

# Labor Market Regulation and Worker Power

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*Due to a lack of competition among employers in the labor market, employers have monopsony power, or power to pay workers less than what the workers contribute to the employers' bottom line. "Worker power" is workers' ability to obtain higher wages and better working conditions. While the antitrust agencies have just begun developing policy and enforcement strategies to regulate employer monopsony, broader government policies that impact market forces, the formation of labor market institutions, and workers' voices and exit options also play a defining role in shaping worker power relative to employers. For example, in addition to antitrust enforcement, worker power can be enhanced by labor agencies' regulation of employer/employee status, wage and working condition floors, and workers' collective action. Worker power can also be enhanced by agencies administering social safety net protections and influencing labor market tightness through monetary policy.*

*Scholars have yet to assess how federal agencies, whose statutory authority and regulatory purview impact worker power, could best direct their authority, regulatory tools, and expertise towards labor market regulation in the presence of employer monopsony power. This Essay outlines the comparative advantages of federal agencies' regulations impacting worker power. It then develops a checklist of worker power indicators for agencies to track and operationalize in high-priority policy and enforcement areas and offers a broader worker power agenda through a whole-of-government approach involving interagency coordination to protect and strengthen workers' voice and exit options.*

## INTRODUCTION

Worker power has declined relative to employer power due to market forces, insufficient regulation, and weak labor market institutions. On the employer side, labor market concentration as well as employer monopsony, anticompetitive conduct, and workplace restructuring, contribute to eroding worker power, reducing employment and worker compensation. Low union density, weak

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labor and employment law protections, and underenforcement limit workers' countervailing power further.

A couple examples are illustrative. First, fast-food workers are some of the lowest paid workers in our economy and suffer rampant wage theft and poor working conditions.<sup>1</sup> Their Fight for \$15 campaign to raise minimum wage laws around the country instigated a national conversation on the need to lift wage floors.<sup>2</sup> But workers faced an uphill battle in negotiating better wages and working conditions with franchisors because labor and employment law does not extend legal duties to upstream firms in "fissured" industries like franchising.<sup>3</sup> Workplace fissuring was allowed by antitrust law's leniency regarding the lawfulness of vertical restraints, allowing firms to vertically disintegrate while retaining significant control over downstream workforces.<sup>4</sup> Further, fast-food employers have used no-poach and noncompete agreements to limit low-wage workers' outside options.<sup>5</sup> This limited labor and antitrust regulation overlays a deeper network of rights allocations that favors employer power relative to worker power, including at-will default rules in employment contracting and limited support for workers, especially workers of color, if

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<sup>1</sup> See, e.g., *Company Wage Tracker*, ECON. POL'Y INST., <https://perma.cc/MMX8-5STT> (last updated Apr. 2022); Tiffany Hsu, *Nearly 90% of Fast-Food Workers Allege Wage Theft, Survey Finds*, L.A. TIMES (Apr. 1, 2014), <https://perma.cc/Q39A-8WT5>; Kiara Alfonseca, *Restaurant Workers Protest Poor Working Conditions and Low Wages at McDonald's, Chipotle, and More Amid Coronavirus Pandemic*, ABC NEWS (May 11, 2021), <https://perma.cc/TY7B-8LJV>.

<sup>2</sup> See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 47–57 (2016).

<sup>3</sup> DAVID WEIL, *THE FISSURED WORKPLACE* 183–213 (2014); see also Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 657–59 (2021) [hereinafter Hafiz, *Structural Labor Rights*] (discussing NLRB's joint-employer action against McDonald's); Hiba Hafiz, *The Brand Defense*, 43 BERKELEY J. EMP. & LABOR L. 1, 7–9, 47–50 (2022) [hereinafter Hafiz, *Brand Defense*] (same).

<sup>4</sup> Hafiz, *Brand Defense*, *supra* note 3, at 32–42; Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising 1960-1980*, 22 ENTER. & SOC'Y: INT'L J. BUS. HIST. 156, 160–69 (2020); Brian Callaci, Sérgio Pinto, Marshall Steinbaum & Matt Walsh, *Vertical Restraints and Labor Markets in Franchised Industries*, SSRN 22 (July 6, 2022), <https://perma.cc/V9RP-6MVB>.

<sup>5</sup> Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 17–20 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24831, 2018); ALAN B. KRUEGER & ERIC A. POSNER, *A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION* 6–9 (Hamilton Project, Proposal No. 2018-05, 2018).

they quit, including limited protections to account for scarce personal wealth, such as social insurance and unemployment insurance.<sup>6</sup>

Worker power is weak relative to employer power even in labor markets with scarcer, high-skilled, and unionized workers. Registered nurses have suffered lower wages from hospital consolidation, employer wage-fixing and information-sharing schemes, as well as labor and employment law violations as they have unionized and struck to improve their benefits and workplace safety and health protections.<sup>7</sup>

Because a range of policies can reinforce or weaken worker power, taking a systematic regulatory approach is necessary. And we have a rare window of opportunity to effectuate one. The Biden Administration has stated that an all-agencies-on-deck approach is required to strengthen worker power, issuing an Executive Order on Promoting Competition in the American Economy that mandates a “whole-of-government” program to combat labor market concentration and employer market power abuses.<sup>8</sup> Pursuant to that objective, the Treasury Department has issued a Report on “The State of Labor Market Competition,” proposing government-wide initiatives and policies to “bolster labor market competition and increase workers’ bargaining power.”<sup>9</sup> And the anti-trust agencies have signed memoranda of understanding with the Department of Labor and National Labor Relations Board to coordinate on “protecting competition in labor markets and promoting the welfare of American workers.”<sup>10</sup>

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<sup>6</sup> See IOANA MARINESCU & JAKE ROSENFELD, WORKER POWER AND ECONOMIC MOBILITY 6–12 (Urban Inst., 2022).

<sup>7</sup> See, e.g., Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397, 406–15 (2021); Jeff Miles, *The Nursing Shortage, Wage-Information Sharing Among Competing Hospitals, and the Antitrust Laws: The Nurse Wages Antitrust Litigation*, 7 HOUS. J. HEALTH L. & POLY 305, 328–74 (2007); Michael Sainato, “We Went From Heroes to Zeroes”: US Nurses Strike Over Work Conditions, THE GUARDIAN (July 30, 2021), <https://perma.cc/VXT9-9PDJ>; Hailey Mensik, *Nursing Union Says Hospitals Aren’t Following OSHA Standard Amid Delta*, HEALTHCARE DIVE (Sept. 28, 2021), <https://perma.cc/LG8H-Z76Q>; Vin Gurrieri, *Calif. Hospital Can’t Bar Union Pins or Badges, NLRB Says*, LAW360 (Apr. 23, 2018), <https://perma.cc/763K-KAQE>.

<sup>8</sup> Exec. Order No. 14,036, 86 Fed. Reg. 36,987 § 1–2 (July 9, 2021).

<sup>9</sup> *The State of Labor Market Competition*, U.S. DEP’T OF TREASURY 52 (Mar. 7, 2022), <https://perma.cc/MM2L-6EEU>.

<sup>10</sup> *Memorandum of Understanding Between the U.S. Department of Justice and U.S. Department of Labor*, U.S. DEP’T OF LABOR & U.S. DEP’T OF JUST. 1 (Mar. 10, 2022), <https://perma.cc/ERN7-GAHG>; *Memorandum of Understanding between the Federal*

Regulatory agencies' "whole-of-government" approach to strengthening worker power would greatly benefit from improved coordination based on a unifying framework identifying indicators of employer and worker power for use in triggering investigations, setting enforcement priorities, and shaping substantive policy. Speaking a common language to overcome obstacles to wide-ranging enforcement can secure more effective outcomes and solidify the bonds between labor market institutions that can buttress worker power.

This Essay proposes such a framework based on a labor-economic model of voice and exit. Voice affects workers' relative bargaining power within the firm while exit gives workers and firms leverage from outside options to the existing employment relationship. When workers have voice and exit options, their wages increase; when they lack such options or when employers limit those options or strengthen their own voice or exit options, worker power decreases. This framework enables us to identify the policy levers that can strengthen or weaken worker and employer power and to locate the regulatory institutions that administer them. But the framework has the added benefit of generating indicators of employer and worker power—a worker power “toolbox”—for interagency transmission and use. The Essay then identifies which policy levers we believe to be the most effective at strengthening worker power and decreasing employer power based on our current empirical knowledge and explains how interagency coordination could better effectuate those policies.

## I. SOURCES OF WORKER POWER

Workers' wages and working conditions are determined by their voice and exit options.<sup>11</sup> Voice allows workers to get more out of their *current* employment relationship by striking a better bargain.<sup>12</sup> A prototypical example of voice is unionization. Exit refers to workers' alternatives to any specific job, whether that is taking another job or being without a job.<sup>13</sup> When workers have

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*Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest*, FED. TRADE COMM'N & NAT'L LABOR RELS. BD. (July 19, 2022), <https://perma.cc/5KVF-Y8UQ>; *Memorandum of Understanding Between the U.S. Dep't of Justice and the National Labor Relations Board*, NAT'L LABOR RELS. BD. & U.S. DEPT OF JUST. (July 26, 2022), <https://perma.cc/PMH2-59QV>.

<sup>11</sup> ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 21–43 (1970).

<sup>12</sup> *Id.* at 30–33.

<sup>13</sup> *Id.* at 21–22.

more and better job alternatives, they can either switch to these better options, or obtain better conditions in the current job by credibly threatening to leave. Workers' wages and working conditions are also improved, all other things equal, when firms have worse exit options, meaning that it is more difficult to find a suitable worker, or to eliminate the job completely.

Before describing some of the mechanisms at play, it is important to note that our discussion brackets the question of what the exact balance should be between worker and employer power. The answer to that question depends on both normative judgments and empirical facts: What is the goal of the policy, and what are the best instruments to achieve it? For example, economics typically adopts a utilitarian framework for its normative judgments. In this framework, economic random search theory shows that either worker or employer bargaining power (best thought of as voice) can be too high relative to a utility-maximizing benchmark: worker power that is too high or too low fails to maximize aggregate utility (Hosios condition).<sup>14</sup>

For a while, economists have pushed the idea that any intervention that increases worker power must reduce employment or otherwise harm workers. For example, minimum wages were assumed to always reduce employment as workers get too expensive. But such results are predicated on perfectly competitive markets. With imperfectly competitive labor markets, increases in worker power can increase employment.<sup>15</sup> Empirical evidence is key to determining which policies are best at achieving specific goals.

Search theory provides us with a useful way of thinking about what determines wages and working conditions. Search theory distinguishes itself from traditional supply and demand models of the labor market, which assume that workers can immediately get a job as long as they are willing to accept the market wage. Instead, search theory posits that there are frictions in the labor market, so that workers cannot get a job immediately but must search for a job, with uncertain outcomes. This means that workers take time to find a job and must design a search strategy that will help them find the right job. According to search theory,

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<sup>14</sup> Arthur J. Hosios, *On the Efficiency of Matching and Related Models of Search and Unemployment*, 57 REV. ECON. STUD. 279, 295–96 (1990).

<sup>15</sup> José Azar, Emiliano Huet-Vaughn, Ioana Marinescu, Bledi Taska & Till von Wachter, *Minimum Wage Employment Effects and Labor Market Concentration*, SSRN 19 (July 5, 2019), <https://perma.cc/ERW4-6NJV>.

wages are determined by worker productivity, worker bargaining power, the worker's outside option as measured by her reservation wage, and the firm's outside option as measured by its reservation profit. Higher worker bargaining power, higher reservation wages, and lower reservation profits all increase wages.<sup>16</sup> Importantly, other theories of imperfectly competitive labor markets—such as monopsonistic competition or job differentiation—have similar wage determinants.<sup>17</sup>

#### A. Workers' Exit Options

Workers' exit options determine their reservation wage, i.e., the lowest wage they would be willing to accept given their other options. When the reservation wage goes up, actual wages go up. Firms' reservation profits play a similar role: when a firm's reservation profits go down, wages go up. When reservation profits go down, the worker becomes more valuable to the firm relative to the firm's next best option, and, as a result, the firm is willing to pay the worker more (the surplus increases and workers get a share of the surplus).

Many market forces affect workers' exit options. Perhaps most obviously, labor supply and demand matter: wages are higher when labor market tightness is higher, i.e., when there are more jobs relative to the number of workers looking for jobs. Indeed, when labor market tightness is high, workers can find a job more easily, so their reservation wage increases. On the other hand, labor market concentration decreases the number of available employers and tends to lower workers' opportunities, thereby lowering wages.<sup>18</sup> Often, workers are not aware that good job substitutes exist, which lowers their reservation wage. Thus, search costs and a lack of information tend to lower workers' reservation wage. Even when workers are aware that there are some good jobs, the cost of moving can dissuade them from taking these jobs. Distance is a key reason why jobs differ from each other and thus

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<sup>16</sup> Richard Rogerson, Robert Shimer & Randall Wright, *Search-Theoretic Models of the Labor Market*, 43 J. ECON. LITERATURE 959, 959–88, 969 Equation 36 (2005).

<sup>17</sup> We do not take a position here as to which is the most relevant theory overall but instead provide an empirical overview of policies tested under various theories and identify those we understand to most likely increase worker power. See, e.g., Carmen Sanchez Cumming, *Understanding the Economics of Monopsony: How Labor Markets Work Under Imperfect Competition*, WASH. CTR. FOR EQUITABLE GROWTH (Apr. 6, 2022), <https://perma.cc/SSE5-R5C2>.

<sup>18</sup> José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 2020 J. HUM. RES. 1218-9914R1, 12–18; Prager & Schmitt, *supra* note 7, at 397–427.

allows firms to pay lower wages because they do not compete on an equal footing with firms offering jobs that are farther away from a worker's home.<sup>19</sup> More broadly, job differentiation lowers wages because it means that other jobs are too different from the current job and therefore not worth moving to. These differences could come from many factors, including relationships with managers. When a worker can afford not to work, their reservation wage also goes up: personal wealth and nonlabor income thus increase workers' wages.

There are similar factors that decrease firms' reservation profit and hence increase wages. Worker differentiation increases wages because it means there are few other workers that are good substitutes (and so the firm has lower reservation profits). Search costs on the firm side to advertise a vacancy, interview candidates, and so on, decrease the value of replacing the current worker. Worker-replacement costs, such as training costs, also make it less profitable for a firm to replace the current worker. In some cases, firms are cash-strapped and cannot afford these extra costs, so credit constraints can also lower reservation profits; however, this is not necessarily good for workers as credit constraints may prevent the growth of new firms and additional job creation. On balance, it is likely that relaxing credit constraints would help workers by promoting investment and job creation.<sup>20</sup>

Many policies affect workers' exit options. Unemployment insurance and income assistance such as food stamps theoretically increase workers' reservation wage because the value of being jobless increases. Minimum wages directly increase wages but also decrease reservation profits since the firm cannot make higher profits by replacing workers with others willing to work for less than the minimum wage. Similarly to minimum wages, regulations concerning working conditions put a floor on the total value of the job that goes to the worker. Macroeconomic policies that increase labor market tightness, such as monetary policy, can also increase wages. Antitrust laws that promote more competition among employers can decrease labor market concentration and limit restraints on worker mobility such as noncompete agreements. Less strict occupational licensing promotes worker

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<sup>19</sup> José Azar, Steven Berry & Ioana Marinescu, *Estimating Labor Market Power*, SSRN 19–21 (July 25, 2022), <https://perma.cc/WSG6-UUL9>.

<sup>20</sup> E. Mark Curtis, Daniel G. Garrett, Eric C. Ohn, Kevin A. Roberts & Juan Carlos Suárez Serrato, *Capital Investment and Labor Demand* 9–10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29485, 2022).

mobility, increasing the value of outside options. Antidiscrimination law can in theory increase the wages of minorities that are discriminated against, both directly by increasing incumbent wages and indirectly by expanding the set of available jobs for people who are usually discriminated against. Workers can acquire more information when firms are required to post salary ranges, and they can use information more judiciously when firms are banned from asking a worker's wage history. Salary-history bans have been empirically shown to effectively increase the relative wages of women and minorities.<sup>21</sup> On the firm side, increasing the cost of replacing workers—through, for example, just cause provisions—can decrease firms' reservation profits and hence increase wages. While one may worry that just cause provisions decrease employment by increasing the cost of labor, the empirical literature shows limited employment effects.<sup>22</sup>

Strong empirical evidence documents certain of these policies' positive effects on worker power.<sup>23</sup> Specifically, strengthening labor antitrust enforcement by blocking anticompetitive mergers and limiting the use of noncompetes helps increase workers' wages.<sup>24</sup> Minimum wage laws help to increase wages, with typically small employment effects.<sup>25</sup> Unions can be helpful to combat the negative effects of concentration on wages.<sup>26</sup>

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Thus, adopting a search-theory approach to determining the relative power of employers and workers based on voice and exit provides a helpful framework for identifying and assessing policy levers that can increase worker power. And where one set of policies faces regulatory hurdles or is weakly enforced, stronger or

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<sup>21</sup> James Bessen, Erich Denk & Chen Meng, *Perpetuating Inequality: What Salary History Bans Reveal About Wages*, BOS. UNIV. SCH. OF L. 24–26 (June 2020), <https://perma.cc/9CW8-6YJH>.

<sup>22</sup> Adriana D. Kugler, *The Effects of Employment Protection in Europe and the USA*, ELS OPUSCLES DEL CREI 11–24 (Feb. 2007), <https://perma.cc/QRG7-B8AM>; Ioana Marinescu, *Job Security Legislation and Job Duration: Evidence from the United Kingdom*, 27 J. LAB. ECON. 465, 471–84 (2009).

<sup>23</sup> See Marinescu & Rosenfeld, *supra* note 6, at 12–24 (discussing empirical evidence at length).

<sup>24</sup> See Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1037–44 (2019).

<sup>25</sup> Marinescu & Rosenfeld, *supra* note 6, at 16–17.

<sup>26</sup> Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 15–17 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24307, 2018); Prager & Schmitt, *supra* note 7, at 419–21.



more effective enforcement of others may help fill regulatory gaps to strengthen worker power. For this reason, successfully deploying policy levers that strengthen worker power depends considerably on the regulatory environment, institutional capacity, and coordination synergies between enforcement actors.

## II. LABOR MARKET REGULATION AND WORKER POWER

Government institutions—and, most importantly for our purposes, regulatory agencies—shape market forces and implement public policies that determine workers’ voice and exit options. This Part provides an overview of the agencies tasked with those determinations and the levers by which they exercise them. Cumulatively, these agencies are critical for reducing employer monopoly power and increasing worker power.

### A. Regulation of Worker Voice

The primary regulatory mechanism impacting workers’ relative bargaining power within the firm is the National Labor Relations Act<sup>27</sup> (NLRA), administered by the National Labor Relations Board (NLRB).<sup>28</sup> Workers’ bargaining leverage is also indirectly regulated by the antitrust laws because certain forms of worker coordination—and, importantly, coordination among independent contractors—can be unlawful because, while the Clayton Act formally immunized “legitimate” labor organization activities, the scope of the labor exemption has been significantly narrowed by the courts and does not clearly apply to NLRA-exempted worker coordination.<sup>29</sup> Finally, while federal labor law substantially preempts state and local labor law regulation,<sup>30</sup> state law may enable worker voice through representation in tripartite commissions<sup>31</sup> or allowing shared governance or codeter-

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<sup>27</sup> National Labor Relations Act of 1935 (Wagner-Connery Labor Relations Act), 29 U.S.C. §§ 151–169.

<sup>28</sup> 29 U.S.C. § 153. For the NLRA’s equal bargaining power purpose, see Hafiz, *Structural Labor Rights*, *supra* note 3, at 664–73.

<sup>29</sup> See 15 U.S.C. § 17; Hafiz, *Structural Labor Rights*, *supra* note 3, at 673–77; Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1004–13 (2016).

<sup>30</sup> See, e.g., Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1164–69 (2011).

<sup>31</sup> See Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, 12 HARV. L. & POL’Y REV. ONLINE 1, 6–12 (2017).

mination through employee representation and cumulative voting on corporate boards.<sup>32</sup> Table 1 illustrates the policies and institutions that impact workers' say in the terms and conditions of their work.

TABLE 1: REGULATION OF WORKER VOICE

Factors	Policies and Institutions Impacting Worker Voice	Agencies
Workers' Bargaining Power to Increase Share of Surplus	Unions	NLRB DOJ, FTC, State Attorneys General (labor exemption)
	Multiemployer, Pattern, and Sectoral Bargaining	NLRB State and Local Commissions
	Codetermination, Employee/Retiree Influence Over Corporate Decision-making	SEC (disclosure rules and minimum voting standards) [Accountable Capitalism Act, S. 3348, 115th Cong. (2018) – Office of US Corporations]
Workers' Voice and Control (incomplete contracts)	Labor Regulation (restraining employers' unilateral control over working conditions inside the firm)	NLRB DOL, DOL subagencies (WHD, OSHA), and state/local equivalents EEOC and state/local equivalents

<sup>32</sup> See Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 3 COLUM. BUS. L. REV. 870, 901–03 (2020); Lenore Palladino, *Economic Democracy at Work: Why (and How) Workers Should Be Represented on US Corporate Boards*, 1 J. L. & POL. ECON. 373, 382–89 (2021).

	Antidiscrimination Policies	EEOC and state/local equivalents
	Unions	NLRB DOJ, FTC, State Attorneys General (labor exemption)
	Codetermination, Employee/Retiree Influence Over Corporate Decision-Making	SEC (disclosure rules and minimum voting standards) [Accountable Capitalism Act, S. 3348, 115th Cong. (2018) – Office of US Corporations]

#### 1. National Labor Relations Board.

The NLRB is the sole regulatory agency responsible for ensuring “equal[ ] . . . bargaining power between employers and employees.”<sup>33</sup> The Board is tasked with guaranteeing workers’ substantive rights under § 7 of the NLRA—the rights to organize, collectively bargain, and engage in concerted activity—and enforcing rules against unfair labor practices, including employers’ intimidation or discrimination against workers for organizing, refusal to collectively bargain in good faith, or interference with striking employees.<sup>34</sup> The Board also makes jurisdictional determinations about which workers and employers are protected and have duties and obligations under the Act, including by deciding whether workers are “employees” (protected) or “independent contractor[s]” (unprotected), and whether firms that contract for labor through franchising, outsourcing, or subcontracting are “joint employers” required to collectively bargain with workers.<sup>35</sup> The Board’s interventions, and failures to intervene, in workers’

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<sup>33</sup> 29 U.S.C. § 151.

<sup>34</sup> 29 U.S.C. §§ 157–158(a).

<sup>35</sup> 29 U.S.C. § 152(2)–152(3).

organizing efforts and collective bargaining impact workers' bargaining power relative to employers.<sup>36</sup>

The Board collects significant data and makes factual findings in its enforcement that are directly relevant for ascertaining worker power. First, the Board has a record of employers' non-compliance with the NLRA, including instances where employers committed unfair labor practices by violating workers' right to organize, collectively bargain, or strike. Employer noncompliance can be evidence of monopsony power, or an employer's ability to profitably and unilaterally lower wages and worsen working conditions without workers quitting.<sup>37</sup> But noncompliance can also be evidence of anticompetitive conduct because it can reduce worker welfare and aid in maintaining or enhancing employer monopsony.<sup>38</sup> Existing legal protections establish a baseline against which workers bargain, and noncompliance with those protections by committing unfair labor practices like refusing to bargain in good faith, terminating workers for organizing activity, or misclassifying workers as independent contractors pushes workers below that baseline, reducing their bargaining leverage and ability to counter an employer's monopsony power.<sup>39</sup> It can also harm an employer's rivals by reducing an employer's labor costs, giving that employer a wedge against law-abiding competitors: compliance is costlier than noncompliance,<sup>40</sup> and unionized workers generally receive a wage premium relative to nonunionized workers, as do employees relative to misclassified independent contractors.<sup>41</sup> Thus, noncompliance may be understood as a

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<sup>36</sup> See Hafiz, *Structural Labor Rights*, *supra* note 3, at 673–87 (arguing that NLRA enforcement contributed to employers' stronger bargaining power over workers and advocating for "structural" approach to correct imbalance); see also Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 WIS. L. REV. 1115, 1134–38 (2017) [hereinafter Hafiz, *Economic Analysis*].

<sup>37</sup> Ioana Marinescu & Eric A. Posner, A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony 16 (Roosevelt Inst., Working Paper, 2018).

<sup>38</sup> *Id.* at 14–17.

<sup>39</sup> See generally Benmelech, Bergman & Kim, *supra* note 26.

<sup>40</sup> See, e.g., Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 287–91 (2018).

<sup>41</sup> For union wage premium, see, for example, David Card, *The Effect of Unions on the Structure of Wages: A Longitudinal Analysis*, 64 ECONOMETRICA 957, 976–78 (1996), Henry Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 Q.J. ECON. 1325, 1344–55 (2021), and Barry T. Hirsch & Edward J. Schumacher, *Unions, Wages, and Skills*, 33 J. HUM. RES. 201, 209–13 (1998). But see Brigham R. Frandsen, *The Surprising Impacts of Unionization: Evidence from Matched Employer-Employee Data*, 39 J. LAB. ECON. 861, 879–81 (2021). For independent contractor wage penalties, see, for example, Arindrajit

mechanism for increasing employer monopsony by raising rivals' relative costs.<sup>42</sup>

In addition to records of employer noncompliance, the NLRB collects data and makes factual findings critical for worker power assessments within the administrative state more broadly. Its jurisdictional findings regarding worker and employer exemptions from the NLRA can identify which labor service providers lack organizing protections and may even be subject to antitrust liability for coordinating against employers.<sup>43</sup> Such workers may lack voice as a source of worker power. The Board also receives data about collective bargaining agreement terms, the size of union bargaining units relative to an employer's broader workforce, the history of organizing and strike activity, evidence of employer control of workers' wages and working conditions (including of purported joint employers), and evidence of unions' successor status following mergers and acquisitions. While the NLRB is prohibited from hiring economists to compile and analyze this data,<sup>44</sup> its collection and use of data in investigations and enforcement actions is invaluable for gauging worker power for broader labor market regulatory efforts.

## 2. Antitrust agencies.

The antitrust agencies impact worker voice when they target worker coordination as cartel activity unprotected by the labor

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Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. & LABOR RELS. REV. 287, 291–93 (2010), David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, HARV. BUS. REV. (July 5, 2017), <https://perma.cc/8LXZ-3PJC>, Lawrence Mishel & Josh Bivens, *Identifying the Policy Levers Generating Wage Suppression and Wage Inequality*, ECON. POL'Y INST. 39–42 (May 13, 2021), <https://perma.cc/YS2E-VSUY>, and Maarten Goos, Alan Manning, Anna Salomons, Bas Scheer & Wiljan van den Berge, *Alternative Work Arrangements and Worker Outcomes: Evidence from Payrolling*, CPB 14–16 (Mar. 2022), <https://perma.cc/ZAS2-ZLU7>.

<sup>42</sup> For raising rivals' costs, see, for example, Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 320–24 (2003), Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 230–41 (1986), and Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267, 268–70 (1983).

<sup>43</sup> See 29 U.S.C. § 152(3). For antitrust law and the labor exemption, see, for example, Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. 65, 67–78 (2019), and Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 UNIV. CAL. DAVIS L. REV. 1543, 1559–65 (2018).

<sup>44</sup> 29 U.S.C. § 154(a); Hafiz, *Economic Analysis*, *supra* note 36, at 1119–29.

exemption to the antitrust laws.<sup>45</sup> To the extent the agencies (and reviewing courts) subject worker coordination to criminal sanctions, injunctions, or treble damages liability, they can reduce worker voice and chill worker organizing due to litigation risk.<sup>46</sup>

Antitrust agencies have charged independent contractors with unlawful collusion, and courts have generally held their coordination ineligible for the labor exemption.<sup>47</sup> But while the agencies have expressed interest in expanding the exemption,<sup>48</sup> they have yet to establish a policy on enforcement in misclassification cases. Agency and court analyses of the labor exemption's scope lack clear metrics for determining when independent contractors may coordinate or withhold services free of liability, reinforcing the uncertainty of the exemption's application.

The data and analyses collected in antitrust agency investigations and enforcement are useful for assessing worker voice. They reveal what, if any, agreements—e.g., noncompetition agreements and vertical restraints—that labor providers are subject to strengthen or weaken their bargaining leverage relative to trading partners, including evidence of trading partners' countervailing control over wages and terms and conditions of service.

### 3. State and local regulation.

State and local governments can regulate worker voice under two legal exemptions: exceptions to NLRA preemption and to antitrust law liability under *Parker* immunity, developed in the case

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<sup>45</sup> See, e.g., *FTC v. Super. Ct. Trial Laws. Ass'n*, 493 U.S. 411 (1990) (holding that a boycott of providing court-appointed defense to indigent clients by members of an association of independently employed trial lawyers in an effort to secure higher rates was an unlawful conspiracy to fix prices regardless of “social justifications”); *L.A. Meat & Provision Drivers Union, Loc. 626 v. United States*, 371 U.S. 94 (1962) (holding that a labor union and a subgroup of its members violated antitrust laws by enforcing and agreeing to fixed purchase and sale prices).

<sup>46</sup> See, e.g., Brief of the U.S. Department of Justice, as Amicus Curiae in Support of Neither Party, *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union*, Loc. 798, IATSE, 10-RC-276292, at \*5 (NLRB Feb. 10, 2022).

<sup>47</sup> See *Sup. Ct. Trial Laws. Ass'n*, 493 U.S. 411; *L.A. Meat*, 371 U.S. 94; *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942) (holding that independent fishermen's sales to a fish processor had no bearing on an employer-employee relationship). But see *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306 (1st Cir. 2022) (holding that jockeys' alleged independent-contractor status does not categorically make them ineligible for the labor exemption).

<sup>48</sup> See, e.g., Siri Bulusu, *FTC's Khan Urges Antitrust Legislation to Protect Gig Workers*, BLOOMBERG L. (Sept. 28, 2021), <https://perma.cc/95YK-LWE7>.

*Parker v. Brown*.<sup>49</sup> First, state and local governments can regulate organizing and bargaining by workers exempted from the NLRA or can avoid NLRA preemption when they act as “market participant[s]” intervening to shape labor-management relations through “tripartite lawmaking.”<sup>50</sup> Examples of tripartism include conditioning permits and zoning decisions or infrastructure policy on employer recognition of organizing rules and collective bargaining obligations.<sup>51</sup> Second, *Parker* immunity protects exempted NLRA worker coordination if done under a state’s active supervision.<sup>52</sup> Consistent with these exemptions, state and local governments can strengthen worker voice by creating tripartite commissions with employer and employee representation empowered to decide wages or other standards.<sup>53</sup>

## B. Regulation of Workers’ Exit Options

Worker power is also determined by workers’ exit options and the employers’ outside options to a specific employment relationship: more good jobs, and easier movement between jobs, increases workers’ reservation wage; fewer other suitable workers, and more costs in replacing them, decreases hiring firms’ reservation profit.<sup>54</sup> Government regulation of the relative reservation wages and profits of workers and firms is administered through a wide range of policies by a network of labor and nonlabor agencies. Table 2 illustrates the market forces, policies, and government institutions that impact workers’ and firms’ exit options.

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<sup>49</sup> 317 U.S. 341 (1943).

<sup>50</sup> See Sachs, *supra* note 30, at 1168–90, 1199–1200.

<sup>51</sup> *Id.* at 1174–90.

<sup>52</sup> See N.C. State Bd. of Dental Exam’rs v. FTC, 574 U.S. 494, 511 (2015).

<sup>53</sup> For tripartite wage boards, see Andrias, *supra* note 31, at 10–12. For state corporate law and worker representation, see Palladino, *supra* note 32, at 382–89. State corporate law reforms allowing worker representation on boards may be subject to challenges on preemption and “company union” grounds. 29 U.S.C. § 158(a)(2).

<sup>54</sup> See Marinescu & Rosenfeld, *supra* note 6, at 6–12.

TABLE 2: REGULATION OF WORKERS' EXIT OPTIONS

<b>Factors</b>	<b>Market Forces Impacting Exit</b>	<b>Policies and Institutions Impacting Exit</b>	<b>Agencies</b>
Workers' Reservation Wage	Labor Market Tightness	Macroeconomic Policies to Increase Tightness	Federal Reserve, U.S. Treasury
	Labor Market Concentration	Merger Policy; Antimonopsony Law	DOJ, FTC, State Attorneys General
	Search Costs and Imperfect Information	Unemployment Insurance	DOJ, FTC, State Attorneys General NLRB DOL and State-Level Agencies DOL-OFCCP EEOC and state/local equivalents
	Moving Costs	Mobility Restrictions	DOJ, FTC, State Attorneys General
	Job Differentiation	Occupational Licensing	DOJ, FTC, State Attorneys General State-Level Licensing Boards
	Personal Wealth and Nonlabor Income	Income Assistance	Treasury-IRS (EITC, etc.); USDA (food stamps); HUD (housing); DHHS-OFA (TANF, etc.); SSA (social se-



			curity benefits); VA (veterans' benefits); Department of Education (Pell Grants, student debt); DOL-ETA (training) State Human/Social Service Agencies
	Discrimination	Antidiscrimination Law	EEOC and state/local equivalents
Firm's Reservation Profit	Turnover costs	Job Protections / Firing Costs	Federal Reserve, US Treasury NLRB; EEOC and state equivalents State Law/Courts (just cause)
	Worker differentiation	Minimum Wage/ Maximum Hour Law  Education	DOL, Subagencies (WHD), Office of Federal Contract Compliance Programs (OFCCP), ETA and state equivalents; DOJ/FTC/State Attorneys General (wage discrimination); NLRB; EEOC and

			state/local equivalents; Immigration Agencies (DHS, ICE, DOL)  DOL-ETA, Department of Education
	Training Costs	Training/Apprenticeship Programs	DOL-ETA State Human/Social Service Agencies
	Discrimination	Antidiscrimination Law	DOL EEOC and state/local equivalents
	Credit Constraints	Small business loans, etc.	Federal Reserve, FDIC, NCUA, OCC, CFPB, SBA

### 1. Federal labor agencies.

Regulation by three core labor agencies impacts workers' and employers' exit options: the Department of Labor (DOL) and its subagencies, the Equal Employment Opportunity Commission (EEOC), and the NLRB.

First, labor agencies can impact firms' reservation profit by regulating firms' access to outside options in the form of cheaper labor inputs. Most importantly, the DOL's Wage and Hour Division (WHD) imposes a wage floor by establishing minimum wages, maximum hours, and overtime regulation, and clarifies thresholds of employee eligibility, employer status, and exemptions from liability.<sup>55</sup> The DOL's Occupational Safety and Health Administration (OSHA) imposes minimum safety and health standards that set a floor for risk-adjusted wages: employers cannot reduce the quality of employment in their workplaces below a

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<sup>55</sup> See Fair Labor Standards Act, 29 U.S.C. §§ 201–219.

regulated level of risk exposure.<sup>56</sup> Minimum wage and workplace safety and health laws also prevent firms from taking advantage of worker differentiation to the extent that some workers are willing to work for lower wages or under worse working conditions. The EEOC administers Title VII, which prohibits employers from hiring, firing, or differentiating between workers on a discriminatory basis based on protected classifications (race, color, religion, sex, and national origin).<sup>57</sup> By establishing higher minimum wages and labor standards in project labor agreements with federal contractors, the DOL can lift those floors even higher.<sup>58</sup> And the DOL's Employment and Training Administration (ETA) can fund and administer specialized skills trainings that make workers harder to replace.<sup>59</sup> Finally, the NLRB can support collectively bargained-for job protections (increasing firms' firing costs) and closed shop agreements (limiting employer hiring to union-only workers or union hiring halls).

Second, labor agencies can increase worker power by easing workers' access to outside options, thus increasing their reservation wage. While states fund unemployment insurance as a backstop allowing workers to survive without a job, the DOL's Education and Training Administration (ETA) administers job-training and worker-dislocation programs to train or retrain workers, especially those dislocated by layoffs, downsizing, and corporate restructuring. Along with the DOL's Office of Unemployment Insurance Modernization, it administers and provides oversight to federal grants to state and local workforce-development agencies. Additionally, the labor agencies can decrease workers' search costs and remedy imperfect information in labor markets by requiring employer notice of workers' labor and employment rights as well as of employers' noncompliance. The EEOC, NLRB, and the DOL's Office of Federal Contract Compliance (OFCCP) can increase wage transparency and even impose salary-history bans to enable workers to strike better deals.<sup>60</sup> And the DOL's Employee Benefits Security

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<sup>56</sup> Occupational Safety and Health Act, 29 U.S.C. §§ 651–678.

<sup>57</sup> Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e–2000-17.

<sup>58</sup> See Exec. Order No. 14,063, 87 Fed. Reg. 7,363 (Feb. 4, 2022); 20 C.F.R. § 10; 23 C.F.R. § 230.

<sup>59</sup> *About Us*, U.S. DEP'T OF LABOR EMP. & TRAINING ADMIN, <https://perma.cc/TKY9-6MFM>.

<sup>60</sup> The EEOC collects pay-related questions under the EEO-1 Component 2 diversity survey. See, e.g., Anne Cullen, *EEOC Leader Says Wage Data Crucial to Pay Equity*,

Administration can reduce workers' moving costs through easing the portability of and reducing the leakage from workers' retirement savings when they change jobs.

In all, the labor agencies collect and analyze data and have employer compliance records that offer a much clearer picture of workers' outside options relative to looking merely at the number and size of competitor employers alone. Specifically, they reveal, at a much more granular level, the extent to which workers have and can exercise quit threats for more bargaining leverage to improve their compensation.

## 2. Federal antitrust agencies.

Federal antitrust enforcement by the Department of Justice (DOJ)'s Antitrust Division and Federal Trade Commission (FTC) also impacts firms' reservation profit and workers' reservation wage and can reduce employer monopsony power and increase worker power.

While most regulation of firms' outside options is governed by labor law, the antitrust agencies can reduce *employers'* outside options through a number of levers. First, as discussed, expansive interpretation of the labor exemption would lower firms' outside options by allowing workers to collectively refuse to deal with firms that do not meet their compensation standards. Second, by limiting wage discrimination against independent contractors as an unlawful exercise of firm monopsony, agencies could limit dominant firms' outside hiring options in the labor market.<sup>61</sup> And third, by prohibiting employers' use of anticompetitive vertical restraints in labor and product markets, agencies can reduce firms' outside options. For example, Uber's combined use of vertical price and nonprice restraints (like nonlinear pay and minimum

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LAW360 (Mar. 24, 2022), <https://perma.cc/NL5Q-FZXZ>. The NLRB protects collective bargaining overcompensation scales ratified in collective bargaining agreements accessible to employees and voluntarily disclosed to the DOL's Office of Labor-Management Standards. The Biden Administration has encouraged the DOL to issue rules enhancing pay equity and transparency for job applicants, including through salary-history bans in federal contracting. See Exec. Order No. 14,069, 87 Fed. Reg. 15,315 (Mar. 15, 2022); *Directive 2022-01*, U.S. DEPT OF LABOR OFF. OF FED. CONT. COMPLIANCE PROGRAMS (Mar. 15, 2022), <https://perma.cc/PY49-RR2L>.

<sup>61</sup> See Sherman Antitrust Act, 15 U.S.C. § 2. Hiring independent contractors instead of employees can allow employers to wage discriminate by paying internal labor market wages to employees and lower market wages to contracted workers. See, e.g., Weil, *supra* note 3, at 76–91. Agencies' narrow interpretation of the labor exemption as inapplicable to independent contractor coordination and refusals to deal may enable firms' wage discrimination between employees and independent contractors.

acceptance rates) can reduce steering, increase drivers' switching costs, and reduce drivers' take-home pay.<sup>62</sup> Prohibiting firms from using certain vertical restraints can reduce firms' contracting options for labor inputs and, thus, their reservation profit. Restraints of concern include price and nonprice restraints in product markets, such as input purchase requirements, that reduce labor demand as a complementary input.<sup>63</sup>

But the agencies have more policy levers to increase *workers'* outside options through enforcement, effectively lifting workers' reservation wage. First, the agencies' enforcement of the antitrust laws' prohibition of unlawful monopsony and anticompetitive employer agreements can increase workers' bargaining power and reduce workers' search and moving costs between employers. For example, enforcement against exclusionary agreements tying workers to firms for lengthy contract periods or against mobility restraints on workers' ability to switch employers or start their own firms—like noncompete, no-poach, training-repayment, non-disclosure, and other provisions—increases workers' outside options.<sup>64</sup> Enforcing against horizontal agreements between employers that restrain compensation or hiring is particularly critical because workers often lack knowledge of them. Workers are not parties to agreements between employers, and employers are incentivized to keep such agreements secret because they can violate the antitrust laws.<sup>65</sup> Pervasive use of noncompete agreements can suppress employment opportunities and increase search costs for both employers and workers market-wide.<sup>66</sup> Further, antitrust agencies' merger enforcement reduces labor market concentration, which can increase labor market competition

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<sup>62</sup> See, e.g., Marshall Steinbaum, *The Antitrust Case Against Gig Economy Labor Platforms*, LPE BLOG (Apr. 7, 2022), <https://perma.cc/R67W-RHBL>.

<sup>63</sup> See generally Hafiz, *Brand Defense*, *supra* note 3, at 33–35.

<sup>64</sup> Other agencies can facilitate worker mobility to increase workers' outside options, including by subsidizing housing under the Fair Housing Act (administered by the U.S. Department of Housing and Urban Development) and by regulating mortgage lending (administered by the CFPB).

<sup>65</sup> See, e.g., Hafiz, *Structural Labor Rights*, *supra* note 3, at 658.

<sup>66</sup> See Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 190–91 (2020).

and limit firms' ability to unilaterally set or coordinate compensation.<sup>67</sup> Finally, enforcement against occupational licensing restrictions can increase workers' ability to switch jobs and move across jurisdictions, increasing their outside options.<sup>68</sup>

Through their enforcement, antitrust agencies collect a significant amount of data and produce analyses of that data. First, through merger enforcement, the agencies collect labor market-power evidence, including wage and other data regarding employee compensation and employment contract provisions such as noncompetes. Additionally, the agencies conduct market-definition and market-power analyses, economic analyses of wage transactions, analyses of collusion and the impacts of employers' horizontal and vertical agreements, and analyses of the unilateral and coordinated labor market effects of mergers and acquisitions.

### 3. Other federal and state agencies.

Finally, other federal and state agencies impact workers' and firms' exit options through policies that increase labor market tightness, workers' personal wealth and nonlabor income, firm credit, worker differentiation, or decrease job differentiation.

First, federal agencies setting macroeconomic policy can increase worker power by lowering investment costs and increasing job availability.<sup>69</sup> The Federal Reserve is tasked with setting monetary policy and interest rates that can stimulate investment and raise employment.<sup>70</sup> The federal government also utilizes policy levers impacting workers' personal wealth, which can increase their reservation wage and ability to hold out for better employment bargains. The U.S. Treasury Department and Internal Revenue Service enforce the tax code, including the Earned Income Tax Credit (EITC) and Child Tax Credit (CDC) that put more cash in workers' and working families' pockets but, because

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<sup>67</sup> 15 U.S.C. § 18; *Horizontal Merger Guidelines*, U.S. DEPT OF JUST. 2 (Aug. 19, 2010), <https://perma.cc/GJM6-2CDB>; see Marinescu & Rosenfeld, *supra* note 6, at 4.

<sup>68</sup> See Marinescu & Rosenfeld, *supra* note 6, at 13–14.

<sup>69</sup> *Id.* at 13.

<sup>70</sup> *Id.* at 16. The U.S. Treasury Department also impacts investment and employment by managing federal spending and implementing monetary policy. Immigration agencies regulate migration that can not only impact labor market tightness but also chill undocumented worker complaints for employer noncompliance. See, e.g., Amanda M. Grittner & Matthew S. Johnson, *When Labor Enforcement and Immigration Enforcement Collide: Deterring Worker Complaints Worsens Workplace Safety* 14 (Upjohn Inst., Working Paper No. 21-353, 2021).

they are conditional on work, can decrease labor market tightness and, thus, workers' take-home wage.<sup>71</sup> Cash and in-kind assistance programs can also increase workers' reservation wage due to their income effects.<sup>72</sup> Other federal agencies—the Treasury Department (and its subagencies), Consumer Financial Protection Bureau (CFPB), Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Small Business Administration (SBA)—impact commercial and retail lending, or firms' access to credit, as well as individuals' credit access as a source of personal wealth or as a means of establishing new firms to compete with employers. And federal student loan and job-training programs—administered by the U.S. Department of Education and the DOL's ETA—can decrease mobility-limiting job differentiation by expanding the jobs workers are eligible for through providing higher or more general skills training. Those loans and training programs can also increase worker differentiation by allowing higher worker specialization that makes workers more difficult to replace. Both can thus increase workers' reservation wage.

State and local governments can increase workers' reservation wage by allocating and administering unemployment insurance benefits as well as human or social service programs for low-income workers and families. State-level agencies primarily administer unemployment insurance, sometimes with federal supplements, and data pertaining to administration of those programs is collected by the ETA's Unemployment Insurance Data program.<sup>73</sup> Some state and local governments have created and

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<sup>71</sup> Marinescu & Rosenfeld, *supra* note 6, at 20–21.

<sup>72</sup> In-kind benefits include but are not limited to: Fair Housing Act benefits, 42 U.S.C. §§ 3601–3631 (administered by the Department of Housing and Urban Development); Affordable Care Act health care benefits, 124 Stat. 119, 119–130 (administered by the Department of Human Health and Services and Centers for Medicare & Medicaid Services, among others); Social Security Act benefits, 42 U.S.C. §§ 1301–1305 (administered by the Social Security Administration); Temporary Assistance for Needy Families Program benefits, 42 U.S.C. §§ 601–619; 42 U.S.C. § 1308 (administered by Office of Family Assistance); veterans' benefits (administered by the Veterans Benefits Administration and DOL's Veterans' Employment and Training Service); Lifeline Program benefits from the Universal Service Fund (administered by the Federal Communication Commission's Universal Service Administrative Company); and food stamps, 7 U.S.C. §§ 2011–2036d (administered by the Department of Agriculture).

<sup>73</sup> See *Unemployment Insurance Data*, U.S. DEP'T OF LAB. EMP. & TRAINING ADMIN., <https://perma.cc/6SV9-SK3A> (last updated July 7, 2022). Data on unemployment is collected by the BLS's Local Area Unemployment Statistics program. *Local Area Unemployment Statistics*, U.S. BUREAU OF LAB. STAT., <https://perma.cc/MQ3W-Z577> (last modified Mar. 20, 2020).

administer unconditional cash programs, but while such transfers increase consumer spending, which can tighten labor markets by increasing employment and, thus, worker power, there is still no direct evidence of reservation-wage effects.<sup>74</sup> Finally, state and local government agencies administer broader social insurance programs for income supports, workforce development, education programs, health and nutrition benefits, and housing.<sup>75</sup> Many of these programs have work requirements, which can blunt their ability to generate worker power by increasing labor supply, decreasing labor market tightness and, therefore, wages.<sup>76</sup>

### C. Regulatory Slack and Worker Power

While government agencies use policy levers and gather data relevant for assessing employer and worker power, regulatory slack can weaken their impact due to resource constraints and jurisdictional limitations.

First, the labor agencies face significant budgetary and staffing constraints that limit their enforcement against employer labor and employment law violations, including wage theft, worker misclassification, workplace safety and health violations, and unlawful union busting.<sup>77</sup> As their budgets have stagnated or been cut over the last decades, the number of workers and workplaces that they are responsible for has only increased.<sup>78</sup> The antitrust

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<sup>74</sup> Marinescu & Rosenfeld, *supra* note 6, at 19. For an overview of UBI research, see *Visualizing UBI Research*, STANFORD BASIC INCOME LAB, <https://basicincome.stanford.edu/research/ubi-visualization/>.

<sup>75</sup> For an overview, see, for example, Mitchell Barnes, Lauren Bauer, Wendy Edelberg, Sara Estep, Robert Greenstein & Moriah Macklin, *The Social Insurance System in the U.S.: Policies to Protect Workers and Families*, BROOKINGS INST. (June 2021), <https://perma.cc/E2G5-NJY8>.

<sup>76</sup> Marinescu & Rosenfeld, *supra* note 6, at 19–21.

<sup>77</sup> See, e.g., David Weil, *Improving Workplace Conditions Through Strategic Enforcement*, U.S. DEP'T OF LABOR 5–8 (May 2010), <https://perma.cc/Z38B-NBLB>; Ihna Mangundayao, Celine McNicholas, Margaret Poydock & Ali Sait, *More Than \$3 Billion in Stolen Wages Recovered for Workers Between 2017 and 2020*, ECON. POL'Y INST. 4 (Dec. 22, 2021), <https://perma.cc/7XGN-5KFG>; Ann Rosenthal, *Death by Inequality: How Workers' Lack of Power Harms Their Health and Safety*, ECON. POL'Y INST. 17–21 (Apr. 19, 2021), <https://perma.cc/7WYR-V24E>; National Labor Relations Board: *Meaningful Performance Measures Could Help Improve Case Quality, Organizational Excellence, and Resource Management*, GAO 13–18 (Mar. 2021), <https://perma.cc/NSR7-LXDG>.

<sup>78</sup> See Weil, *supra* note 77, at 5–15; Ihna Mangundayao & Celine McNicholas, *Congress Should Boost NLRB Funding to Protect Workers' Wellbeing*, ECON. POL'Y INST. WORKING ECON. BLOG (Feb. 28, 2022), <https://perma.cc/V9AB-LGZ3>.



agencies similarly face financial resource and manpower constraints to challenging anticompetitive conduct in labor markets.<sup>79</sup> Agencies administering social insurance and social safety net programs face similar challenges.<sup>80</sup>

Theoretically, private rights of action enabling civil enforcement could make up for agencies' regulatory slack. But some statutes—like the NLRA, Occupational Safety and Health Act (OSH Act), and the Federal Trade Commission Act (FTC Act)—do not grant private rights of action.<sup>81</sup> And private enforcement faces significant obstacles, including information barriers regarding employer collusion, procedural obstacles to certifying class actions, mandatory arbitration provisions and class action waivers in employment and other contracts, the lack of natural corporate plaintiffs, and the risk and expense of bringing suits.<sup>82</sup>

Second, legislative carve-outs and narrow judicial interpretations of agencies' jurisdiction and authority have limited agencies' ability to reduce employer power and increase worker power. Federal labor and employment statutes exempt a number of workers from their protections, including independent contractors, supervisory and managerial workers, farmworkers, domestic and home care workers, and state and local employees.<sup>83</sup> Courts have interpreted these exemptions broadly.<sup>84</sup> Federal law also limits the types of employers accorded duties and obligations to workers, and there is significant legal uncertainty as to whether firms that fissure, outsource, or subcontract for labor inputs are subject to

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<sup>79</sup> See, e.g., Bryan Koenig, *Limited Resources Will Test DOJ Preference for Merger Suits*, LAW360 (Jan. 26, 2022), <https://perma.cc/7WTS-DFCT>; Christine S. Wilson, *Governing is Hard: Antitrust Enforcement in the First Year of the Biden Administration*, U.S. FED. TRADE COMM'N 5–6 (Jan. 26, 2022), <https://perma.cc/8DB5-5L8S>; Bill Baer, Jonathan B. Baker, Michael Kades, Fiona Scott Morton, Nancy L. Rose, Carl Shapiro & Tim Wu, *Restoring Competition in the United States: A Vision for Antitrust Enforcement for the Next Administration and Congress*, WASH. CTR. FOR EQUITABLE GROWTH 14–15 (Nov. 2020), <https://perma.cc/YUX7-5KC3>.

<sup>80</sup> See, e.g., THEODORE R. MARMOR, JERRY L. MASHAW & JOHN PAKUTKA, *SOCIAL INSURANCE: AMERICA'S NEGLECTED HERITAGE AND CONTESTED FUTURE* 40–46 (2014).

<sup>81</sup> But see 29 U.S.C. § 185(a); *Boys Mkts., Inc. v. Retail Clerks Union*, Loc. 770, 398 U.S. 235 (1970) (finding that the Norris-LaGuardia Act did not prohibit granting injunction under narrow circumstances).

<sup>82</sup> Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1362–82 (2020).

<sup>83</sup> See 29 U.S.C. § 152(3); 29 U.S.C. § 213; 42 U.S.C. § 2000e(f); 29 U.S.C. § 1002(6).

<sup>84</sup> See Hafiz, *Structural Labor Rights*, *supra* note 3, at 677–79 (collecting cases).

compliance requirements under law as “joint employers.”<sup>85</sup> Further, antitrust courts have issued inconsistent decisions in labor antitrust cases, establishing limited precedent.<sup>86</sup>

### III. STRENGTHENING WORKER POWER THROUGH REGULATION

While agencies administer a number of policies impacting the relative power of employers and workers, they lack uniform metrics for assessing that power when administering their regulatory mandates, whether in the investigation, enforcement, remedial, or postremedial stages. Further, agencies lack robust institutional relationships for sharing data and analyses relevant for assessing employer or worker power. Such sharing is necessary to avoid regulatory arbitrage and ensure a coherent, whole-of-government approach to effectively increasing worker power. An interagency approach is also critical for setting and achieving enforcement priorities where workers may need it most. This Part outlines a regulatory checklist of bargaining power indicators, identifying a uniform set of metrics and relevant data that agencies could use to assess employer and worker power. It then draws from the empirical literature to propose policy priorities for interagency enforcement based on their demonstrated ability to increase worker power.

#### A. Regulatory Checklist of Bargaining Power Indicators

Agencies can use many measures to gauge worker power through the exit or voice dimensions. Data sharing across agencies would improve those measures, making enforcement more effective. And once data have been pulled out, documented, and shared, it is easier to reshare them.<sup>87</sup>

The following Table lists indicators of worker and employer power based on exit and voice, identifying public and private data sources that report them:

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<sup>85</sup> Weil, *supra* note 3, at 183–213; see also Hafiz, *Structural Labor Rights*, *supra* note 3, at 656–58.

<sup>86</sup> See Marinescu & Posner, *supra* note 82, at 1362–82; Hiba Hafiz, *Labor Antitrust’s Paradox*, 86 U. CHI. L. REV. 381, 392–99 (2020).

<sup>87</sup> Agencies need memoranda of understanding (MOUs) to facilitate data sharing, and such MOUs have already been signed between the antitrust and labor agencies.

TABLE 3: BARGAINING POWER INDICATORS BASED ON EXIT AND VOICE

Factors	Indicators of Worker/Employer Power	Public and Private Data Sources
Workers' Exit Options	<p>Labor market tightness (number of job vacancies / number of unemployed)</p> <p>Labor market concentration</p> <p>Labor share</p> <p>Minimum wage</p> <p>Employer violations of workers' rights (working conditions, hiring and firing)</p> <p>Employer antitrust law violations (unlawful monopsony, wage fixing, mobility restraints, market allocation agreements, other vertical restraints)</p>	<p>Number of job vacancies: BLS JOLTS, Burning Glass Technologies</p> <p>Number of unemployed: BLS Current Population Survey &amp; LAUS</p> <p>Burning Glass Technologies</p> <p>BLS Office of Productivity and Technology</p> <p>DOL Minimum Wage Rate by State</p> <p>NLRB, OSHA, EEOC, Good Jobs First Violation Tracker</p> <p>DOJ/FTC Case Files</p>
Workers' Voice and Control (incomplete contracts)	<p>Union membership</p> <p>Strike activity</p> <p>Organizing drives</p> <p>Employer NLRA violations</p>	<p>BLS Current Population Survey</p> <p>BLS Work Stoppages Program, NLRB Case Files/Activity Reports, DOJ/FTC Case Files ("independent contractors")</p> <p>NLRB Case Files/Activity Reports</p> <p>NLRB Case Files/Activity Reports, Good Jobs First Violation Tracker</p>

These worker power indicators can help gauge how much power workers have in specific geographic locations, occupations, or industries. We already discussed most indicators and related concepts above, except for the labor share.<sup>88</sup> The labor share is the fraction of output that goes to workers in the form of labor compensation. When the labor share decreases, it suggests that workers have lower power.<sup>89</sup>

## B. A Whole-of-Government Agenda for Worker Power

While worker power indicators can aid agencies in determining which labor markets they should target for enforcement, an evidence-based approach may also be used to rank policy priorities based on their demonstrated ability to increase worker power. This Section draws from current empirical knowledge in the worker power literature to identify those priorities. It also maps out mechanisms by which interagency coordination could aid in effectuating them.

### 1. Policy priorities to enhance worker voice.

Building labor market institutions, such as labor unions, that give workers voice is a promising means of increasing workers' bargaining power to increase wages and improve working conditions. Unionized workers receive a "union wage premium" of between 15–25% and more generous benefits relative to similarly situated nonunion workers.<sup>90</sup> But unions can also lift wages and working conditions offered by nonunion employers competing

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<sup>88</sup> Michael D. Giandrea & Shawn Sprague, *Estimating the U.S. Labor Share*, U.S. BUREAU OF LAB. STAT. (Feb. 2017), <https://perma.cc/6VHP-LZJW>.

<sup>89</sup> When the labor share decreases, it could indicate an increase in capital investment: if there is more capital relative to labor in production, then the labor share is smaller, as capital is compensated for its contribution to production. When firms invest in capital, it does not necessarily lower the labor share if firms also use more labor to go with that additional capital. The labor share decreases only when labor is substituted with capital. Firms substituting capital for labor can be an indication of a decline in worker power. See, e.g., JAN ECKHOUT, *THE PROFIT PARADOX* 71–94 (Joe Jackson & Josh Drake eds., 2021).

<sup>90</sup> JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 45–51 (2014); see also, e.g., Farber, Herbst, Kuziemko & Naidu, *supra* note 41, at 1346; Thomas C. Buchmueller, John Dinardo & Robert G. Valletta, *Union Effects on Health Insurance Provision and Coverage in the United States*, 55 INDUS. & LAB. RELS. REV. 610, 615–25 (2002); Hirsch & Schumacher, *supra* note 41, at 209–13; Card, *supra* note 41, at 976–78. But see Frandsen, *supra* note 41, at 79–81.

with unionized employers for labor inputs.<sup>91</sup> Strengthening union density will require a suite of labor law reforms that may include (but are not limited to) passage of the Protecting the Right to Organize Act (PRO Act), reforms to ease union recognition, sectoral and supply chain bargaining, “Ghent system” reforms, and worker representation on corporate boards.<sup>92</sup> But empirical evidence supports a number of promising avenues for increasing worker voice under the NLRB’s existing authority. This Section proposes tools to more effectively deter employer noncompliance and reverse some contributing causes of union decline. It then offers guidance on interagency coordination that can strengthen those tools and better support labor market institution building to enhance worker voice.

First, the NLRB has adjudicated the legality of a range of employer practices alleged to interfere with workers’ attempts to unionize and collectively bargain without drawing from or relying on empirical studies regarding their decisions’ effects on worker power.<sup>93</sup> The empirical literature now more clearly shows the adverse effects of employer conduct on unionization efforts, justifying overturning prior NLRA interpretations as inconsistent with its equal-bargaining power purpose. The most promising candidates for review based on the literature are: employer use of mandatory “captive audience” meetings in their anti-union drives,<sup>94</sup> allowing worker demonstration of majority support through card-

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<sup>91</sup> See, e.g., Nicole M. Fortin, Thomas Lemieux & Neil Lloyd, *Labor Market Institutions and the Distribution of Wages: The Role of Spillover Effects* 3–12 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28375, 2021); Patrick Denice & Jake Rosenfeld, *Unions and Nonunion Pay in the United States, 1977–2015*, 5 SOCIO. SCI. 541, 551–52 (2018); Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOCIO. REV. 513, 524–33 (2011).

<sup>92</sup> Marinescu & Rosenfeld, *supra* note 6, at 36–40 (collecting proposals).

<sup>93</sup> See Hafiz, *Structural Labor Rights*, *supra* note 3, at 683–88.

<sup>94</sup> For workers’ right to refrain from captive audience meetings, see Jennifer A. Abruzzo, *Memorandum GC 22-04*, NLRB OFF. OF GEN. COUNS. (Apr. 7, 2022), <https://perma.cc/4KC2-R7S7>. Between 1999 and 2003, employers held captive audience meetings in 89% of union election campaigns. See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL’Y INST. 9–12, 10–11 Table 3 (May 20, 2009), <https://perma.cc/YWC5-PRWX>. Union win rates in elections without captive audience meetings were 73% compared to 47% when management required such meetings. *Id.* For corporate financing of anti-union consultants, see Gordon Lafer & Lola Loustau, *Fear at Work: An Inside Account of How Employers Threaten, Intimidate, and Harass Workers to Stop Them from Exercising Their Right to Collective Bargaining*, ECON. POL’Y INST. 8–20 (July 23, 2020), <https://perma.cc/T8Q9-XT95>.

check recognition to trigger employer collective bargaining duties,<sup>95</sup> and adopting a more expansive definition of “employee” to avoid employer “independent contractors” misclassification of employees.<sup>96</sup> Finally, the Board might seek more expansive penalties—such as consequential damages for economic losses employees suffered due to employers’ unfair labor practices—based on empirical evidence of the limited deterrence value of standard penalties like notice posting, back pay, or reinstatement.<sup>97</sup> These remedies could include more aggressive use of bargaining orders to overcome employer delays in reaching a first collective bargaining agreement that reduce worker voice.<sup>98</sup>

Second, while there are a number of contributing causes to union-density decline in the private sector, some include workplace restructuring, the “gigification” of the workforce, and low

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<sup>95</sup> For workers’ right to union recognition through card check, see Jennifer A. Abruzzo, *Memorandum GC 21-04*, NLRB OFF. OF GEN. COUNS. (Aug. 12, 2021), <https://perma.cc/287H-S6RL>. For empirical studies on union success rates through card check as compared to elections with limited adverse coworker or organizer pressure, see generally, for example, Timothy D. Chandler & Rafael Gely, *Card-Check Laws and Public-Sector Union Membership in the States*, 36 LAB. STUD. J. 445 (2011), Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. RELS. REV. 157 (2009), and Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LABOR RELS. REV. 42 (2001).

<sup>96</sup> For prevalence and effects of employee misclassification, see *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT’L EMP. LAB. PROJECT 2–5 (Oct. 2020), <https://perma.cc/9H4E-JWC2>. For monopsony evidence of wage penalties due to employer misclassification, see, for example, Weil, *supra* note 3, at 88–91; Dube & Kaplan, *supra* note 41, at 291–93; Matthew Dey, Susan Houseman & Anne Polivka, *What Do We Know About Contracting Out in the United States? Evidence from Household and Establishment Surveys*, 2010 LABOR IN THE NEW ECON. 267, 270–71. For proposed expansion of “employee” status under the NLRA, see Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, CLEAN SLATE FOR WORKER POWER 25–26 (2020), <https://perma.cc/QLX4-4EBP>.

<sup>97</sup> See, e.g., Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?* 30–33 (Peterson Inst. for Int’l Econ., Working Paper No. 21-9, 2021). For the NLRB’s expansive remedial authority, see Jennifer A. Abruzzo, *Memorandum GC 21-06*, NLRB OFF. OF GEN. COUNS. (Sept. 8, 2021), <https://perma.cc/ZK43-CKMV>.

<sup>98</sup> Empirical studies show that employers’ appeals of Board orders can delay bargaining by three to five years, and over half of all new bargaining units do not have a first collective bargaining agreement within a year of a union election. See Kamala D. Harris & Martin J. Walsh, *White House Task Force on Worker Organizing and Empowerment: Report to the President*, WHITE HOUSE 22 (Feb. 2022), <https://perma.cc/WB2F-VXV7>; Bronfenbrenner, *supra* note 94, at 22; John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. RELS. REV. 3, 5 (2008). For NLRB authority to issue collective bargaining orders, see generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

union density itself increasing employers' incentives to resist unionization to avoid higher labor costs relative to nonunionized employers.<sup>99</sup> By displacing labor and employment law obligations to smaller, less accountable companies, or removing those obligations entirely by misclassifying employees as independent contractors, strong employers have exempted themselves from duties to bargain with workers over compensation or working conditions, reducing workers' ability to assert countervailing leverage over them.<sup>100</sup> Reversing these causes may increase worker power.<sup>101</sup> For example, lowering burdens for workers to engage in enterprise-wide bargaining (like the McDonald's franchise network) by recognizing upstream firms' control over downstream firms' labor costs could expand union density significantly.<sup>102</sup> And expanding worker protections to picket and boycott firms with market power in their employer's product or relevant labor market could increase workers' leverage over their own employer and potentially industry wide.<sup>103</sup>

In addition to redirecting its own authority and resources towards increasing worker power, the NLRB could benefit from and aid interagency coordination to do the same.<sup>104</sup> First, the Board can share its own data, information, and evidence of employer noncompliance as indicators of employer and worker power with other agencies, especially the antitrust agencies. As noted below, employer noncompliance with labor law can be evidence of employer monopsony power and anticompetitive conduct in labor

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<sup>99</sup> Marinescu & Rosenfeld, *supra* note 6, at 27–30.

<sup>100</sup> See generally Weil, *supra* note 3, at 10–22.

<sup>101</sup> For the impacts of workplace fissuring on labor law compliance, see Weil, *supra* note 3, at 214–42; Mark Barenberg, *Widening the Scope of Worker Organizing*, ROOSEVELT INST. 11–13 (Oct. 7, 2015), <https://perma.cc/6ZYP-6QJR>.

<sup>102</sup> For a proposal to implement enterprise bargaining structures in franchising, see Hafiz, *Brand Defense*, *supra* note 3, at 73–74, and *id.* at 65–72 (collecting literature on franchisor control of franchisee labor costs).

<sup>103</sup> See Hiba Hafiz, *Picketing in the New Economy*, 38 CARDOZO L. REV. 1845, 1894–1906 (2018). For impact of vertical restraints on labor markets, see Callaci, Pinto, Steinbaum & Walsh, *supra* note 4, at 10–22; Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511, 522–26 (2023), <https://perma.cc/M9R6-L9CV>; Tirza J. Angerhofer & Roger D. Blair, *Collusion in the Labor Market: Intended and Unintended Consequences*, COMPETITION POL'Y INT'L, ANTITRUST CHRON., June 12, 2020, at 6; Hafiz, *Brand Defense*, *supra* note 3, at 53–71.

<sup>104</sup> The NLRB signed MOUs with the antitrust agencies, enabling information sharing and referrals. See *supra* note 10. For best practices on interagency coordination, see Hiba Hafiz, *Interagency Coordination on Labor Regulation*, 6 ADMIN. L. REV. 199, 225–29 (2021) [hereinafter Hafiz, *Interagency Coordination*].

and product markets. Also, employers who commit labor law violations effectively pay lower wages and put themselves at an advantage relative to their rivals, which can be a competition issue. Evidence of noncompliance or low unionization rates can be red flags to other agencies regarding which labor markets particularly suffer from higher employer power or weaker worker power to inform agency enforcement priorities, instigate referrals and investigations, and use as evidence in enforcement proceedings. The Board's data and enforcement record can also inform antitrust agencies' merger reviews, aiding their evaluation of mergers' labor market effects. For example, the Board can advise the agencies on the successor status of existing unions in the merging firms' labor market(s), conditioning merger approvals on Board-administered elections or card-check recognition, and establishing accelerated, mandatory mediation for resolving unfair-labor-practice disputes or collective bargaining impasses as components of consent decrees and remedies imposed in antitrust cases. The Board's collected data could also aid the antitrust agencies in assessing anticipated effects from mergers based on richer information and context regarding employer and worker bargaining power within respective firms (voice) as opposed to relying merely on evidence of workers' outside options (exit). And the Board could take a more active role in designing consent decrees and remedies for antitrust violations impacting labor markets by advising the antitrust agencies on how to preserve and strengthen worker power in the postremedial environment.<sup>105</sup>

The Board could also benefit from receiving data, information, and analyses from other agencies, especially the antitrust agencies, to inform its own enforcement priorities, supplement investigations, and support evidence in its own enforcement actions, particularly because the statutory ban on Board hiring of economists limits its economic analysis of the relative bargaining power of employers and employees.<sup>106</sup> During their investigations, enforcement actions, and merger reviews, antitrust agencies collect and analyze: market power evidence; labor market concentration evidence; wage and other data from merging employers; evidence of wage fixing, no-poach agreements, and other

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<sup>105</sup> See, e.g., Hiba Hafiz, *Rethinking Breakups*, 71 DUKE L.J. 1491, 1580–92 (2022) [hereinafter Hafiz, *Rethinking Breakups*]. See generally Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 CHI.-KENT L. REV. 37 (2020) [hereinafter Hafiz, *Interagency Merger Review*].

<sup>106</sup> See 29 U.S.C. § 154(a); Hafiz, *Economic Analysis*, *supra* note 36, at 1119–31.



mobility restraints in agreements between employers and in employment contracts and their impacts on labor markets; and the effects of mergers in labor markets.

Data and analyses from the antitrust agencies could aid the Board in its strategic enforcement against employer unfair labor practices as well as with its “joint employer” and “employee” status determinations. First, where the antitrust agencies collect evidence of employer buyer power, anticompetitive conduct in labor markets, or merger-specific labor market effects, their evidence and market power analyses can be used to set or adjust NLRB enforcement priorities to focus on labor markets most in need of government intervention. Second, data and analyses from the antitrust agencies are relevant for Board assessments of whether firms should be understood as “joint employers” or whether labor-input providers should be understood as “employees” rather than “independent contractors” based on a thicker understanding of upstream firms’ indirect control over downstream firms’ labor demand (hiring) and variable costs (wages as complementary inputs) as well as workers’ exit options, or opportunities for profit or loss. The Board may even use evidence of firm wage-setting power, employer collusion, or bargaining leverage in agreements for labor services to presume “joint employer” or “employee” status to upstream firms or purported “independent contractors,” expanding the NLRA’s duties to collectively bargain and extending protections to organizing workers.<sup>107</sup> But the Board could also use this evidence in determining the scope of employers’ protected rights and unfair labor practices to ensure equal bargaining power between employers and employees.<sup>108</sup>

## 2. Policy priorities to enhance worker exit.

Policy levers strengthening worker power through exit require an interagency approach since an expansive set of labor, antitrust, and other policies shape employers’ and workers’ outside options. More specifically, the empirical literature points to three priority areas for enforcement and interagency collaboration due to their high potential for effectively increasing worker

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<sup>107</sup> See, e.g., Andrew Elmore, Sachin S. Pandya & Kate Griffith, *Rebooting Joint-Employer with Presumptions—A Modest Proposal*, ONLABOR (July 7, 2022), <https://perma.cc/6SGS-S32A>; Hafiz, *Interagency Coordination*, *supra* note 104, at 232–38; Hafiz, *Structural Labor Rights*, *supra* note 3, at 723–27; Sachin S. Pandya, *What Taft-Hartley Did to Joint-Employer Doctrine*, 25 EMP. RTS. & EMP. POL’Y J. 161, 188–97 (2021).

<sup>108</sup> Hafiz, *Structural Labor Rights*, *supra* note 3, at 711–23.

power: (1) challenging horizontal and vertical agreements that reduce labor market competition, especially workers' mobility restraints; (2) challenging mergers and acquisitions that may substantially lessen competition or tend to create monopsony in labor markets; and (3) strengthening DOL enforcement, especially against employer violations of Fair Labor Standards Act (FLSA) and OSH Act. This Section provides an overview of the empirical literature supporting these policy levers as priorities and outlines mechanisms for interagency coordination that can enhance their effective deployment.

*a) Challenging anticompetitive agreements to enhance worker exit.* While the antitrust agencies have made clear that certain horizontal agreements between employer competitors—wage fixing, market allocation, bid-rigging, and no-poach agreements—are per se unlawful and even subject to criminal sanction, a number of other horizontal and vertical agreements also limit workers' exit options but are subject to more lenient "rule of reason" review under current law.<sup>109</sup> That means that, to successfully challenge those agreements, enforcers must show employer market power and overcome justifications of those agreements' pro-competitive efficiencies, which is a riskier and more costly endeavor. Additionally, persistent legal uncertainty and limited legal precedent guiding labor antitrust adjudication favors selecting cases and enforcement priorities based on empirically strong demonstrations of specific restraints' adverse effects on workers' exit options. Challenging such restraints offers the most promising prospect of increasing worker power.

Leading targets empirically shown to reduce workers' exit options are mobility restraints in agreements between employers and workers, including noncompete clauses that reduce workers' wages without offsetting benefits to workers in the form of training or other considerations.<sup>110</sup> Training-repayment agreements

<sup>109</sup> See U.S. Dep't of Just. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals*, U.S. DEP'T OF JUST. 2–5 (Oct. 2016), <https://perma.cc/BV2G-HNAK>; Eduardo Porter, *A New Legal Tactic to Protect Workers' Pay*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/business/economy/wages-antitrust-law-us.html>.

<sup>110</sup> See, e.g., Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J.L. & ECON. 53, 75–77 (2021); Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633, 660–65 (2020); Matthew S. Johnson, Kurt Lavetti & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility*, SSRN 31–37 (Oct. 12, 2021), <https://perma.cc/9YP8-ZCB3>; Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LAB. RELS. REV. 783, 812–14 (2019); Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. 1

also limit workers' exit options, and for low-wage workers, may be even more constraining than noncompetes because preventing workers from switching to direct competitors may be less burdensome than requiring workers to pay employers a substantial sum to quit.<sup>111</sup> Nondisclosure agreements can increase information asymmetries between workers and firms, which can increase search costs, and empirical work suggests that legislative limits on their use can increase the availability of underprovided negative information about employers in the marketplace.<sup>112</sup> Similarly, mandatory arbitration provisions and class action waivers can increase information asymmetries between employers and current/future workers regarding employer legal noncompliance because they prevent suit in public fora and require private resolution with undisclosed awards. Arbitration clauses that include class action waivers can reduce workers' bargaining leverage and limit their ability and incentives to assert countervailing power against dominant, colluding, or noncompliant employers. Empirical work suggests that employees win less often and receive lower damages in arbitration than in court while employers may have a repeat-player advantage, winning more cases when they appear before the same arbitrator in multiple cases.<sup>113</sup>

There are a number of horizontal and vertical agreements that raise strong theoretical concerns of decreasing workers' exit options but would benefit from more empirical study. These include information-sharing agreements between employers that facilitate their collusion without reducing information asymmetries between employers and workers. Vertical agreements between employers in fissured workplaces can also limit workers' exit options, including mobility restraints between upstream and downstream firms, product market restraints—like input purchase requirements—that reduce demand for labor downstream

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(Dec. 10, 2019), <https://perma.cc/LP3J-M3HR>; Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, SSRN 23–25 (Dec. 2019), <https://perma.cc/UUW9-5ZK2>.

<sup>111</sup> See Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 737–40 (2021) (collecting studies); Mitchell Hoffman & Stephen V. Burks, *Training Contracts, Employee Turnover, and the Returns from Firm-Sponsored General Training* 19–20 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23247, 2017).

<sup>112</sup> See Jason Sockin, Aaron Sojourner & Evan Starr, *Non-Disclosure Agreements and Externalities from Silence* 16–24 (Upjohn Inst. for Emp. Rsch., Working Paper No. 22-360, 2022).

<sup>113</sup> See Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. 18–23 (Dec. 7, 2015), <https://perma.cc/BA8T-TWF4>.

as a complementary input, and restraints that limit downstream employers' demand for labor by reducing their budgetary discretion over all production decisions outside of labor costs.<sup>114</sup>

In targeting agreements for enforcement, antitrust and labor agencies could use a few direct regulatory authorities. First, antitrust enforcers can directly challenge horizontal and vertical restraints through enforcement actions and private litigation. But the FTC can also exercise its rulemaking authority to prohibit or limit the use of such restraints when they reduce labor market competition.<sup>115</sup> And the DOL's OFCCP can prohibit federal contractors from including these restraints in employment agreements with workers or with contracting firms providing labor inputs.

But challenges to agreements that reduce workers' exit options could benefit from more robust interagency coordination. First, the DOL and NLRB can share data and analyses with the antitrust agencies to aid their investigations and enforcement priorities regarding such agreements. Most importantly, they can share evidence indicating strong employer power or weak worker power, including low unionization rates, market definition, and market power evidence necessary in rule of reason cases, like employer legal noncompliance, Standard Occupational Classification (SOC) data, data on labor productivity and costs (to observe whether worker productivity has risen without wages rising), evidence of postmerger mass layoffs where efficiency justifications are weak or lacking (market power evidence), and federal contractor wage data disaggregated by sex, race, ethnicity, and job classification (as evidence of wage discrimination). The labor agencies could also refer worker complaints (and underlying evidence) in their investigations and enforcement actions about the use of such agreements as relevant for antitrust agencies' analyses of unlawful horizontal agreements (to infer agreements in an employer cartel because they limit workers' discovery of the cartel and can police cheating) and unlawful vertical agreements (as conduct with anticompetitive effects). Information sharing and referrals between agencies can institutionalize labor agency cooperation and strengthen a whole-of-government approach to

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<sup>114</sup> See Angerhofer & Blair, *supra* note 103, at 4–8; Hovenkamp, *supra* note 103, at 32–38; Callaci et al., *supra* note 4, at 16–20.

<sup>115</sup> See Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 363–65 (2020); Exec. Order No. 14,036, *supra* note 8, at §§ 1, 5(g).

deter employer noncompliance and alert regulators to issues or facts they might otherwise overlook.<sup>116</sup>

Finally, to close the loop, antitrust agencies gathering evidence of unlawful agreements can share their evidence and analyses with and refer cases to the labor agencies. Such evidence and analyses can aid labor-agency investigations and enforcement priorities, including regarding “employer,” “joint employer,” and “employee” (as opposed to “independent contractor”) status determinations because such evidence is indicative of control over wages and other terms and conditions of employment.

*b) Challenging mergers to enhance worker exit.* Mounting empirical evidence on labor market concentration places merger policy as another leading policy lever to increase workers’ exit options.<sup>117</sup> Labor market concentration reduces the number of firms at which workers can seek employment while increasing firms’ incentives to reduce employment and lower wages. While the antitrust agencies have begun reviewing mergers for their labor market effects and may incorporate labor market-effects guidance in revised merger guidelines,<sup>118</sup> they can enhance merger enforcement by incorporating the broader bargaining power indicators we have detailed into merger reviews and improve coordination with labor and other agencies to get a clearer picture

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<sup>116</sup> See Hafiz, *Interagency Coordination*, *supra* note 104, at 225–29; Michael M. Oswald & César F. Rosado Marzán, *Organizing the State: The “New Labor Law” Seen from the Bottom-Up*, 39 BERKELEY J. EMP. & LAB. L. 415, 448–49 (2018).

<sup>117</sup> See, e.g., Gregor Jarosch, Jan Sebastian Nimczik & Isaac Sorkin, *Granular Search, Market Structure, and Wages* 33–35 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26239, 2019); José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LABOUR ECON., no. 101886, July 18, 2020, at 2; David W. Berger, Kyle F. Herkenhoff & Simon Mongey, *Labor Market Power* 34–35 (Nat’l Bureau of Econ. Rsch., Working Paper No. 25719, 2021); Prager & Schmitt, *supra* note 7, at 416–18; David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes*, SSRN 26–33 (Jan. 21, 2020), <https://perma.cc/Y2FM-NBGW>; see also Anna Sokolova & Todd Sorensen, *Monopsony in Labor Markets: A Meta-Analysis*, 74 INDUS. & LAB. RELS. REV. 27, 42–48 (2021) (collecting literature); Alan Manning, *Monopsony in Labor Markets: A Review*, 74 INDUS. & LAB. RELS. REV. 3, 13–15 (2021) (same).

<sup>118</sup> See, e.g., *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, FED. TRADE COMM’N (Jan. 18, 2022), <https://perma.cc/W96S-B5WA>; Brent Kendall, *Amazon’s Planned Purchase of MGM Faces FTC Scrutiny*, WSJ. (June 22, 2021), <https://perma.cc/6K8L-RUWQ>; Jordan Middled, *FTC’s Probe of Microsoft’s Activision Acquisition Will Reportedly Focus on Consumer Data, Labour Market*, VIDEO GAMES CHRON. (Apr. 6, 2022), <https://perma.cc/6F5A-T8KF>.

of a merger's anticipated effects and to inform consent decrees and proposed remedies.<sup>119</sup>

The DOJ's Antitrust Division and the FTC have signed memoranda of understanding (MOUs) with the DOL and NLRB enabling information sharing and referrals, and operationalizing these agreements can improve data collection to report indicators of employer and worker power and strengthen evidence relevant for enforcement.<sup>120</sup> The data and analyses already discussed with regard to unlawful agreements would be relevant for enriched merger review to inform the agencies' market definition, market power, and determinations of unilateral and coordinated effects of mergers on workers' outside options. Specifically, information sharing about provisions in merging parties' labor contracts and firms' history of noncompliance with labor and employment law may signal concerns about postmerger anticompetitive effects in labor markets. Further, information sharing can improve the antitrust agencies' retrospective analyses of mergers' effects in labor markets, including by reviewing data on labor productivity and costs to assess whether the merged firm's monopsony power has increased, whether merger-specific efficiencies have been achieved and workers' shares in the gains from trade have increased, or whether postmerger mass layoffs indicate increased monopsony power when such layoffs cannot be justified by efficiencies.<sup>121</sup>

Merger review evidence could also be relevant to aid labor-agency enforcement. For example, the antitrust agencies could share wage transaction data, critical loss analyses, market power measurements, unilateral and coordinated effects analyses, and analyses of labor-cost reductions to better inform employer- and employee-status determinations, misclassification investigations,

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<sup>119</sup> See Hafiz, *Interagency Merger Review*, *supra* note 105, at 60–65; Hafiz, *Rethinking Breakups*, *supra* note 105, at 1590–92.

<sup>120</sup> *Memorandum of Understanding Between the U.S. Department of Justice and U.S. Department of Labor*, U.S. DEPT OF LABOR & U.S. DEPT OF JUST. 1 (Mar. 10, 2022), <https://perma.cc/ERN7-GAHG>; *Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest*, FED. TRADE COMM'N & NAT'L LABOR RELS. BD. (July 19, 2022), <https://perma.cc/5KVF-Y8UQ>; *Memorandum of Understanding Between the U.S. Dep't of Justice and the National Labor Relations Board*, NAT'L LABOR RELS. BD. & U.S. DEPT OF JUST. (July 26, 2022), <https://perma.cc/PMH2-59QV>.

<sup>121</sup> See *Mass Layoff Statistics*, U.S. BUREAU OF LAB. STAT., <https://perma.cc/AW82-HM7Q>; Omer Arain, *WARN Layoff Data*, WARN DATABASE, <https://perma.cc/9SYE-7WBH>.

and contracting arrangements that evidence control over downstream workers.

The MOUs can also better structure interagency involvement and build institutional relationships, enabling longer-term policy coordination, labor-agency input on antitrust agency policy statements and guidance (like the Merger Guidelines and Merger Remedies Manual), and remedial design coordination to condition merger approvals on labor-agency-led compliance solutions and postmerger supervision over both structural and conduct remedies.<sup>122</sup>

*c) Strengthening DOL enforcement to enhance worker exit.* A final set of critical policy priorities to increase worker voice through exit include more aggressive enforcement to safeguard wage and working-condition floors. First, minimum wage enforcement can increase worker power without decreasing employment when workers are underpaid relative to their marginal productivity, or in labor markets where employers have some level of monopsony over workers.<sup>123</sup> One study estimated that wage theft cost workers in the ten most populous states more than \$8 billion in lost earnings.<sup>124</sup> While strong wage-enforcement regimes can work to effectively deter wage theft and employer misclassification of workers, the realities of underenforcement and weak penalties for noncompliance have limited that deterrent effect.<sup>125</sup> Similarly, workplace health and safety standards place a floor on working conditions, are effective at reducing workplace injuries, and have not been found to reduce employment or firm survival.<sup>126</sup> To summarize, then, widespread enforcement improves workers' outside options in these contexts because it ensures that

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<sup>122</sup> See Hafiz, *Interagency Merger Review*, *supra* note 105, at 60–65; Hafiz, *Rethinking Breakups*, *supra* note 105, at 1590–92.

<sup>123</sup> See Azar et al., *supra* note 15, at 13–15; Doruk Cengiz, Arindrajit Dube, Attila Lindner & Ben Zipperer, *The Effect of Minimum Wages on Low-Wage Jobs*, 134 Q.J. ECON. 1405, 1446–49 (2019).

<sup>124</sup> David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. 1 (May 10, 2017), <https://perma.cc/77ZY-E5JU>.

<sup>125</sup> Daniel J. Galvin, *Deterring Wage Theft*, 14 PERSP. POL. 324, 331–35 (2016); Stansbury, *supra* note 97, at 5–11; Françoise Carré, *(In)dependent Contractor Misclassification*, ECON. POL'Y INST. 6–8 (June 8, 2015), <https://perma.cc/R4YK-KZRK>; Lynn Rhinehart, Celine McNicholas, Margaret Poydock & Ihna Mangundayao, *Misclassification, the ABC Test, and Employee Status*, ECON. POL'Y INST. 5 (June 16, 2021), <https://perma.cc/MDA2-AJX5>.

<sup>126</sup> See, e.g., Marinescu & Rosenfeld, *supra* note 6, at 18; David I. Levine, Michael W. Toffel & Matthew S. Johnson, *Randomized Government Safety Inspections Reduce Worker Injuries with No Detectable Job Loss*, 336 SCI. 907, 910 (2012).

more employers are not paying infracompetitive wage rates or offering inferior working conditions; remaining workers who *do* suffer under such conditions can more easily quit those jobs for better ones, increasing their bargaining leverage with existing employers.

While scholars and advocates have a range of proposals to improve DOL enforcement—from more expansive jurisdiction, more enforcement resources, higher penalties, and strategic enforcement—our focus is on improving enforcement synergies through interagency coordination to support enforcement within DOL but also pool DOL efforts with outside agencies to target repeat violators.

First, as discussed, the DOL could utilize indicators of strong employer power and weak worker power gleaned from other agencies to instigate investigations, set minimum wage and OSHA enforcement priorities, and use in its own enforcement actions to impose joint employer status or protect misclassified workers. These indicators include data and analyses that antitrust agencies could flag that focus specifically on labor market concentration, employer dominance, and employers' anticompetitive conduct in low-wage labor markets and hazardous industries.

But the DOL could share its own data, analyses, and enforcement record with the NLRB and the antitrust agencies to create a unified approach to expand workers' exit options in labor markets where worker power is weakest. The agency could share information about its investigations and employer noncompliance as evidence of market power and to aid in antitrust-agency merger reviews as evidence of existing monopsony power (or the limits of workers' countervailing power).

### CONCLUSION

A whole-of-government approach can significantly strengthen worker power. The framework and indicators we develop here are a first step towards increasing agencies' capacity to target some of the most critical and reversible challenges to worker voice and exit. But certainly, more work is required. More empirical work is necessary to not only assess the effectiveness of a wider range of policy levers that can increase worker power but also to assess the impacts of agency action and inaction on workers' relative bargaining power. Further, qualitative assessments of obstacles to interagency coordination will be critical for securing agency-wide buy-in to operationalize collaboration that



furthering worker power goals. And ensuring both executive and congressional oversight is critical to gauge whether agency efforts are effective in strengthening worker power through interagency task forces, White House, Treasury Department, and Office of Information and Regulatory Affairs review, and continued study through congressional hearings and commissioned reports. Finally, worker power can be increased by expanding interagency coordination tools and levers to integrate antitrust and labor-agency regulation with agencies that regulate monetary policy, social insurance design and distribution, and other sources of personal wealth enabling worker exit.