



Office of Commissioner  
Alvaro M. Bedoya

UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

**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 Commission & U.S. Department of Justice**

**July 19, 2023**

**I. “There is almost nowhere else to work...”**

Two years ago, following the most recent wave of the COVID-19 pandemic, an administrative assistant at the pathology department of a major university hospital told her manager that she and her colleagues needed better personal protective equipment. She also thought they should get hazard pay.

Nila Payton had been working at the hospital for 15 years. She had been promoted several times. Yet she still made \$19 an hour, well below a living wage. She couldn’t afford treatment at the university’s medical facilities, as required by her employer’s insurance plan. In fact, she was in medical debt to her employer. So were many of her coworkers. She and her colleagues would skip or delay treatment as a result. “[T]he bills are just too high,” she explained.

Her manager turned down both of her requests. In Ms. Payton’s words, “[m]y manager told me that because I work in healthcare, I signed up for this and I should stop complaining.”

It wasn’t always this way. As she explained in testimony before the antitrust subcommittee of the U.S. House of Representatives, hospitals used to *compete* for workers like Ms. Payton.<sup>1</sup> Twenty years ago, Ms. Payton’s employer was one of nine hospitals in the region. Workers like her could “pick the best place for them based on salary, location, treatment, etc.” Since then, however, her employer had merged with or acquired those eight other hospitals, along with over a dozen others beyond the region.<sup>2</sup> Now, said Ms. Payton, “[t]here is almost nowhere else to work if you are a healthcare worker.”

This was not hyperbole. The week before she testified, Ms. Payton ran a search for administrative jobs offered by other employers. It was promising at first: 800 jobs were offered in the area. Then Ms. Payton eliminated the part-time posts and those that paid the same or less

---

<sup>1</sup> *Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker Before the Subcomm. on Antitrust, Com., and Admin. Law of the H. Comm. on the Judiciary*, 117th Cong. 38–42 (2021) (statement of Nila Payton, Medical Administrative Assistant, University of Pittsburgh Medical Center).

<sup>2</sup> AM. ECON. LIBERTIES PROJECT, *CRITICAL CONDITION: HOW UPMC’S MONOPOLY POWER HARMS WORKERS AND PATIENTS* 4-5 (2023).

than her current job. She filtered out the night shift jobs; she was the mother of two boys, her youngest in preschool, and she couldn't be away from them at night. Then Ms. Payton eliminated the jobs that would require her to have a car – she didn't have one. After all of that, there were only two jobs left.

People across the country are going through what Ms. Payton has gone through. Their costs are going up. Their incomes are not. They don't go to the doctor, even when they need to. They stop taking medicine. They ration insulin. And while they see the rich get richer, they see their own options for better jobs dwindling.

People sense that their stagnant earnings and limited job prospects are connected. That intuition – Ms. Payton's intuition – is borne out by research. The fewer companies in a community, the lower the wages.<sup>3</sup> Research shows that mergers, specifically, help companies keep wages low.<sup>4</sup> One review, conducted by Professor Posner, concluded that it was “plausible” that in many labor markets, workers receive many thousands of dollars less than the competitive rate.<sup>5</sup>

That's a lot of money.

## **II. Antitrust law is supposed to protect workers like Ms. Payton.**

We have antitrust law because Congress was worried about how corporate power would hurt small businesses, consumers, and – yes – workers.<sup>6</sup>

In March of 1890, when John Sherman went to the floor of the Senate to rail against the trusts and to press for what we now know as the Sherman Act, he denounced the trusts' ability to unilaterally set the price of labor. The trust “can control the market, raise or lower prices, as will best promote its selfish interests,” he said. “It commands the price of labor without fear of strikes, for in its field it allows no competitors.”<sup>7</sup>

---

<sup>3</sup> See, e.g., Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages*, 57. J. OF HUM. RES. S200, S203 (Supplement) (2022).

<sup>4</sup> See Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397, 397 (2021); Benmelech et al., *supra* note 3, at S200 (“instrumenting concentration with merger activity shows that increased concentration decreases wages”).

<sup>5</sup> ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 28 (2021). The Treasury Department, in a broader survey not limited to market concentration, estimates that labor market power is associated with wage reductions equivalent to eight weeks out of a 52-week work year, as compared to a fully competitive market. See U.S. DEP'T OF TREASURY, THE STATE OF LABOR MARKET COMPETITION at 23-7 (2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

<sup>6</sup> For a general discussion of Congress's interest in the impact of corporate power on small business, see Alvaro M. Bedoya, Cmm'r, Fed. Tr. Comm'n., Returning to Fairness, Remarks at the Midwestern Forum on Fair Markets (Sep. 22, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/returning\\_to\\_fairness\\_prepared\\_remarks\\_commissioner\\_alvaro\\_bedoya.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf); for a discussion of Congress's desire to protect workers, see Alvaro M. Bedoya, Cmm'r, Fed Tr. Comm'n., Aiming at Dollars Not Men, Remarks at the Utah Project on Antitrust and Consumer Protection (Apr. 10, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/bedoya-aiming-dollars-not-men.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/bedoya-aiming-dollars-not-men.pdf).

<sup>7</sup> 21 CONG. REC. 2457 (1890), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 117 (Earl W. Kintner ed., 1978).

In fact, a core part of the Sherman Act debates in 1890 as well as the Clayton Act debates in 1914 centered around the lawmakers' shared concern that the antitrust laws would be misused to stop labor organizing.<sup>8</sup> In 1926, in line with Senator Sherman's intent, the Supreme Court held that antitrust law could be used *affirmatively* to protect competition in labor markets, allowing a group of sailors to sue shipowners for wage-fixing.<sup>9</sup>

Labor matters. Most of us put food on the table by selling our labor. Yet, in the 133 years since the passage of the Sherman Act, including the 109 years since the Clayton Act, only one merger has been stopped because of how it would affect competition for labor.<sup>10</sup> And while the merger guidelines have talked about monopsony, the technical term for buyer power, since at least 1984, they have never expressly addressed the power to buy *labor*.<sup>11</sup>

### **III. The proposed guidelines will help protect competition for labor.**

The proposed guidelines will help law enforcers change that. They will help protect competition for labor, not by creating new standards, but by drawing on existing research and practice. Most fundamentally, they do that by directly saying that antitrust protects competition in labor markets; labor markets are not excepted out of antitrust. But the guidelines also do that by highlighting certain considerations and practices that may be appropriate in merger investigations involving a labor market. I want to highlight four of these contributions.

#### **1. The guidelines recognize the reality of job searches and how they affect labor markets.**

I can buy a toaster in five minutes. It can be shipped to me from any part of the country. I can order it any time, day or night. And the toaster does not care whose bread it toasts or when it does that toasting.

Job searches, on the other hand, can take months. Interviews may involve taking time off work or lining up backup childcare. As with Ms. Payton, choosing a job is not just a matter of money; the right job requires the right commute, hours that work with school schedules, and decent health insurance. And even if both a firm and an applicant agree that the applicant is fully qualified, either of them may decide, for any number of reasons, to walk away.

---

<sup>8</sup> Alvaro M. Bedoya, Cmm'r, Fed Tr. Comm'n., Aiming at Dollars Not Men, Remarks at the Utah Project on Antitrust and Consumer Protection (Apr. 10, 2023).

<sup>9</sup> *Anderson v. Shipowners Ass'n of the Pac. Coast*, 272 U.S. 359, 365 (1926).

<sup>10</sup> *U.S. v. Bertlesmann SE*, No. 1:21-cv-02886, 2021 WL 5105483, at \*79-80 (D.D.C. Nov. 2, 2021); Posner, *supra* note 5, at 28 (predating DOJ's permanent injunction against Penguin Random House and Simon and Schuster acquisition).

<sup>11</sup> DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (1984), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf>. The guidelines specifically mentioned the term "monopsony" starting in 1992. 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*, POSNER, HOW ANTITRUST FAILED WORKERS (2021) (defining monopsony as market condition in which one buyer is the majority purchaser of goods and services, including labor).

The proposed guidelines recognize that as a result of switching costs, individual worker needs, and the need for a mutual match, the level of concentration at which competition concerns arise may be lower in labor markets as compared to seller markets. They also recognize that labor markets may be narrower than other markets.

**2. The guidelines recognize the expertise provided by workers and labor unions.**

Labor markets are complicated – just like any other markets. Workers and their representatives in labor unions can help agency staff understand benefits and non-wage compensation, scheduling and job assignments, and the individualized needs that workers bring to the table. They can also help our agencies understand the industries in which they work. Indeed, the agencies often interview union representatives as part of a merger review.

Yet, as of 2010, the sources of evidence identified in the guidelines’ appendix solely referred to “customers, industry participants, and observers,” lumping in working people with “suppliers” and making no direct mention of workers or labor organizations.<sup>12</sup> The proposed guidelines expressly recognize workers and labor unions as valuable sources of evidence, correcting for these omissions.

**3. The guidelines clarify that purported benefits to consumer markets won’t offset a substantial lessening of competition in labor markets.**

The Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly in *any* line of commerce and in *any* section of the country. If a transaction will substantially lessen competition in a labor market, that transaction cannot be saved by purported benefits to product markets. To be more precise, a merger that may substantially lessen competition for workers will not be immunized by a prediction that predicted savings from a merger will be passed on to consumers.

**4. The guidelines recognize that certain anticompetitive labor practices may signal dominance in a labor market.**

A company with labor market power may use that power to set wages. That company may also use that power to change the terms of a worker’s job for their own benefit, even if those terms are anticompetitive.

In 2022, the Treasury Department repeatedly affirmed the idea that certain anticompetitive labor practices, such as the use of non-compete agreements or worker misclassification, may be considered evidence of labor market power. “Wage-setting power is... evident in the large number of workers who are subject to rules and agreements that limit their

---

<sup>12</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), [https://www.ftc.gov/system/files/documents/public\\_statements/804291/100819hmg.pdf](https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf).

ability to switch jobs,” the report’s executive summary argues.<sup>13</sup> A later section makes a similar statement about misclassification.<sup>14</sup>

The guidelines recognize this fact, explaining that to assess dominance in labor markets, the agencies often examine not just the merging firms’ power to cut or freeze wages, but also their ability to exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit.

\* \* \*

Senator Sherman was right. Americans’ paychecks should not be set by command. They should be set by competition. The FTC and DOJ are tasked with protecting that competition. These guidelines will make the consideration of workers like Ms. Payton a priority in merger enforcement. They will help us do more to ensure that companies *compete* to hire people like Ms. Payton.

---

<sup>13</sup> U.S. DEP’T OF TREASURY, THE STATE OF LABOR MARKET COMPETITION at ii (2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

<sup>14</sup> *Id.* at 12 (“The ability of a firm to misclassify workers without successful pushback from employees (who clearly would have an incentive to not be misclassified) can itself be viewed as a demonstration of the market power firms have over workers.”).