

Comments of 15 Attorneys General of the States and Territories on Labor Market Issues in Response to the July 19, 2023 Request for Comments on the Draft Merger Guidelines

September 18, 2023

We, the undersigned Attorneys General of New York, Arizona, California, Connecticut, the District of Columbia, Illinois, Maine, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, the United States Virgin Islands, Washington, and Wisconsin submit this Comment in response to the July 19, 2023 Request for Comment on the Draft Merger Guidelines (“Draft Guidelines”) from the United States Department of Justice and the Federal Trade Commission (the “Agencies”).¹ This Comment offers the perspective of State Attorneys General (“States”) across the country with a focus on the protection of competition for labor.² As co-enforcers of the federal antitrust laws, and enforcers of their own state antitrust laws, the States have unique perspectives, experiences, and interests in protecting their citizens from anticompetitive harms, including those arising from mergers. Given the predominantly local nature of labor markets, the States are uniquely positioned to opine on competition in these markets.³

We applaud the Agencies for updating the Draft Guidelines to expressly state that the antitrust laws protect competition in labor markets.⁴ This principle is not new. In 1890, as Congress was formulating the first federal antitrust statutes, Senator John Sherman recognized the harms caused by restraining competition in labor markets.⁵ Almost a century ago, the Supreme Court held that antitrust law could be used to protect competition in labor markets when a group of sailors sued ship-owners for wage-fixing.⁶ In the context of mergers, the legislators who drafted and debated the Clayton Act in 1914 were motivated in part by concerns that monopsonists should not dictate the wages of their labor—wages should be set by competition.⁷ In keeping with Congress’ mandate, injury to labor is an independent basis to challenge mergers under the Clayton Act.⁸ The same is true in challenging conduct under the Sherman Act.⁹

¹ U.S. Dep’t of Justice & Fed. Trade Comm’n, Draft Merger Guidelines (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

² *Id.*, Guideline 11, at 25-27.

³ See generally Labor and Equity Comments from Attorneys General in Response to Request for Information on Merger Enforcement (Apr. 21, 2022), <https://www.regulations.gov/comment/FTC-2022-0003-0817>.

⁴ Draft Merger Guidelines, *supra* note 1, at 25-27.

⁵ 21 CONG. REC. 2457 (1890) (recognizing importance of labor markets in stating “the law of selfishness, uncontrolled by competition. . . commands the price of labor without fear of strikes, for in its field it allows no competitors.”).

⁶ *Anderson v. Shipowners Ass’n of the Pac. Coast*, 272 U.S. 359, 365 (1926).

⁷ See, e.g., 51 CONG. REC. 9184 (1914) (“Monopoly has the power to dictate to the producer of the raw material which it must buy, and it has the power to dictate to its labor the wage it will pay for the only commodity labor has to sell, and at the same time it is the absolute dictator of the price which the consumer must pay for the output of monopolies.”) (statement of Rep. Guy Helvering).

⁸ See, e.g., *United States v. Bertelsmann SE & Co. KGaA*, No. CV 21-2886-FYP, 2022 WL 16949715, at *1, 37 (D.D.C. Nov. 15, 2022); Press Release, U.S. Dep’t of Justice, Justice Department Obtains Permanent Injunction Blocking Penguin Random House’s Proposed Acquisition of Simon & Schuster (Oct. 31, 2022), <https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed>.

⁹ See, e.g., *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) (in Sherman Act context noting that “[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or

However, the Guidelines have never expressly addressed the power in labor markets.¹⁰ Likewise, in the 109 years since the passage of the Clayton Act, only one merger has been condemned because of its anticompetitive effects in labor markets, and harms to workers.¹¹ The need to invigorate merger enforcement in labor markets has become urgent, as evidence of how concentration can inhibit competition in labor markets continues to grow.¹² This takes on even greater significance because as of 2019, it is estimated that nearly 17% of U.S. workers toil in concentrated labor markets.¹³ Additionally, rural markets and certain occupations (including health professionals like paramedics, nurses, etc.) which tend to be concentrated, are of particular concern to many States.¹⁴ Economists have further demonstrated that mergers decrease wages when labor market concentration increases in the aftermath of a merger.¹⁵ The proposed update to the Guidelines addressing labor markets explicitly is thus appropriate and welcome. Moreover, this update continues the Agencies' long history of revising the Guidelines to reflect new learning and actual agency practices.

The Guidelines are an influential authority for antitrust enforcers and a critical guidepost for firms that are contemplating a merger. As such, the Draft Guidelines will help enforcers more effectively protect competition for labor, not by creating new standards, but by reflecting existing research and practice, and highlighting considerations that may be appropriate in merger investigations involving a labor market.¹⁶

to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”); *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141 (2021) (applying Sherman Act to protect workers from employer-side agreement to limit compensation).

¹⁰ Previous Guidelines mentioned market power by “buyers.” See, e.g., U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines at n.5 (1982), <https://www.justice.gov/archives/atr/1982-merger-guidelines> (“Market power also encompasses the ability of a single buyer or group of buyers to depress the price paid for a product to a level that is below the competitive price. Market power by buyers has wealth transfer and resource misallocation effects analogous to those associated with market power by sellers.”) The Guidelines adopted the term “monopsony” starting in 1992. U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines at 3 (1992), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf> (“The exercise of market power by buyers (‘monopsony power’) has adverse effects comparable to those associated with the exercise of market power by sellers.”). See generally ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 28 (2021) (defining monopsony as market condition in which one buyer is the majority purchaser of goods and services, including labor).

¹¹ *Bertelsmann*, 2022 WL 16949715, at *1, 37.

¹² See, e.g., José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUMAN RES. S167 (2022); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1043 (2019); Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, 57 J. HUMAN RES. S200 (2022); Kevin Rinz, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility* (Center for Economic Studies, U.S. Census Bureau, Working Paper, 2018), <https://kevinrinz.github.io/concentration.pdf>; Yue Qiu & Aaron Sojourner, *Labor-Market Concentration and Labor Compensation* (Apr. 7, 2022), <https://papers.ssrn.com/abstract=3312197>; Ben Lipsius, *Labor Market Concentration Does Not Explain the Falling Labor Share* (Nov. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3279007; Brad Hershbein et al., *Concentration in U.S. Local Labor Markets: Evidence from Vacancy and Employment Data* (Society for Economic Dynamics, Meeting Papers, 2019).

¹³ Satoshi Akara et al., *Labor Concentration Across the Atlantic*, 90 CHIL. REV. 339, 347 (2023).

¹⁴ *Id.* at 352.

¹⁵ David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* (Jan. 21, 2020), <https://papers.ssrn.com/abstract=3476369>; Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* (Washington Center for Equitable Growth, Working Paper, 2018).

¹⁶ See, e.g., Fed. Trade Comm’n, Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter Regarding the Proposed Merger Guidelines Issued by the Federal Trade

We particularly welcome the following changes in the Draft Guidelines:

First, the Draft Guidelines clarify that benefits in consumer markets will not offset a substantial lessening of competition in labor markets.¹⁷ This principle restates for labor markets the longstanding rule set forth by the Supreme Court in *Philadelphia National Bank*: “anticompetitive effects in one market” cannot be “justified by procompetitive consequences in another”¹⁸ This holding follows the text of Section 7 and the legislative history of the 1950 amendments to the Clayton Act.¹⁹ As Phillip Areeda and Herbert Hovenkamp have observed, “The statute . . . plainly contemplates that mergers may involve more than one market, yet it bases legality on a separate market-by-market appraisal.”²⁰ The rule against cross-market balancing of harms also governs Sherman Act enforcement,²¹ and was recently applied to labor markets by the Seventh Circuit, which found that “treat[ing] benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing)” is “not right; it is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs,” and the Supreme Court has held otherwise.²²

Second, the Draft Guidelines accurately address the unique characteristics of labor market competition. Recent analysis of labor markets has underscored certain important realities: labor

Commission & U.S. Department of Justice, (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p234000_merger_guidelines_statement_bedoya_final.pdf.

¹⁷ Draft Merger Guidelines, *supra* note 1, at 26-27.

¹⁸ *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370-371 (1963). See also Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397, 397 (2015) (describing Supreme Court’s prohibition on balancing effects across markets); ABA SECTION OF ANTITRUST LAW, *MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES* 236 (4th ed. 2015) (*Phila. Nat'l Bank* “stated that procompetitive effects in one market could not justify anticompetitive effects in another”); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 686 n.92 (5th ed. 2016) (*Phila. Nat'l Bank* rejected “defense that a merger that lessened competition in one market should be approved because it increased competition in a different market”).

¹⁹ See, e.g., S. REP. NO. 81-1775, at 5 (1950) (“It is intended that acquisitions which substantially lessen competition . . . will be unlawful if they have the specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition.”).

²⁰ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 972a, at 57 (4th ed. 2016); see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (“Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition ‘in any line of commerce,’ it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.”).

²¹ See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (“[T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.”) (citing *Phila. Nat'l Bank*, 374 U.S. at 371); *id.* at 612 (“If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts.”); see also Ward S. Bowman, Jr., *Toward Less Monopoly*, 101 U. PA. L. REV. 577, 640 (1953) (“The merger case is not essentially different from the cartel case which is so generally disparaged. In fact, it is likely to be worse. Mergers allow less freedom for independent action than do cartels, are less limited in the amount of monopoly power they can exercise, and represent much more permanent forms of organization.”).

²² *Deslandes v. McDonald's USA, LLC*, No. 22-2333, 2023 WL 5496957, at *2 (7th Cir. Aug. 25, 2023) (Easterbrook, J.); *Alston*, 141 S. Ct. at 2144.

markets exhibit high switching costs and have search frictions (e.g., finding, applying, interviewing for, and acclimating to, a new job).²³ Moreover, the individual needs of a worker may limit the scope of jobs that may be competitive substitutes (e.g., finding the right commute, hours that work with childcare, the right culture-fit, or decent health insurance).²⁴ In sum, the Guidelines are justified in acknowledging that switching jobs is not the same as switching toothpaste brands.²⁵

Third, the Draft Guidelines state that certain labor practices may signal dominance in labor markets.²⁶ As such, the Agencies will examine not only the merging firms' power to affect wages, but also their ability to exercise increased leverage over workers or degrade benefits and working conditions.²⁷ Indeed, studies have shown that an increase in labor market concentration correlates with a reduced probability of being covered by employer provided health insurance.²⁸ Providing safe working conditions could be costly for employers and some may offer jobs with less safe conditions when they do not have to compete vigorously for employees who cannot credibly threaten to go work for a competitor. As the primary protectors of the welfare of workers in our jurisdictions, the States are keenly interested in maintaining the benefits that competitive labor markets provide for our residents.

The value of such evidence was recently affirmed by a March 2022 report by the United States Department of the Treasury, finding that labor practices such as non-compete agreements or worker misclassification may be considered evidence of labor market power.²⁹ In a similar vein, the Draft Guidelines state that workers and labor unions may be valuable sources of evidence in assessing competition in labor markets.³⁰ The States support this approach, and additionally urge the Agencies to consider whether evidence of non-compete agreements should be specifically named as a valuable source of evidence under Appendix 1.³¹ More extensive discussions addressing the relevance of non-compete agreements in merger enforcement may be found in public comments by the States addressing this issue, and the importance of protecting labor markets generally.³²

²³ Draft Merger Guidelines, *supra* note 1, at 26; *id.*, Appendix 3, at 15.

²⁴ *Id.* at 26.

²⁵ *Id.*; see also Eric A. Posner & Ioana E. Marinescu, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343 (2020).

²⁶ Draft Merger Guidelines, *supra* note 1, Appendix 3, at 15.

²⁷ *Id.*

²⁸ See Akara, *supra* note 13, at 361.

²⁹ U.S. DEP'T OF TREASURY, THE STATE OF LABOR MARKET COMPETITION at 12, ii (2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

³⁰ *Id.*, Appendix 1 at 1.

³¹ *Id.* On June 29, 2023, the FTC released a Notice of Proposed Rulemaking concerning amendments to the premerger notification rules that implement the Hart-Scott Rodino Antitrust Improvements Act of 1976. We applaud the FTC for their proposed rulemaking and inclusion of a Labor Markets section. The Rulemaking, if adopted, would complement the Draft Merger Guidelines, as would the inclusion of non-competes as a source of evidence. See Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42,178, 42,196 (proposed June 29, 2023) (to be codified at 16 C.F.R. pts. 801, 803) (requirement to disclose non-compete and non-solicitation agreements); *id.* at 42,197-98 (reportable labor market information); *id.* at 42,214-15 (proposed language for reporting instructions).

³² Labor and Equity Comment, *supra* note 3; Public Comments of 19 State Attorneys General in Response to the Federal Trade Commission's Workshop on Non-Compete Clauses in the Workplace (Jan. 9, 2020), <https://oag.dc.gov/sites/default/files/2020-03/FTC-CommentLetter-Non-Compete-Clauses-Workplace.pdf>.

In conclusion, the States commend the Agencies for realigning the Draft Guidelines with the longstanding statutory goal of protecting labor market competition, as well as recent learning concerning these markets' particular features. These updates will ensure that merger enforcement addresses the harms of anticompetitive consolidation in all markets.

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