AMERICAN ECONOMIC LIBERTIES PROJECT

Courage to Learn: Antitrust & Labor

Properly used, antitrust law should help break corporations' control over workers. Over the last 20 years, antitrust enforcers have reversed this traditional posture, contributing to weakening worker power. Most Americans now sell their work in concentrated labor markets, with fewer outlets where they can get a job.

Policymakers did this in two ways. First, enforcers used antitrust law to target organizing among working professionals, bringing suits against, for example, organists, animal breeders, electricians, ice-skating teachers, and property managers. Second, enforcers ignored harmful mergers and collusion among employers. For instance, enforcers did no analysis of the consequences of mergers on labor markets and whether such mergers elevated employer bargaining power. In 2010, when presented with wage-fixing by well-known Silicon Valley companies that affected at least 64,000 workers, the Justice Department settled for no serious consequences and allowed famous executives like Steve Jobs, Eric Schmidt, and Paul Otellini to avoid any legal charges despite clear evidence of individual criminal wrongdoing.

Key Facts

- The average labor market is highly concentrated with only a few employers.
- Median annual compensation would be more than $10,000 higher if employers were less concentrated.
- One study estimates that 10 percent of wage stagnation from 1979 to 2014 came from increased buyer power over smaller suppliers, who held down their workers' wages.
- The Justice Department and Federal Trade Commission challenged zero mergers or acquisitions based solely on the mergers' effects on workers.
    - The FTC allowed a major merger in the mixed martial arts promotion industry; before the merger, fighters received 45-63 percent of revenues; after, they got 20 percent.
- After DOJ settled charges against Silicon Valley companies for colluding not to recruit each other's workers, a class action lawsuit won $415 million for the workers, though the suit estimated the damages at $3 billion.
- In 2016, a bipartisan FTC unanimously opposed the city of Seattle's attempt to allow Uber and Lyft drivers to bargain collectively.

Recommended Policies

- Target concentrated power among employers by:
  - Challenging mergers based on its potential consequences on workers and labor markets.
  - Prosecuting labor monopsonists (powerful employers).
  - Refraining from prosecuting, investigating, or weighing in on licensing or organizing efforts by workers or local government efforts to raise wages or working conditions.
- Remove barriers to class action litigation by barring arbitration clauses and class action waivers either through statute or through the FTC's unfair methods of competition authority.
- Prevent misclassifying workers and independent contractors by rejecting attempts to federalize California's Proposition 22. Forbid antitrust law from allowing benefits from consumers to justify harms to workers.
- The DOJ should revisit its 1996 guidance on health care safe harbors from antitrust law, for the risk that it facilitates collusion among health care employers.
- Bar non-compete clauses in work arrangements.
- Prosecute no-poaching agreements among employers as a *per se* illegal crime.

Further Reading

- "The Case for Small-Business Cooperation" by Philip Longman, November/December 2018
- "The Allocation of Economic Coordination Rights" by Sanjukta Paul, September 2018
- "California's Prop 22 is going to screw over gig workers for years to come, and the terrible anti-labor policy could soon be coming to a state near you" by Pat Garofalo, December 2020

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