acknowledge workers' employment status.
 - Such a suit would allege that the control of terms and conditions under which workers labor constitutes illegal monopsonization. Those terms include (but are not limited to)
 - matching individual workers to customers
 - setting the prices at which those transactions occur
 - surveilling workers in the performance of those services
 - determining who is permitted to be a service provider on the platform.

- enacting pay policies that have the effect of directing workers to particular geographic areas, to work at particular times, and not to be able to work for a rival platform.
 - The Cartwright Act may provide greater latitude than federal law to argue that labor platforms are engaged in impermissible vertical restraints.
 - The state Attorney General should also make the vertical restraints argument under federal law, arguing that federal precedent permitting vertical restraints typically involves restraints imposed by a supplier involving the resale of goods. Restraints imposed by gig economy labor platforms do not concern goods or services sold by those platforms to workers and resold by those workers. Moreover, traditional economic arguments in favor of the claim that vertical restraints do not reduce competition do not apply to the type of contracting the labor platforms engage in.
- Use the California Unfair Competition Law to pursue not only employment misclassification and violation of existing labor and employment law (as in *Diva Limousine v. Uber*) but to explore other theories of unfair competition: for instance, oppressive contractual terms in gig worker or franchising contracts.
- Enforce Cal. AB5.
- Make a recommendation to the FTC and the U.S. Department of Justice that they should desist from investigating or prosecuting coordination among non-employed workers or between non-employed and employed workers, whether through a labor organization or otherwise, as an antitrust violation.

Reforming state law

- The State of California should, either through administrative or legislative action, implement a program that would allow individuals or small businesses engaged in economic activity, with eligibility defined by an annual revenue cap, to collectively negotiate with their suppliers and processors, and franchisees and fuel retailers to collectively negotiate with their franchisor or fuel wholesaler, modeled upon the Australian competition authority's plan (<https://www.accc.gov.au/media-release/feedback-sought-on-collective-bargaining-plan-for-small-businesses>) This would not be intended to apply to workers who should be classified as employees under AB 5, or under any other state or federal law including the NLRA.
- Strengthen California state antitrust law's scrutiny of vertical restraints, constraining firms from engaging in vertical control beyond firm boundaries in ways that are oppressive, including but not limited to leveraging economic dominance to transfer a greater share of the surplus created by the bilateral economic relationship to themselves, or inappropriately constraining the decision-making of independent businesses.

Reforming federal law

- We do not include a comprehensive list of recommended reforms to federal antitrust law here, but in response to your query regarding merger review, we suggest that workers be considered alongside consumers (and ahead of shareholders) in federal merger review, particularly in terms of impacts upon: job loss or new jobs; wages; opportunities for training or upskilling, or the lack thereof, attendant to expanding, improving, or contracting operations and production.

- We also note that lenient treatment for vertical restraints under federal law has permitted both franchising and other fissured business arrangements, including today's digital labor platforms, all of which disadvantage workers, to flourish. This leniency was won by the use of arguments about economic efficiency, yet the economics does not remotely warrant such leniency.
- We attach in this regard a comment we submitted to the Federal Trade Commission regarding the proposed revision of its vertical merger guidelines.