A MISSING LINK: THE ROLE OF ANTITRUST LAW IN RECTIFYING EMPLOYER POWER IN OUR HIGH-PROFIT, LOW-WAGE ECONOMY

ISSUE BRIEF BY **MARSHALL STEINBAUM** | APRIL 2018

The American economy no longer functions to the benefit of American workers. Despite record profits and increased productivity, wages have been stagnant. In fact, despite being 75 percent more productive in 2016 than in 1973, the average worker earned just 12 percent more.[1]

An emerging body of research chronicles the extent of *labor market monopsony*—where employers have the discretion to set wages and working conditions on their own terms, without fearing that their workers could check their power by finding another job. This issue brief explains what labor market monopsony is, describes what it means for workers and the economy, and proposes ways to address it.

WHAT IS LABOR MARKET MONOPSONY?

While the term *monopoly* has long been understood in the popular imagination, its cousin, *monopsony*, is a term only now coming into common use. Whereas monopoly describes a circumstance where there is just one seller in the market who controls the way goods and services are provided, monopsony describes a circumstance where there is just one buyer in the market who controls the way goods and services are procured.[a]

When the term *monopsony* is used to describe a labor market, the classic example is of a "company town": where there is only one main employer, giving the company the power to set wages and rendering the town's workers powerless to bargain for better wages or working conditions. Labor market monopsony exists when firms are able to wield power over their suppliers—in this case, suppliers of labor, i.e., workers.

The alternative is a labor market where there are enough businesses competing within an industry and in a specific area that employers have to bargain against each other to get the workers they need, and workers can use that leverage—that companies need their labor, and they need to offer something their competitors don't have to get it—to bargain for higher wages.

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[a] While the terms monopoly and monopsony, in the strict sense, refer to circumstances where there is only one seller or buyer, respectively, in a given market, the terms as commonly used describe circumstances where firms in a given area or industry are sufficiently concentrated that they can exert market power as described here.

THE EFFECTS OF LABOR MARKET MONOPSONY ON WORKERS

There is a significant and growing body of evidence that concentration, and the substantial power that certain firms enjoy over others as a result, exists across industries. This—also known as *market power*—has had a serious and detrimental impact on our economy.[b] There is now both direct and indirect evidence that this marked rise in employer power is a missing link in the way we understand and explain the high-profit, low-wage economy we see today.

Increased Levels of Concentration, and Mounting Evidence of Its Effects, Across the Economy—Including in the Labor Market

The evidence of increased concentration and growing market power is striking. Perhaps most notably, the number of mergers and acquisitions each year has skyrocketed—up from less than 2,000 in 1980 to roughly 14,000 per year since 2000.[2] As a result, researchers have found that more than 75 percent of U.S. industries became more concentrated between 1997 and 2012, meaning that a smaller number of larger firms account for most of the revenue.[3] The number of publicly traded corporations and their share of the total market are also lower than at any time in the last 100 years—which, taken together, suggest that conditions within the economy are ripe for a small handful of large powerful firms to crowd out all others.[4]

This, in fact, is precisely what we are seeing—that new, small businesses are failing, and large, incumbent firms are thriving. Furman (2016) documents that for 40 years, the rate of firm entry has decreased, as has the share of sales and employment corresponding to young businesses.[5] This suggests that it has become harder for new companies—facing larger, often predatory established firms—to overcome barriers to enter the market and compete. Given that new businesses, as disproportionate creators of jobs, are essential to a healthy economy,[6] this is especially problematic. At the same time, the largest firms are thriving: Gutierrez and Phillipon (2017) document that since 1980, measures of profitability have increased for the largest firms while remaining constant for small ones.[7]

Reflecting these trends, there are new findings that labor markets themselves are highly concentrated. According to recent research using online vacancy data, labor market concentration is well in excess of the threshold for high concentration contained in antitrust agencies' merger guidelines.[8] High concentration is a particular problem in rural areas, where only one or two employers are posting jobs for a given occupation at a time.

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[b] For a complete discussion of the substantial evidence of market power and its effects on the economy, see *Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities* available at http://rooseveltinstitute.org/powerless.

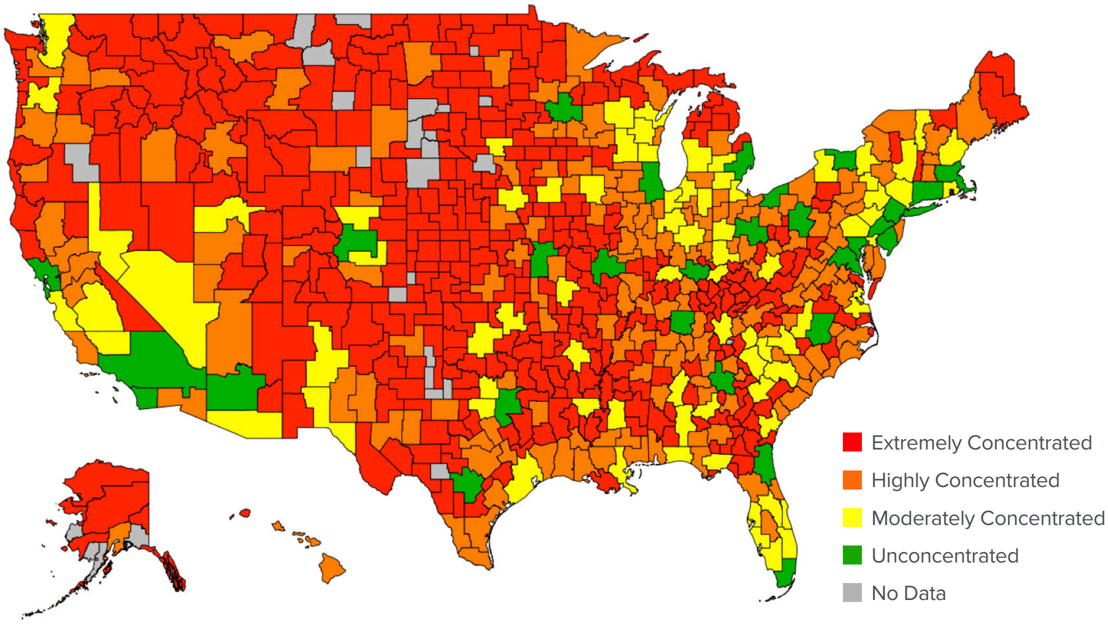

FIGURE 1 Average concentration by commuting zone from "Labor Market Concentration," by José Azar, Ioana Marinescu, and Marshall Steinbaum. Regions shaded orange and red have average labor market concentration in excess of 2500 HHI, the threshold for "highly concentrated" under the 2010 Horizontal Merger Guidelines.

Our Highly Concentrated Economy Is Harming Workers

There are several ways that labor market monopsony harms workers; first, through fewer jobs, both directly as a result of mergers and indirectly as a result of what happens to workers when companies accrue power in the market; second, through lower wages; third; through a number of discrete anti-competitive strategies used by employers to stifle worker mobility; and finally, through changes to the structure of employment that are available to powerful employers and create a systematic disadvantage for workers, particularly women and people of color who depend on antidiscrimination laws to ensure fair pay and equal treatment at work.

Fewer Jobs

As companies accrue market power through consolidation, they tend to lower production and raise prices. This reduces the need for labor; when a company can earn the same amount of profit with less production, it no longer needs the same amount of labor to earn profits, which leads to fewer jobs.

It is also common for mergers to result in substantial layoffs of workers. In fact, workforce reduction is often offered to antitrust regulators considering whether or not to approve a merger as evidence that the newly created company will be more economically efficient than its predecessors post-merger. The Federal Trade Commission (FTC) approved the 2009 merger of pharmaceutical companies Pfizer and Wyeth, after which Pfizer announced it would cut 20,000 jobs worldwide.[9]

A firm with monopsony power may use it to reduce the number of people employed at the firm as a way to reduce the costs associated with labor, knowing in part that there will be workers available to take their place. This results in fewer jobs overall than would otherwise be the case had there been more employers competing for labor within a given labor market.

Lower Wages

New evidence demonstrates that labor market monopsony is a cause of our low-wage economy. My recent paper with José Azar and Ioana Marinescu found that moving from the 25th to the 75th percentile of the labor market concentration distribution reduces wages by 17 percent.[10] Another recent paper shows rising labor market concentration over time and that concentration causes lower wages, even within the same firm with multiple plants in relatively concentrated and unconcentrated labor markets.[11] Those authors show that while concentration has always been bad for workers, its impact has become more pronounced as labor markets become more concentrated, heightening the adverse wage effect.

It is not just concentration of the labor market that reduces workers' wages—concentration of a firm's buyers, one stage downstream in the supply chain, can also lead to lower wages. For example, if Walmart tells its suppliers they need to cut prices if they want space on its shelves and access to its unparalleled distribution network, it's the workers at those suppliers who feel the pain. A new paper by Nathan Wilmers of MIT shows that when a small number of large buyers account for a firm's total customer base, that firm pays its workers less.[12] This is especially the case in retail and manufacturing industries that have become extremely concentrated over the last several decades, showing the ripple effect that market concentration and market power can have throughout the supply chain.

Job Lock

Companies with market power are increasingly using anti-competitive tactics to lock their employees into jobs contractually. Non-compete clauses, for instance, prevent workers from joining competing firms until after they have left their employer and waited, presumably unemployed, for extended periods of time. These contracts are typically used to protect a firm from employees leaving the firm for a competitor and, in turn, sharing the firms proprietary work or trade secrets with its competitor. However, the Treasury Department points out that non-compete clauses are used with startling frequency among low-income workers and those without a college degree, and less than half of these employees profess to possess trade secrets.[13] After the New York attorney general's office found its contract “unlawful,” the sandwich chain Jimmy John’s stopped its practice of requiring a two-year, non-compete agreement to work at its chain.[14] Far from promoting innovation and investment, these agreements simply discourage workers from searching for new jobs, allowing their employers to pay less and demand more.

No-poaching agreements between employers have a similar effect. Firms agree not to hire a current or former employee of a competitor, thus limiting the freedom and economic opportunity of workers.[15] A lawsuit pending against McDonald’s argues that its practice of requiring no-poaching agreements among its franchisees restricts mobility, suppresses wages, and diminishes employees’ bargaining power.[16]

While a problem on its own, this type of job lock also contributes to wage stagnation. Formal restrictions on quitting and on the labor mobility of workers hamper their ability to obtain raises and promotions over the course of a career. Several papers find that reducing wages does not cause workers to leave their jobs, at least not very much or very often—suggesting that, in reality, they have nowhere else to go.[17]

More Precarious Work

One of the most important and harmful ways employers have exercised their monopsony power is by making their employees independent contractors. This employment arrangement still allows the company to tell workers what to do, but lets them pay workers less, take away their health insurance benefits, and removes them from the statutory protections provided under civil rights and labor law. Whereas direct employees simply receive a regular salary or hourly wage, outsourced workers are forced to competitively bid against one another for every contract, driving costs down for the lead firm but also wages for subcontracted workers. Once pushed outside of the firm’s organizational structure, workers receive a smaller share of the company’s revenue[18] and face steep barriers[19] to bargain for more.

With less power and wealth than the firms that ultimately pay them, and with competing contractors threatening to undercut them, outsourced workers are driven to the lowest common denominator for workplace standards. Dube and Kaplan find that subcontracted security guards and janitors suffer a wage penalty of up to 8 and 24 percent,[20] respectively, while a 2013 study by ProPublica found that temp workers—another large category of outsourced labor—were between 36 and 72 percent more likely to be injured on the job than their full-time counterparts.[21] One study found that these positions account for all new jobs created between 2005 and 2015, and make up nearly 16 percent of the current labor force.[22] As long as employers have monopsony power, they will continue to exercise it to circumvent labor protections and obtain a structural advantage over a large subsection of the workforce.

CURRENT LAW, AS IT HAS BEEN APPLIED, HAS BEEN INSUFFICIENT TO ADDRESS LABOR MARKET MONOPSONY

Federal antitrust law in the United States is comprised largely of two governing statutes: the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914. These statutes provide broad powers to federal antitrust regulators to guarantee that firms compete with one another on a level playing field and do not become so powerful as to dominate workers, consumers, or smaller firms.

However, a cramped and incomplete reading of these statutes has informed and defined antitrust jurisprudence and federal enforcement policy since the early 1980s. The current approach to antitrust enforcement had, for many years, largely ignored the effects of labor market monopsony (or monopsony generally) and permitted a range of predatory behaviors by companies towards their workers. This, notably, has begun to shift: the Council of Economic Advisors (CEA) published an issue brief in October 2016 on labor market monopsony;[23] in the same year, Acting Assistant Attorney General Renata Hesse stated that antitrust enforcement efforts must benefit not only consumers, but "also benefit workers, whose wages won't be driven down by dominant employers with the power to dictate terms of employment."[24]

With evidence mounting of the role labor market monopsony plays in declining wages and corporate concentration in widening inequality, incremental steps are insufficient. An aggressive, multipronged agenda is needed to return to more robust antitrust enforcement on several fronts.[c] The section below describes the various ways antitrust policy, jurisprudence, and enforcement have failed to prevent or address the effects of labor market monopsony on workers, and then outlines a series of specific policy proposals to prevent future harms.

Incomplete and Inadequate Merger Reviews

When antitrust regulators at the Department of Justice (DOJ) and the Federal Trade Commission review a potential merger, they first define the market or markets in which the merging companies' particular product or service will be sold and then assess whether the proposed merger within said market(s) would reduce consumer welfare, usually by increasing prices. Such an economic analysis is currently not conducted with respect to labor markets, despite the mounting evidence of labor market effects.

Current merger review, however, is limited to an assessment of the effects on the market merger-by-merger, without taking into account the structural effects that a concentrated

[c] For a full discussion of changes needed to antitrust law and enforcement policy, see *Powerless* and forthcoming work from the Roosevelt Institute.

market overall has on economic actors or outcomes other than the merging parties. For example, we know that in monopsonized labor markets, the firms with the most market power tend to pay higher wages than other less-powerful firms, even if wages overall are lower as a result of monopsony power. Current merger policy fails to account for the effects of consolidation across the industry, and any consideration of labor markets in merger review can and must rectify it.

Additionally, merger review in labor markets must account for the fact that defining labor markets is fundamentally a different economic question than defining product markets, and wage-setting in labor markets is a different economic process than price-setting in product markets.

Insufficient Scrutiny of Monopsony Power

Though antitrust agencies remain subject to the 2010 Horizontal Merger Guidelines—which outline the circumstances under which mergers that result in monopsony should be challenged—antitrust agencies have done too little to enforce the law and protect against monopsony, particularly in the labor market. A recent letter sent by Senator Cory Booker (D-NJ) to the FTC and DOJ Antitrust Division in November 2017 found that his office was "unable to identify ... any instance in which employment monopsony concerns were cited as a reason to challenge a proposed merger or acquisition," and concluded that the agencies "have not prioritized this sort of [monopsony] harm in your enforcement efforts, especially with respect to labor market competition."[25]

This inattention to monopsony is in part a result of the "consumer welfare standard" that has governed merger enforcement since the Reagan era, which has focused antitrust scrutiny on potential harms to consumers. It is also the result of an enforcement paradigm that has inappropriately prioritized efficiency at the expense of the structural conditions that effect workers and other stakeholders.

Whatever its source, a renewed commitment to addressing monopsony power, including but not limited to such power within the labor market, is needed to restore balance to our economy.

Inappropriately Permissive Standards for Determining Whether Certain Employer Actions Are Illegal

A series of court rulings has effectively moved a range of anti-competitive behaviors by employers beyond the reach of antitrust law. First, the Supreme Court cases *Continental Television v. GTE Sylvania, State Oil Co. v. Khan, United States v. Microsoft*, and *Leegin Creative Leather Products v. PSKS*, among others, mandated that various types of so-called "vertical restraints,"[d] both price and non-price, be treated under a higher burden of proof on plaintiffs in antitrust litigation than had traditionally been the case under the previous standard. This shift permitted the exploitation of market power documented above.

Next, several court cases created a loophole to the rule that, when two or more companies coordinate their anti-competitive behavior, they are guilty of violating federal antitrust law: conduct that is merely parallel is insufficient to prove a conspiracy—actual evidence of concerted action was added to the plaintiff's burden. There's circumstantial evidence that parallel anti-competitive conduct, such as a uniform contract term for outsourced employees, is pervasive in the tech sector, for example, and yet it is invisible to antitrust enforcers.

Finally, forcing workers to arbitrate their claims against their employers is increasingly widespread, though it is a clear example of employers' using their power to restrict the rights of workers. A series of Supreme Court rulings has expanded the purview of the Federal Arbitration Act to the point that it operates as a super-statute through which both legal and constitutional rights can be voided.[26] The Supreme Court is currently deliberating in the consolidated case of E*pic Systems Co. v. Lewis*, in which both the National Labor Relations Board and private parties allege that a mandatory arbitration clause violates workers' legal right to concerted action by employees on the job.

POLICY SOLUTIONS

Though the language and intent of the Clayton and Sherman Acts are broad enough to enable courts to address the problems above, courts' and regulators' current interpretations of the law call for congressional action to restore the proper role of antitrust enforcement in our economy. This is particularly true when it comes to addressing the problem of labor market monopsony. Any agenda to address today's high-profit, low-wage economy should include the following:

- **Expand merger review to include analyses of merger effects in labor markets, including an analysis of the "coordinated effects" of a proposed merger.** When conducting merger review, antitrust regulators should be required to define the relevant labor market—in addition to the traditional approach of defining the relevant product market—and assess whether the proposed merger would harm workers by reducing wages, employment, or both. To make such a review meaningful, the analysis should investigate whether a merger would result in anti-competitive "coordinated effects" in order to address the degree of competition in the market as a whole, not just on the part of merging parties. Such a review should include theories of harm that involve non-price

[d] Vertical restraints are restrictions in agreements between companies or individuals at different levels of the production and distribution process.

effects, such as the ability to impose disadvantageous terms of employment on workers post-merger, including re-classification as independent contractors.

- **Provide new resources for antitrust authorities.** In order to analyze merger effects in labor markets, antitrust agencies must have systematic access to firm-level labor market datasets constructed and maintained by other federal agencies, including the U.S. Census and the Bureau of Labor Statistics, because data generated by the merging parties is not the only data relevant to the competitive effect of a merger in labor markets. In addition, antitrust agencies must have resources to supplement existing staff with labor economists in order to investigate the competitive effect of mergers in labor markets.

- **Expressly include "monopsony" in federal antitrust statutes.** Given the evidence that dominant buyers induce their suppliers to lower their workers' wages, analyzing the direct effect of mergers on workers' wages is insufficient to confront the threat of monopsony power. Mergers that create such dominant buyers, which have the capacity to squeeze supply chains, should also be analyzed for their effect on the labor markets where those suppliers' workers work. This point underlines the importance of properly defining labor markets separate from product markets, and also of scrutinizing monopsony power—as well as monopoly power—as a matter of course in merger enforcement. For example, the recent merger of Amazon and Whole Foods induced Whole Foods to enact restrictions on its suppliers that will likely adversely impact those suppliers and their workers—a tactic that Amazon has replicated in market after market.

- **Ban non-competes, no-poaching agreements, and other types of restraints on competition in the labor market, as well as mandatory arbitration in employment contracts.** Non-compete clauses are non-price restraints that should be made *per se* illegal. No-poaching language in franchising contracts (between franchisor and franchisee) has both horizontal and vertical characteristics—but whatever the case, it should also be illegal *per se*. Congress should clarify that parallel anti-competitive conduct is illegal. Finally, concerted action through litigation is one of the few remedies workers' have against the exercise of monopsony power by employers; hence, Congress should restrict the scope of the Federal Arbitration Act and ban mandatory arbitration across the board, but particularly in employment.

In concert with labor[e] and consumer protections, antitrust laws are one of three policy prongs intended to create an equitable balance of power among the various actors in our

[e] In addition to antitrust protections adopted in the early part of the 20th century, another key component of the effort to build balanced markets was when President Franklin D. Roosevelt signed the National Labor Relations Act (NLRA) into law. This established a legal means through which workers could act collectively to counter the power of the large corporations that employed them—without exerting an undue and undesirable burden on the economy. Alongside antitrust protections, labor unions were designed in hopes of equalizing power in markets, so that they would be both productive and broadly beneficial.

market economy. While antitrust and competition policy cannot wholly eliminate market power from the economy, it is an important tool in limiting the ways in which market power can be deployed. These policy proposals—along with a renewed commitment by antitrust enforcement agencies to use the full weight of the law to prevent and prosecute anti-competitive practices in the labor market—would mark an important step toward restoring antitrust law to its rightful place in protecting workers from the effects of dominant firms and ultimately curbing the effects of corporate power at large.

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