

Boston College Law School

Digital Commons @ Boston College Law School

Boston College Law School Faculty Papers

11-2-2021

The Labor Justice System

Hiba Hafiz

Boston College Law School, hiba.hafiz@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lsp>



Part of the [Labor and Employment Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Hiba Hafiz. "The Labor Justice System." *The Law and Political Economy Project* (2021).
<https://lpeproject.org/blog/the-labor-justice-system/>

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.

THE LABOR JUSTICE SYSTEM

HIBA HAFIZ

PUBLISHED 11.02.21

This post continues a week-long symposium on President Biden's [Executive Order on Promoting Competition in the American Economy](#). Read the other posts [here](#).

President Biden's recent [Executive Order on Promoting Competition](#) brought much-needed attention to labor market concentration, employer collusion, and abusive employment contracts that suppress wages and diminish labor's share of national income. But while the Order recognized the necessity of a "whole-of-government" approach to employers' monopsony power over workers, it could go further to more fully tackle the sources of that power and mobilize the collective resources of government to combat them.

SOURCES OF EMPLOYER MONOPSONY

Employer monopsony makes work—as a daily experience and as a means of accessing economic opportunity—coercive. Its ultimate sources include those traditionally identified under antitrust law such as labor market concentration, barriers to labor market entry, and employer collusion. But monopsony power also derives from [labor market frictions](#) like search and mobility costs, information asymmetries, and heterogeneous preferences, all of which make it harder for workers to quit and find other jobs in the face of low wages, discrimination, or dangerous working conditions. Current antitrust doctrine and agency practice ignore these frictions in their analyses of employer power.

Employer power over workers is also grounded in the [structures](#) of American [law](#) that employers have entrenched through regulatory [entrepreneurship](#) within what I call a [labor justice system](#). One much-discussed legal source is the [ossification](#) and [deradicalization](#) of [labor law](#). In addition to [congressional](#) and [judicial](#) erosion of worker protections, [legally-enabled workplace fissuring](#), [globalization](#), [automation](#), and [shifts in growth](#) to non-unionized sectors have rendered labor protections inapplicable to large sections of employers' labor supply. Less discussed are two additional sources of monopsony: (1) legal sources of monopsony power beyond labor law that strengthen employers' bargaining leverage over workers; and (2) fragmented labor market regulation. These sources of employer power are even less likely to be addressed in current antitrust enforcement and doctrine.

Legal sources of monopsony power (beyond labor law) include employers' [constitutional](#), statutory, and common law [real property](#) rights—which allow them to [control](#) organizing conditions on their property—as well as employers' [intellectual property \(IP\) rights](#) over [employee work product and innovation](#). Employers have

also used several different strategies to immunize their extraction of cheaper outsourced and franchised work, including using IP-based “[brand defenses](#)” to avoid work law liability and virtually immunizing their antitrust [liability](#) for [workplace fissuring](#). Employers have further extended their immunity from workplace liability under [arbitration](#), [contract](#), and [bankruptcy](#) law.

The [fragmentary](#) nature of labor market [regulation](#) also increases employers’ bargaining leverage over workers. While interagency coordination failures on [national security](#) and [banking](#) regulation have received significant scholarly attention, similar failures in labor market regulation have been understudied. [My recent work](#) uncovers an utter lack of interagency coordination in tackling [employer power](#). Unless labor market regulation creatively addresses the *systemic* roots that rig the employment bargain against workers—taking seriously the broad sources of employers’ private power *as* public power—employer monopsony will persist.

TAKING THE FIRST STEP TO ADDRESS LABOR MONOPSONY

While Biden’s Order is [not the first](#) to take on labor market competition, it is the first to outline a “whole-of-government competition policy” targeting employer monopsony. While taking crucial steps to tackle high-profile employer abuses, it focuses primarily on traditionally understood sources of employer monopsony in antitrust, like market concentration, non-compete and no-poaching agreements, and occupational licensing restrictions. It also encourages the antitrust agencies to strengthen guidance on employer collusion and merger policy.

One particularly welcome aspect of the Order is its attempt to improve coordination between agencies on labor market competition issues by establishing a White House Competition Council to implement the Order and develop “best practices for agency cooperation.” The Council includes one labor agency official, the Labor Secretary, who is tasked with considering ways his authority could further the Order’s policies, including through Department spending to “improve the competitiveness of . . . businesses with fair labor practices.” The Department has [already planned](#) to [use](#) contracting to increase the minimum wage and ensure pay equity, paving the way for federal spending to ensure that businesses that prioritize strong worker earnings and anti-discrimination can better compete with those that prioritize reducing labor costs, and the EO’s commitment to further steps is encouraging.

The Order also instructs the OMB Director to improve regulatory review of competition effects in agency regulatory impact analyses. So, for example, in future Labor Department rulemakings on “joint employer” or “independent contractor” status, DOL may have to evaluate how its rules impact employer monopsony. And, to “inform broader public policy,” the Order requires the Treasury Secretary to report on the effects of weak labor market competition to the Council.

MOVING FORWARD ON LABOR MONOPSONY

Biden’s Order is an excellent first step in tackling labor market competition issues, but it doesn’t go far enough to address the systemic sources of employer power identified above. More action is necessary to ensure that the labor justice *system* reinforces workers’ “[structural rights](#)” and countervailing power against employers. Such action should include (1) strengthening DOJ and FTC protection of labor market competition, and (2) truly institutionalizing a “[whole-of-government](#)” approach to enable antitrust *and* labor agencies’ anti-monopsony regulation.

First, the DOJ and FTC should more aggressively tackle broader employer contracting abuses and adopt a consistent legal position that showing consumer harm or [balancing](#) worker and consumer harm is not required under antitrust law: harm to workers is enough. In [franchising and fissured industries](#), vertical agreements that [squeeze](#) downstream employers and incentivize work law non-compliance to cut labor costs should be challenged, as should [employer](#) information-sharing on [wages](#) unless it increases [wage transparency](#) between workers.

The agencies should issue guidance on how they intend to consider the labor market effects of mergers in their [merger reviews](#), and should [block mergers that lessen](#) labor market competition or create local monopsony power. To more accurately assess the impacts of mergers, the agencies’ [metrics](#) of employer power should incorporate broader sources of monopsony in addition to concentration levels, such as [labor market frictions](#) and [legal sources](#) of employers’ stronger holdout ability. These broader metrics can also inform [remedial](#) design that ensures workers’ countervailing power. For example, agencies could condition merger approval on conduct remedies, such as card-check neutrality agreements with unions, timelines for

reaching collective bargaining agreements that also bind subsidiaries, and union access to employer property and employee lists, all monitored by [Remedial Task Forces](#) with worker representation.

The agencies should also more aggressively challenge employer dominance. Specifically, they should clarify their view—in litigation and through agency guidance—that market share thresholds for proving monopsony should be lower than monopoly power thresholds in product markets. This is because labor markets, by virtue of institutional [constraints](#) and labor market frictions, are [less elastic](#) than product markets and allow significant monopsony even without entry barriers or collusion. The agencies should also target a wider range of unlawful monopsony [conduct](#) than is identified in the Order, including employers' use of mobility restrictions in their labor supply contracts with downstream employers and shifting work away from unionized to non-unionized workers [less able to assert countervailing power](#) to their dominance.

Second, to truly institutionalize a “whole-of-government” approach, Executive action should more fully integrate labor agency expertise and action into anti-monopsony enforcement. The Order assigns the NLRB no role in competition policymaking beyond “encourag[ing]” compliance, even though the NLRB is the agency tasked with [ensuring workers' equal bargaining power](#) with employers. And while the Labor Department, NLRB, and EEOC check employer monopsony by regulating workers' countervailing power, administering wage floors, and ensuring against employer discrimination, my research reveals [no interagency coordination](#) between those labor agencies and the antitrust agencies: they neither share information on nor engage in joint investigations, enforcement, or policy-making to regulate monopsonistic employers. The labor and antitrust agencies should establish Memoranda of Understanding to build institutional relationships and design [outcome-based interagency coordination](#), aligning antitrust and work laws' microeconomic, macroeconomic, and anti-subordination goals through unifying enforcement priorities and protecting workers' collective rights where most needed. Better integrating labor agencies' data and social scientific expertise could strengthen antitrust enforcement that currently overlooks broader sources of employer monopsony. And the antitrust agencies should [collaborate](#) with the NLRB in analyzing mergers' effects on workers and [designing and monitoring remedies](#) to employer conduct that reduces worker bargaining power.

Finally, the Administration should continue prioritizing passage of [Congressional antitrust reforms](#), the [Protecting Worker Organizing \(PRO\) Act](#), and [state law](#) measures expanding worker protections. It should also encourage legislation [allowing the NLRB](#) to block mergers that reduce workers' bargaining power much like the FCC and FERC can block telecommunications and energy mergers that violate the “public interest”. The Board is the agency best able to leverage its [regulatory tools and expertise](#)—including a treasure trove of industry-specific labor market data and key indicators of employers' monopsony, like their history of labor law violations and relative bargaining leverage over workers in collective bargaining battles—to more accurately measure the labor market effects of mergers and sustainably ensure workers' countervailing power through conditioning mergers on labor law-related remedies, monitoring, and aggressive enforcement.

It is critical that our government view employer monopsony as a systemic problem requiring an all-hands-on-deck regulatory approach. This will require identifying and studying traditional sources of employer power already within the purview of antitrust enforcement but also labor market frictions, our legal infrastructure, and regulatory fragmentation that contribute to employer monopsony. Our antitrust and labor agencies should be jointly empowered to address monopsony's structural sources that current enforcement overlooks.

SHARE

[EMAIL](#)[FACEBOOK](#)[TWITTER](#)[PRINT](#)[POCKET](#)

Hiba Hafiz ([@hibahafiz](#)) is Assistant Professor of Law at Boston College Law School.

RELATED CONTENT



THE "VALUE OF A STATISTICAL LIFE": REFLECTIONS FROM THE PANDEMIC

Mark Silverman



WEEKLY ROUNDUP: OCTOBER 8, 2021



WEEKLY ROUNDUP: OCTOBER 15, 2021

ENTER YOUR EMAIL TO SUBSCRIBE

ENTER EMAIL ADDRESS

SUBSCRIBE!

ABOUT LPE

TOWARD A MANIFESTO

OUR TEAM

LEARN

ENGAGE

STUDENT GROUPS

STARTING (OR JOINING) A STUDENT GROUP

SPEAKERS BUREAU

EVENTS

CONFERENCE 2021

UPCOMING EVENTS

PAST EVENTS

BLOG

SUBMISSIONS

LEARN

VIDEOS

AMRI ACADEMY

LPE 101

SYLLABI

PRIMERS

LPE IN THE NEWS

CONTACT US

TWITTER

Accessibility Statement

Privacy Policy

© The Law and Political Economy Project