U.S. Chamber of Commerce

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Federal Trade Commission
600 Pennsylvania Avenue, NW
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Department of Justice Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Public Comments on Promoting Competition in Labor Markets

On behalf of the U.S. Chamber of Commerce ("the Chamber"), we are pleased to submit these comments to the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") in response to your solicitation for public comments in connection with your recent workshop, "Making Competition Work: Promoting Competition in Labor Markets."

In general, the Chamber applauds your study of these issues and encourages your agencies to continue to promote competition in labor markets through competition advocacy and case-by-case adjudication, particularly by challenging overly burdensome non-compete agreements and occupational licensing regimes, as well as by challenging agreements in which employers agree not to poach one another's employees or otherwise to suppress wages. Nevertheless, for reasons outlined more fully below, the Chamber urges your agencies to avoid promulgating new rules in these areas and to respect the traditional jurisdictions of the states and other agencies.

The FTC Should Avoid Promulgating Rules Regarding Competition in Labor Markets

As the Chamber explained more fully in our comments relating to Non-Compete Clauses, the FTC lacks the legal authority to promulgate rules to prohibit business practices that the FTC deems an unfair method of competition.[1] For instance, in *AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021), the Supreme Court unanimously rejected the FTC's claim that it could assert broad remedial powers without an express grant of authority from Congress.

In addition to these legal constraints, sound policy counsels against the imposition of unilateral national rules. Most common business practices have sound, pro-competitive rationales that benefit consumers, employers, and employees alike. Moreover, state law governs most business practices, such as non-compete clauses,

[1] *See* Chamber comments at https://www.uschamber.com/assets/documents/210927_comments_noncompete_clauses_ftc.pdf. *See also* https://www.uschamber.com/employment-law/6-questions-about-the-impact-of-noncompete-agreements-on-businesses-and-employees.

and state regulation gives both employers and employees flexibility to choose the legal regime that best fit their needs. Only if certain practices were always, or even almost always, anticompetitive – such as horizontal agreements to suppress wages -- would grounds exist to consider a categorical rule.

For example, as explained in our prior comments, reasonable non-compete clauses have a legitimate role in employment contracts. Such clauses protect, among other things, an employer's special investment in, training of and disclosure of sensitive business information to its employees. At a prior Commission hearing, many witnesses testified, and pointed to studies concluding, that many non-compete clauses serve legitimate, pro-competitive rationales for employers and can even raise wages for employees. Around the country, almost all states and courts continue to enforce reasonable non-compete clauses.

The FTC Should Avoid Promulgating Rules Regarding Collective Bargaining

In general, federal labor law governs collective bargaining and the status of independent contractors. In particular, the National Labor Relations Act broadly governs collective bargaining, while the Taft-Hartley Act governs independent contractors.[2] These laws generally exempt unions and union activities from the antitrust laws.

Around the country, elected policymakers are considering whether to extend collective bargaining rights to independent workers. At the federal level, at least one bill would have made independent contractors subject to unionization.[3] At the state level, lawmakers in several states, including California and New York, have considered or passed laws aimed at making it harder to classify workers as independent contractors.

Given this extensive statutory backdrop and the heavy interest from elected lawmakers and their constituents around the country, it would be inappropriate for the FTC to take upon itself the authority to promulgate rules regarding collective bargaining and independent workers. The FTC has neither the statutory mandate nor the institutional expertise to usurp the role of elected legislators and to decide this question for companies and workers around the country.

Moreover, even if the FTC had the authority and the mandate to decide this question, policy reasons militate against the promulgation of a rule. For example, there are vast differences in how companies and workers treat independent work. Some workers use such opportunities as a primary stream of income, while other workers use them to supplement their everyday jobs. If independent workers were reclassified as employees, the number of such opportunities would almost certainly shrink dramatically. This change would harm workers who value flexibility. The

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[2] *See generally Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

[3] *See* https://www.congress.gov/bill/117th-congress/house-bill/842.

change would also harm consumers. According to one study, forced reclassification of independent workers would increase costs for consumers and reduce pay for many workers.[4]

Conclusion

For these reasons, we urge the FTC and DOJ to continue your traditional work, but avoid promulgating rules in areas where there is no statutory mandate, legal authority, institutional expertise, or valid policy rationale.

Sincerely,

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[4] *See* https://cei.org/studies/california-ride-share-contracting-legislation-is-a-solution-in-search-of-a-problem/.