February 11, 2023

The FTC's proposed noncompete rule defines "worker" as follows under Section 910.1.(f):

> Worker means a natural person who works, whether paid or unpaid, for an employer. The term includes, without limitation, an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer. The term worker does not include a franchisee in the context of a franchisee-franchisor relationship; however, the term worker includes a natural person who works for the franchisee or franchisor. Non-compete clauses between franchisors and franchisees would remain subject to Federal antitrust law as well as all other applicable law.

This definition is laudable in that it takes a broad view of the rule's applicability to working people. The scope of the noncompete rule ought to be as broad as possible, because noncompete agreements are generally an unfair method of competition that channels business rivalry away from productive and socially beneficial purposes and toward extractive relationships that are both harmful and inefficient, and because sufficient other means are available to meet the narrow subset of legitimate interests and concerns such agreements might address.

We encourage the FTC to add a paragraph to the final rule that explicitly defines "employee" in terms of the "ABC test" for employment status, while continuing to affirm that the noncompete rule applies beyond the category of employment. The franchisee exclusion in paragraph (f) directly implicates the choice of operational test for employment status, as further explained below.

The ABC test is defined by the California Employment Development Department as follows:

> A worker is considered an employee and not an independent contractor, unless the hiring entity meets all three conditions of the ABC test:
>
> A. The person is independent of the hiring organization in connection with the performance of the work, both under the contract for the performance of the work and in fact.
> B. The person performs work that is outside the hiring entity's business.
> C. The person is routinely doing work in an independently established trade, occupation, or business that is the same as the work being requested and performed.

We note that the FTC has already adopted a definition of employment, in the context of its Franchise Rule. That Rule imposes several positive tests for whether a given economic relationship is a franchise and therefore subject to the rule, as providing that employment relationships are categorically excluded. Below is an excerpt from the FTC's user guide for the Franchise Rule as amended in 2007:

Exclusions from the Amended Rule

The following relationships are excluded from the amended Rule. Although each of these relationships may have some superficial similarities with a franchise relationship, none of them meet the definitional elements of the term "franchise," and should not be confused with a franchise relationship.

- **Employer-Employee Relationship Exclusion**

  Bona fide employer-employee relationships are excluded from coverage under the amended Rule. The Commission will apply the traditional test of "right to control" in determining whether an employment relationship exists. Specifically, in determining whether a bona fide employer-employee relationship exists, the Commission will consider: (1) whether the employer pays a salary or definite sum of money as consideration for the work; (2) whether the employee can be discharged or his employment terminated without liability on the part of the employer; and (3) whether the "employee" must invest money in the business before being "hired."[8]

Instead of the 'right to control' test for employment status referred to above, the Commission should adopt the ABC test for all purposes within its ambit.

Even though the proposed noncompete rule uses the category "worker" rather than "employee" as its threshold category, it nevertheless implicates the FTC's own test for employment status. That is because the definition of "worker" in the proposed rule expressly excludes franchisees—and because, according to the Franchise Rule, anyone who is an "employee" is not a "franchisee." Therefore, a broader definition of employee status (such as replacing the 'right to control' test with the ABC test) implies that fewer people will be excluded from the proposed noncompete rule as franchisees, and vice versa.

Having previously adopted an operational test for employment status by majority vote of the commission in the past (when adopting the Franchise Rule), which to our knowledge has never been litigated or challenged, the current Commission is free to adopt a different definition in light of changing economic realities, namely the continuing growth of the "fissured workplace"—which undermines fair competition in numerous ways—enabled by functional control of the labor process at a distance. The FTC has the opportunity here to lead the way among federal agencies in recognizing the harm done by functional control without responsibility represented by the fissured workplace. Moreover, because the terms of the proposed noncompete rule logically implicate the test for employment status, this is an appropriate place to clarify that test. The Commission should avail itself of this opportunity.

Beyond ensuring the noncompete rule applies as broadly as possible,[1] a broad definition of employment would serve additional purposes under the laws and regulations the FTC implements and enforces:

[1] Platform workers who are likely misclassified as independent contractors (and would generally be employees under an ABC test, given the degree of control the platforms exercise) are frequently bound by de-facto noncompete agreements in the form of non-linear pay structures. Christopher Peterson and Marshall Steinbaum,

1. Adopting an expansive test for employment would help to immunize collective bargaining and collective action by workers from antitrust liability by effectively expanding the scope of antitrust's labor exemption.[2] We note that the labor exemption sits at the intersection of multiple federal statutes (including the antitrust Acts); to the extent that employment status is relevant to or determinative of its bounds, *the FTC is under no obligation to adopt or defer to tests for employment used by other agencies or under other statutes*.

   The Commission's gig worker policy statement issued in September 2022 indicates that the current Commission will not seek to impose penalties for collective action and coordination on the part of gig workers, noting that it cannot unilaterally protect workers from third-party suits to that end. That is true, but expressly adopting the ABC test for employment status, including for purposes of its implementation of the labor exemption, would be a significant step beyond the policy statement in terms of the important authority the agency does possess—given its special, statutorily defined expertise on fair competition and the implementation of the antitrust laws, its institutional competence to evaluate the realities of various economic relationships, and its special relationship of trust with Congress in relation to these matters.

2. If the FTC adopts the ABC test for employment status, that would strengthen the legal claims of franchisees laboring under the yoke of especially dominating and extractive franchise contracts, when franchisees allege that they are in effect employees. Such cases have been brought in ABC test states including California and Massachusetts. In 2021, a franchisor-defendant in such a misclassification suit cited the FTC's right of control test as part of its defense in the misclassification suit. In response, the FTC submitted an amicus brief in support of neither party pointing out the FTC's definition of employment for the purposes of the Franchise Rule does not preempt Massachusetts state employment law.[3] While that is correct, if the FTC itself followed the ABC test, this might provide helpful guidance to state courts wrestling with franchise contracts involving excessive and onerous control over franchisees (which has also been shown to harm workers employed by franchisees[4]), even under state employment statutes. Again, if it could be

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"Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy," *University of Chicago Law Review*, 2023.

[2] Marshall Steinbaum, "The Feds Side Against Alt-Labor," *Next New Deal* (blog), November 16, 2017, http://rooseveltinstitute.org/feds-side-against-alt-labor/; Sanjukta Paul, "The Enduring Ambiguities of Antitrust Liability for Worker Collective Action," *Loyola University Chicago Law Review* 47 (2016): 969; Sanjukta Paul, "Uber as a For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications," *Berkeley Journal of Employment and Labor Law* 38, no. 2 (2017): 233; Sanjukta Paul, "Fissuring and the Firm Exemption," *Law and Contemporary Problems* 82, no. 2 (2019): 65–87; Sandeep Vaheesan, "Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages," *University of Maryland Law Review*, October 1, 2017, https://papers.ssrn.com/abstract=3046302; Marshall Steinbaum, "Antitrust, the Gig Economy, and Labor Market Power," *Law and Contemporary Problems* 82, no. 2 (2019): 45–64; Marina Lao, "Workers in the 'Gig' Economy: The Case for Extending the Antitrust Labor Exemption," *UC Davis Law Review* 51 (2018): 1543–87, https://doi.org/10.2139/ssrn.3015477.

[3] James Reilly Dolan et al., "Brief of the Federal Trade Commission as Amicus Curiae in Support of Neither Party in Patel v. 7-Eleven, Inc." (Federal Trade Commission, December 2, 2021), https://www.ftc.gov/system/files/documents/amicus_briefs/dhananjay-patel-et-al-v-7-eleven-inc/ftc_franchise_rule_brief_final_sl_copy_1_file_stamped.pdf.

[4] Brian Callaci et al., "The Effect of Franchise No-Poaching Restrictions on Worker Earnings," Working Paper, 2023; Brian Callaci et al., "Vertical Restraints and Labor Markets in Franchised Industries," *Research in Labor Economics*,

shown that putative franchisees are, in fact, employees under the ABC test, then they would be protected by the proposed noncompete rule.[5]

3. Finally, we note that aside from the breadth or narrowness of the eventual group of individuals covered by the category "employee," the ABC test replaces an open-ended balancing test–whose outcomes have been notoriously difficult to predict and that entrusts individual adjudicators with maximal levels of discretion—with a clear and easy-to-apply bright-line test that reduces an individual adjudicator's discretion. This increases predictability for all actors and businesses involved and reduces variability in results.

   Importantly, this benefit of a clear rule persists *even if appropriate, carefully drawn exceptions to the ABC test are adopted.* For the purposes of labor and employment statutes, specific and carefully drawn carveouts for particular industrial roles and relationships[6] may indeed be appropriate. A bright-line rule with carveouts is preferable to an open-ended balancing test because it is more predictable and vests less discretion in an individual adjudicator. But for purposes of the labor exemption and the noncompete rule—the major implications of the FTC's adoption of a given test for employment status—such carveouts are likely unnecessary. It is appropriate, in the interests of fair competition, for both the prohibition on noncompete agreements and the limitation of antitrust liability for coordination among small players to sound as broadly as possible.

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2022, https://marshallsteinbaum.org/assets/callaci-et-al-2022-vertical-restraints-in-franchised-industries-draft-of-7-5-22-.pdf.

[5] Given that the Franchise Rule mandates disclosure of the terms of the franchising relationship and many states require registration of the resulting Franchise Disclosure Document, one could imagine an enforcement action in which those disclosed terms form the basis of a later misclassification suit. In practice, we doubt that compliance with the Franchise Rule would seriously diminish as a result of narrowing the scope of the Franchise Rule by expanding the definition of employment it relies on: franchisors do not want to take the position that they are employers, so they will not cease to comply with the Franchise Rule on the grounds that the relationship they are selling is that of employment, rather than a franchise.

[6] This might include certain professional service-providers (as in the carveouts adopted by the state legislature in California's employment classification law). *See* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5. The carveouts should *not* cover workers laboring under contracts with "gig" platforms such as Uber, Lyft, Doordash, and the like, which have sponsored misleading ballot initiatives and lobbied state legislatures to achieve such carveouts.