THE ANTITRUST DIVISION AND THE POTENTIAL IMPLICATIONS OF A LABOR RULING FOR GIG WORKER ORGANIZING: **A LOOK AT THE *ATLANTA OPERA AMICUS* BRIEF**

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THE ANTITRUST DIVISION AND THE POTENTIAL IMPLICATIONS OF A LABOR RULING FOR GIG WORKER ORGANIZING: A LOOK AT THE *ATLANTA OPERA* AMICUS BRIEF

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The Antitrust Division of the Department of Justice's amicus brief in an appeal before the National Labor Relations Board (the "NLRB" or the "Board") weighs in on a potential NLRB decision regarding who is an "employee" or an "independent contractor" under the National Labor Relations Act, a ruling that may have significant implications for the gig economy. Although the Antitrust Division did not take a position on the criteria that should be applied to determine if a worker is an employee or an independent contractor, the brief reflects that the Division considered a broader definition of an "employee" to generally be pro-competitive. This article examines the implications of the Division's arguments regarding the reach of federal antitrust law with respect to worker organizing, the impact of alleged misclassification on competition, actions that might be brought against workers or companies, and the potential need for "modernization." Looking forward, the article considers how the Division may proceed with respect to the gig economy.

01

INTRODUCTION

The Antitrust Division of the Department of Justice weighed in on a National Labor Relations Board (the "NLRB" or the "Board") appeal that may have significant implications for "gig economy" workers, as the NLRB considers changing its approach to determining which workers are entitled to collectively organize under federal labor law.[2] In its February 10, 2022 amicus brief in *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, the Antitrust Division (the "Division") addressed the potential implications of the NLRB's decision on this issue for federal competition law and reflected concerns about labor market competition and potential harm to workers that the Biden Administration has placed front and center. President Biden's July 2021 Executive Order on Promoting Competition in the American Economy asserted it was the policy of his administration to "enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in," among other things, labor markets.[3] Indeed, shortly after his confirmation to head the Division, Assistant Attorney General Jonathan Kanter asserted that promoting competition in labor markets was "fundamental," and that he "couldn't imagine a more important priority for public antitrust enforcement."[4]

This article examines the implications for the gig economy of the Division's arguments in its Atlanta Opera brief regarding the reach of federal antitrust law with respect to worker organizing, the impact of alleged misclassification on competition, actions that might be brought against workers or companies, and the asserted need to "modernize." Looking forward, the brief may also signal how the Division could proceed with respect to the gig economy.

02

THE NLRB'S CRITERIA FOR IDENTIFYING INDEPENDENT CONTRACTORS AND THE *ATLANTA OPERA* APPEAL

The Division's brief expressed its views on an NLRB appeal that gives the NLRB an opportunity to change its interpretation of who qualifies as an "employee" under the National Labor Relations Act ("NLRA"), as opposed to an "independent contractor." "Employees" receive certain protections under the NLRA, including the right to organize and collectively bargain.[5]

The NLRB's articulation of the criteria for determining if a worker is an "employee" or an "independent contractor" under the NLRA has shifted in different directions over the last decade. In its 2014 *FedEx* decision, the NLRB stated that actual entrepreneurial opportunity for gain or loss was a "relevant consideration" in evaluating whether workers were independent contractors, but that it was one aspect of a relevant factor that asks if the evidence "tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*."[6] Five years later, the NLRB issued an opinion in *SuperShuttle DRW, Inc.* that overruled the *FedEx* decision.[7] In part, the *SuperShuttle* opinion concluded that the *FedEx* decision improperly altered the "traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis."[8] After reviewing what it stated were the traditional common-law factors, the Board in *SuperShuttle* concluded that franchisees who operated

2 Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case 10-RC-276292 (NLRB Feb. 10, 2022) (hereinafter "Brief").

3 Executive Order on Promoting Competition in the American Economy, Exec. Order 14036, 86 Fed. Reg. 36987 (2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

4 Assistant Attorney General Jonathan Kanter, Remarks at Federal Trade Comm'n – Dep't of Justice Workshop "Making Competition Work: Promoting Competition in Labor Markets," (Dec. 16, 2021), transcript available at https://www.ftc.gov/system/files/documents/public_events/1597830/ftc-doj_day_1_december_6_2021.pdf.

5 *National Labor Relations Act*, 29 U.S.C. § 151, *et seq.*

6 *FedEx Home Delivery*, 361 NLRB No. 55 at 619-620 (2014).

7 *SuperShuttle DRW, Inc.*, 367 NLRB No. 75 (2019).

8 *Id.* at *17.

shared-ride vans were independent contractors.[9] A dissent authored by the current NLRB chairman criticized the *SuperShuttle* majority's focus on "entrepreneurial opportunity" and its application of the test to the drivers.[10]

The appeal currently before the NLRB concerns makeup artists, wig artists, and hairstylists who did work for The Atlanta Opera.[11] An NLRB Acting Regional Director found that the workers were employees of The Atlanta Opera, Inc., and not independent contractors.[12] On December 27, 2021, the NLRB granted review and expressly invited the filing of amicus briefs regarding whether the Board should revisit the standard for determining the independent contractor status of workers from the *SuperShuttle* decision and, if it did, what standard should apply.[13] Although two dissenting Members asserted there was no reason to revisit the decision and argued that no party had asked the Board to do so, a three-Member majority asserted that the Board had previously revisited precedent *sua sponte* and in the absence of adverse judicial decisions.[14] Dozens of amicus briefs were filed with the NLRB.[15]

03

THE DIVISION'S AMICUS BRIEF

The Division's amicus brief was filed "in support of neither party" and did not state a position on exactly what criteria that should be applied to determine if a worker is an employee or independent contractor, or on whether the Atlanta Opera workers at issue should be considered employees. However, although much of the brief discussed potential issues with an ambiguous or uncertain standard, it left little doubt that the Division was concerned was that the existing definition was too narrow and that it considered a broader definition of an "employee" to generally be pro-competitive. As there has been vigorous debate over whether many gig economy workers are, or should be, treated as employees, a decision that meaningfully broadens who qualifies as an employee could lead to more gig workers receiving employee status under the NLRA.

04

EMPLOYEE STATUS AND INTERACTION WITH THE LABOR EXEMPTIONS IN FEDERAL ANTITRUST LAW

As explained by the Division, the understanding of who qualifies as an "employee" under the NLRA is significant because court have historically held that certain activity by employees and unions is exempt from federal antitrust laws, but that the protection of the exemption does not extend to independent contractors.[16] Critically, the Division's brief did not assert that the labor exemptions do, in fact, *only* apply to workers properly classified as "employees" under the NLRA. Instead, it left open the opportunity to assert that the antitrust exemptions should be interpreted more broadly, and can cover gig economy workers even if they do not meet the NLRB's criteria to be "employees." Indeed, the amicus brief previewed potential arguments for an expansive reading of the exemptions.

"Substantially all, if not all of the normal peaceful activities of labor unions" are exempted from the Sherman Act, even

9 *Id.* at *17-20 (discussing extent of control by the employer; method of payment; instrumentalities, tools, and place of work; supervision; the relationship the parties believed they created; engagement in a distinct business, work as part of the employer's regular business, and the principal's business; and skills required); see also *id.* at *2 (stating that Board's inquiry to determine if a worker is an employee or independent contractor involves application of nonexhaustive common-law factors from Restatement (Second) of Agency, § 220 (1958) and listing factors).

10 *Id.* at *21-25 (McFerran, dissenting).

11 Order Granting Review and Notice and Invitation to File Briefs, *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case 10-RC-276292, 371 NLRB No. 45 (NLRB Dec. 27, 2021).

12 *Id.*

13 *Id.*

14 *Id.*

15 National Labor Relation Board, The Atlanta Opera, Inc., https://www.nlrb.gov/case/10-RC-276292 (last accessed June 13, 2022).

16 See Brief, *supra* note 2, at 4.

if they interrupt trade.[17] The statutes "declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws."[18] Beyond this statutory exemption, however, courts have recognized a "nonstatutory" exemption. Noting that "[u]nion success in organizing workers and standardizing wages ultimately will affect price competition among employers," the U.S. Supreme Court has "acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions."[19] The nonstatutory exemption's allowance of certain collective bargaining agreements, however, does not lend protection when a union and a "nonlabor party agree to restrain competition in a business market."[20] The Division particularly highlighted that the nonstatutory exemption did not protect agreements on how much consumers will pay for a product, or agreements among competing employers to fix prices or allocate markets.[21]

The Division's account of the enactment and recognition of the labor exemptions suggests that the Division believes that Congress did not intend the Sherman Act to cover labor organizing and that this was "affirm[ed]" by the subsequent enactment of the statutory exemptions.[22] The Division stated that the Clayton Act's provision that "[t]he labor of a human being is not a commodity or article of commerce" "helped to ensure that the antitrust laws would be interpreted in a way that allowed workers to collectively organize for better wages and working conditions."[23] It asserted that this principle was "further affirmed" by the Norris-LaGuardia Act of 1932's express exemption of certain worker-organizing activities from antitrust injunctions and that this legislation "reaffirmed Congress's intent for worker organizing to help equalize bargaining power between workers and their employers."[24] The Division further contended that this history "makes clear" that Congress intended the antitrust laws to be interpreted in harmony with labor laws, and that courts have recognized the statutory and nonstatutory labor exemptions to "harmonize" those two bodies of law.[25]

> ***Beyond this statutory exemption, however, courts have recognized a "nonstatutory" exemption***

The Division's discussion of how the NLRB's definition of "employee" relates to the scope of the labor exemptions indicated that the definition has been used to determine the scope of the exemption, but it did not concede that the definition actually limits its reach. It noted that courts have "historically held that these exemptions only protect *employees* and their unions, not independent contractors," and that "traditionally," concerted action by independent contractors has been subject to antitrust scrutiny.[26] It further asserted that courts have a "tendency" to construe the labor exemptions narrowly, indicating that workers who may have been employees under the NLRB's old *FedEx* standard but not the current *SuperShuttle* standard might be subject to antitrust liability.[27] It stated that there therefore "may be potential benefits" to extending labor protections to gig economy workers who seek to bargain with a single employer, including "digital platforms."[28]

The possibility of recognizing a category of workers who are not considered employees covered by the NLRA but who have a greater ability to organize than traditional independent contractors in some ways echoes efforts at the state and local level to grant gig economy workers some additional

17 *Allen Bradley Co. v. Local Union No. 3, Int'l Bros. of Elec. Workers*, 325 U.S. 797, 810 (1945).

18 *Connell Const. Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975) (citations omitted).

19 *Id.* at 622.

20 *Id.* at 622-23 (citations omitted).

21 Brief, *supra* note 2, at 3-4; see also *Connell*, *supra* note 18, at 618-619 (no immunity from federal antitrust statutes where union organizing subcontractors picketed general contractors to compel them to deal only with parties to union's collective bargaining agreement).

22 Brief, *supra* note 2, at 2.

23 *Id.*

24 *Id.* at 2-3 (citing 29 U.S.C. §§ 102, 104-05).

25 *Id.* at 3.

26 *Id.* at 4 (emphasis in Brief).

27 *Id.*

28 *Id.* at 4-5.

rights or benefits without classifying them as employees. Of course, gig economy companies and localities have sometimes vigorously disagreed over the rights and restrictions applicable to gig workers. For example, a dispute arose between ride-sharing companies and the City of Seattle when Seattle passed an ordinance that required the companies to bargain collectively with a certified driver representative.[29] In California, after passage of a state law that required some gig economy companies to employ their workers, companies supported a ballot measure to make some gig workers independent contractors with special benefits.[30] While this measure passed, a California state court judge found that it was unconstitutional under the state constitution and the case is pending on appeal.[31] These disputes about whether and on what terms to treat gig workers as a special category appear likely to continue, as seen in a recent legal battle over a potential Massachusetts ballot proposition that would have guaranteed some gig workers a minimum wage without making them full employees.[32]

The Division's position thus appears to encourage the NLRB to issue a ruling that could bolster the case for finding that gig worker organizing is exempt from federal antitrust law, but leaves room to reject an all-or-nothing approach in which workers are either 1) employees within the scope of NLRA provisions and labor exemptions who can organize, or 2) independent contractors who are much more limited in acting collectively. Even if the NLRB chooses not to address the approach for identifying employees and independent contractors for purposes of the NLRA, or issues a decision that is too fact bound or ambiguous to provide clear guidance on classifying many gig economy workers, the Division may argue that federal antitrust law should not apply to workers who are, or might be, independent contractors under NLRB's standard. This may prove important for companies and workers where workers may still be independent contractors following any change by the NLRB.

05 POTENTIAL IMPACT OF CHANGING THE CLASSIFICATION STANDARD ON COMPETITION

Separately, the Division expressed concern that an "ambiguous" definition of who is considered an "employee" under the NLRA could be used anticompetitively in both labor and product markets. It contended that recent scholarship "suggests that an ambiguous NLRB definition of employment may lead to competitive harm by encouraging employers to misclassify their workers as non-employees."[33] Notably, although the Division framed its arguments as addressing the harms of an "ambiguous" definition, elements of its discussion appear to indicate the Division sees potential competitive harm from a *narrower* standard, clear or not.

First, in discussing the potential impact of misclassification on the labor market, the Division suggested that worker organizing is procompetitive, and that classifying more workers as employees may prevent employers from taking anticompetitive actions. It asserts that misclassification "reduces or eliminates workers' ability to bargain collectively for better terms," and contends that employers can "take advantage" of workers' relative lack of bargaining power to coordinate unlawfully with other employers on classification and other "terms of employment."[34] This concern with employer collusion appears consistent with the Division's recent active pursuit of multiple cases against companies and individuals who it alleged conspired to fix wages and terms of employment, or agreed to restrictions on hiring each other's workers.[35]

29 *Chamber of Commerce of the United States of Am. v. City of Seattle*, 890 F.3d 769, 775-79 (9th Cir. 2018).

30 Kate Conger & Kellen Browning, *A Judge Declared California's Gig Worker Law Unconstitutional. Now What?*, The New York Times, Aug. 23, 2021.

31 *Id.*; see also Kellen Browning, *The Next Battleground for Gig Worker Labor Laws: Massachusetts*, The New York Times, June 1, 2022, available at: https://www.nytimes.com/2022/06/01/business/massachusetts-gig-workers-ballot.html.

32 Browning, *supra* note 31; Kellen Browning, *Massachusetts Court Throws Out Gig Worker Ballot Measure*, The New York Times, June 14, 2022, available at: https://www.nytimes.com/2022/06/14/technology/massachusetts-gig-workers.html.

33 Brief, *supra* note 2, at 6.

34 *Id.*

35 *E.g.*, Indictment, *United States v. Da Vita*, Case No.1: 21-cr-00229 (D. Colo. Nov. 3, 2021) (accusing defendants of conspiracy to suppress wages and restrict solicitation and hiring of workers); Criminal Indictment, *United States v. Hee*, Case No. 2:21-cr-00098 (D. Nev. March 30, 2021) (accusing defendants of conspiracy not to raise wages or hire another company's workers); Indictment, *United States v. Patel*, Case No. 3:21-cr-00220 (D. Conn. Dec. 15, 2021) (accusing defendants of conspiracy to allocate employees and to restrict hiring and recruitment); Indictment, *United States v. Manahe*, Case No. 2:22-cr-00013 (D. Maine Jan. 27, 2022) (accusing defendants of conspiracy to fix rates and not hire each other's workers).

Second, the Division asserted that employers are more likely to impose one-sided contract provisions against misclassified workers, specifically calling out "blanket non-competes or restrictions on employee information sharing regarding wages or terms of employment."[36] It contends that such contract terms may "further restrain competition in the labor market," and prompt a "self-reinforcing cycle" because those terms "may become more pervasive" if workers cannot resist them without the rights and protections of the NLRA.[37] Concern about potential harm from non-competes was raised by President Biden's July 2021 Executive Order on Promoting Competition in the American Economy, which asserted that "[p]owerful companies require workers to sign non-compete agreements that restrict their ability to change jobs" and "encouraged" the Federal Trade Commission ("FTC") Chair to exercise the FTC's rulemaking authority to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[38]

Third, the Division highlighted what it believed to be a potential unfair competitive advantage for companies that cut their costs by allegedly misclassifying their workers. It argued that, unless addressed by NLRB or other agencies, this could lead to a "race to the bottom" that forces rivals to join in allegedly misclassifying their workers or cede the marketplace.[39]

Notably, the Division's reasoning centered on the impact on the worker, rather than detailing its view of the impact on consumers. While this approach may have been well-suited for a worker-focused NLRB, it is also consistent with Kanter's recent criticism of the "consumer welfare" standard traditionally used to evaluate conduct and mergers, as he asserts that it, among other things, "has a blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy."[40] Of course, some have argued that gig economy models have benefits for workers, such as flexibility and control over their schedules, and for consumers, such as lower cost and more convenient services.[41]

06

POTENTIAL FOR ANTITRUST ACTIONS AGAINST WORKERS OR EMPLOYERS

The amicus brief also signaled that the Division is concerned about other actors who may assert antitrust claims against organizing workers. Although the Division said that it may exercise its discretion "not to pursue action against workers whose status as employees is unclear," it noted that other actors may file such lawsuits, particularly citing the possibility that the specter of private antitrust suits and treble damages would "substantially chill worker organizing."[42] Left unsaid, relying on the exercise of discretion could provide fleeting protection even from government enforcement, as a future change in leadership could alter the Division's approach and prompt action regarding conduct that the current Division would leave be.

The Division also argued that ambiguity in the NLRB's standard could subject both workers and employers to antitrust claims, with workers perhaps facing suits from employers and other parties, and employers perhaps accused of im-

36 Brief, *supra* note 2, at 6.

37 *Id.* at 6-7 (citations omitted).

38 Executive Order, *supra* note 3.

39 Brief, *supra* note 2, at 7.

40 Assistant Attorney General Jonathan Kanter, Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022), available at: https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association.

41 E.g. Brian Underwood, *Why More People Are Choosing the Gig Economy*, USA Today, Sept. 1, 2021, available at: https://www.usatoday.com/story/sponsor-story/ascend-agency/2021/09/01/why-more-people-choosing-gig-economy/5650195001/ (stating "this alternate way to work empowers people to take control of their time, workflow, compensation and growth" and asserting that one reason the number of gig workers has surged after the pandemic is the lifestyle and additional freedom a traditional job does not provide); James Sherk, Heritage Found., *The Gig Economy: Good for Workers and Consumers*, Oct. 7, 2016, available at https://www.heritage.org/jobs-and-labor/report/the-rise-the-gig-economy-good-workers-and-consumers (arguing gig workers value flexibility and control and consumers benefit because, among other things, services can be lower cost and more convenient); Marina Lao, *Workers in the "Gig" Economy*: *The Case for Extending the Antitrust Labor Exemption*, 51 UC Davis L. Rev. 1543, 1551, 1586 (asserting that consumers are the "clear winners" in the gig economy and that innovations introduced by platforms increase consumer welfare by improving the consumer experience and offering more options, and arguing that benefits are "more mixed" for gig economy workers).

42 Brief, *supra* note 2, at 5.

properly coordinating the actions of independent contractors.[43]

The Division essentially suggested that the NLRB might actually help gig platforms that set prices to avoid antitrust liability by making it clear that their workers are not independent contractors, citing an antitrust case filed in New York that alleged that Uber established fare-fixing agreements among its drivers.[44] Similarly, one academic has suggested that antitrust liability could be used to create a "significant cost" to classifying workers as independent contractors, with employers having to either give workers the protections of employees (including the right to collective bargaining) or be subject to antitrust liability if they seek to impose vertical restraints on workers treated as independent contractors (such as setting prices they charge).[45] The amicus brief leaves unclear whether the Division merely raises the possibility of antitrust liability for gig economy companies coordinating the work of independent contractors to suggest that gig economy companies benefit from a broad understanding of "employee," or if it has interest in arguing that some gig economy companies must either treat workers as employees or run afoul of antitrust laws.

07

LANGUAGE OF MODERNIZATION AND JUSTIFYING CHANGE

Notably, the Division framed the issue of potentially revising the standard for identifying independent contractors as one of "modernization," paralleling language used by Kanter and FTC Chair Lina Khan in connection with other initiatives where they have signaled that they are poised to make significant changes. The *Atlanta Opera* brief asserted that the "national economy has seen a dramatic change in the 'facts of industrial' life in recent years," and that millions of workers who "until recently, would have been properly classified as employees have seen their work recategorized as independent contracting," leading to the loss of "crucial protections" under federal labor law.[46] In particular, the Division contends that the "rapid rise of digital platform intermediaries, whose core business model often relies on coordinating the work of large numbers of workers while disclaiming the traditional responsibilities of an employer" has accelerated this trend.[47]

In adopting this framing, the Division appears to lay the groundwork to assert that new approaches are needed, but that it thinks that these approaches are not necessarily inconsistent with existing law and past practice because applying the same law and principles to different circumstances has different results. This message has been seen elsewhere, including in the request from the FTC and the Division earlier this year for public input on how to "modernize" merger enforcement, including ensuring that analytical techniques, practices, and enforcement policy "reflect current learning about competition based on modern market realities."[48] By contending that the NLRB has grounds to revise the independent contractor standard because of the "significant, recent changes in our national economy," despite the fact that the current standard was articulated in 2019, the Division offers a possible justification for changing course.[49]

08

WHAT DOES IT MEAN?

Moving forward, the Division's brief may portend future efforts by the Division to attempt to use the antitrust laws to benefit gig workers. Any future advocacy or enforcement activity by the Division may take place alongside efforts by other federal agencies or departments. In particular, FTC Chair Khan has asserted she is "committed to considering" the FTC's "full range of tools," including rulemaking and enforcement, in order to address allegedly illegal em-

43 *Id.* at 5-6.

44 *Id.* at 5-6 & n.25 (citing *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 824 (S.D.N.Y. 2016)).

45 Martin Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & Contemp. Probs., 45, 62-63 (2019).

46 Brief, *supra* note 2, at 1.

47 *Id.*

48 U.S. DOJ and U.S. FTC, Request for Information on Merger Enforcement, Jan. 18, 2022, available at https://www.regulations.gov/document/FTC-2022-0003-0001.

49 Brief, *supra* note 2, at 2.

ployment contract provisions.[50] She has also advocated for legislation "clarifying" that labor organizing is outside of the scope of federal antitrust statutes even if the workers are not classified as employees, highlighting the potential far-reaching impact on gig economy companies that rely on non-employee workers.[51]

The Division's decision to weigh in on the *Atlanta Opera* case, and its discussion of the potential consequences of private litigation, suggest that the Division may seek to file amicus briefs in other administrative proceedings or litigation in an effort to shape the interpretation of the labor exemptions and the reach of the antitrust laws. Under Kanter's predecessor, Makan Delrahim, the Division was active in filing amicus briefs and weighed in on significant cases regarding, among other things, the application of the Sherman Act to gig economy workers and the scope of the labor exemptions.[52] Moreover, Chair Khan informed Congress in September 2021 that the FTC "will work with the DOJ to consider providing guidance to the courts on how the Clayton Act is designed to exempt worker organizing activities from antitrust" in private litigation against workers who collectively organize.[53] The Division's brief suggests that the FTC may find a willing collaborator.

Moreover, regardless of how the Division may act to try to expand or clarify the group of workers who can organize without violating federal antitrust laws, its recent activity on labor market antitrust issues suggests that it may increase investigations and enforcement efforts regarding what it believes to be anticompetitive conduct that harms gig economy employees. Of potential relevance, on March 10, 2022, the Division and the Labor Department announced that they signed a memorandum of understanding ("MOU") to "strengthen the partnership between the two agencies to protect workers from employer collusion, ensure compliance with the labor laws and promote competitive labor markets and worker mobility."[54] Although the announcement and memorandum did not expressly mention the gig economy, it referenced protecting workers harmed or at risk of being harmed "as a result of anticompetitive conduct, including through the use of business models designed to evade legal accountability, such as the misclassification of employees," language reminiscent of that sometimes used to accuse gig economy companies of improperly claiming their workers are independent contractors.[55] Among other things, the MOU stated that the agencies would establish procedures for consulting and coordinating enforcement (including sharing information) and that each agency would refer cases to the other agency when it detects possible violations of statutes enforced by the other agency.[56]

Going forward, the Division's efforts regarding worker organization and the gig economy will merit careful watching to see if the Division take a leading or active role in shaping the application of federal antitrust laws to actors in the gig economy.

> ***"The Division's brief suggests that the FTC may find a willing collaborator***

50 Letter of Lina M. Khan, Chair, Federal Trade Commission to the House Subcommittee on Antitrust, Commercial, and Administrative Law 2 (Sept. 28, 2021).

51 *Id.* at 3.

52 *Chamber of Commerce of the United States v. City of Seattle*, Brief for the United States and the Federal Trade Commission as Amicus Curiae in Support of Appellant and in Favor of Reversal, No. 17-35640 (9th Cir. Nov. 3, 2017); *William Morris Endeavor Entm't, LLC v. Writers Guild of Am., West, Inc.*, Statement of Interest of the United States, No. 2:19-cv-05465-AB (AFMx) (C.D. Cal. Nov. 26, 2019); see also The Federalist Society, FedSoc Blog, An Interview with Makan Delrahim, Former Assistant Attorney General for the Department of Justice Antitrust Division (Mar. 22, 2021), https://fedsoc.org/commentary/fedsoc-blog/an-interview-with-makan-delrahim-former-assistant-attorney-general-for-the-department-of-justice-antitrust-division (discussing asserted goals and results of amicus program).

53 Letter, *supra* note 50, at 2.

54 Press Release, U.S. Dep't of Justice, Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), available at https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers.

55 *Id.*; Memorandum of Understanding Between the U.S. Department of Justice and U.S. Department of Labor 1-2 (Mar. 10, 2022), available at https://www.justice.gov/opa/press-release/file/1481811/download.

56 Memorandum of Understanding, *supra* note 55, at 3-4.

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