Is Worker Misclassification an Unfair Method of Competition?

Gregory J. Werden

In a recent speech, FTC Commissioner Alvaro M. Bedoya addressed the misclassification of workers—the improper treatment of employees as independent contractors.[1] He focused on why this is a problem, rather than on why the FTC is part of the solution. Nevertheless, he argued that "every tool in our toolbox" should be used against the practice, including the prohibition on unfair methods of competition in Section 5 of the FTC Act.

I question two key contentions made by Commissioner Bedoya—that the prohibition on unfair methods of competition can address worker misclassification, and that the FTC should address worker misclassification. I begin by disputing Commissioner Bedoya's foundational argument that the legislative history of Section 5 demonstrates the intention of Congress to delegate the question of what constitutes an unfair method of competition.

In his speech, Commissioner Bedoya asked, "What is an 'unfair method of competition'?" But he provided only the tersest of answers to that question. He essentially asserted the FTC has the power to ban whatever it deems unfair. And he based that assertion on the claim that, before enacting the general prohibition on unfair methods of competition, Congress first "drew up a list of the specific practices it considered to be unfair methods of competition and drafted a bill [creating the FTC] to ban them."[2]

Commissioner Bedoya referred to his statement accompanying the release of the FTC's 2022 Section 5 policy statement.[3] He asserted then that "Congress gave the Commission broad power to define and prohibit 'unfair methods of competition' after considering and then abandoning a much narrower proposal."[4] He claimed that the House initially "passed a version of the 'Trade Commission' bill that listed specific unfair competition offenses, in line with President Wilson's initial demands for a bill that prohibited conduct explicitly and item by item."[5] But that claim finds no support in the historical record.

Several trade commission bills were introduced in 1913, but none got out of committee. Senator Francis G. Newlands's bill granted the commission power to investigate possible Sherman Act

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1 Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, "Overawed": Worker Misclassification as a Potential Unfair Method of Competition, Remarks before Global Competition Review: Law Leaders Global Summit Miami, Florida (Feb. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf [hereinafter Bedoya Speech].

2 *Id.* at 5.

3 Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStmtBedoyaStmt.pdf [hereinafter Bedoya Statement].

4 *Id.* at 1.

5 *Id.* at 2 (internal quotation marks omitted).

violations and make findings.[6] Senator Albert B. Cummins's bill granted the commission power to enforce existing law against pricing below cost.[7] And Representative Victor Murdock's "trust triplets" separately created a trade commission and directed it "to prevent . . . unfair and oppressive competition."[8]

On January 20, 1914, Wilson presented his antitrust program to a joint session of Congress. He sought legislation prohibiting the "actual processes and methods of monopoly," "item by item."[9] The result was the Clayton Act. He also sought legislation creating "an interstate trade commission" that would act "only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided."[10]

Consistent with the President's second request, Congressman J. Harry Covington introduced a bill on April 13 to create an interstate trade commission that would act only as an information clearinghouse.[11] It was the bill the President wanted, and it was favorably reported out of committee the next day. The House passed it on June 5. It was the only bill creating a trade commission favorably reported by a House committee.

The day Covington's bill was reported out of committee, competing bills were introduced by Congressmen A. Walter Lafferty and Raymond B. Stevens.[12] Stevens's bill was drafted by George Rublee,[13] who would soon draft and champion Section 5. Lafferty and Stevens then submitted minority views on Covington's bill, advocating a prohibition on unfair competition. Those views were appended to the committee's report.[14]

While the House considered Covington's bill, Rublee sought support for a prohibition on unfair methods of competition. He used his connections to get a meeting with the President and sold him on the idea. On June 13, a Senate committee reported out a substitute for the House bill incorporating Rublee's draft of Section 5.[15] Section 5 prompted much debate in the Senate, but both houses passed the FTC Act in September.[16]

A list of "specific unfair competition offenses" drawn up by academic economist William S. Stevens[17] was part of the legislative history of the FTC Act. The list was mentioned three times in

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[6] S. 829, 63d Cong. (1913); 50 Cong. Rec. 163–64 (1913) (introduced Apr. 12). In 1914, a new version of the Newlands bill was introduced in both houses. H.R. 12120, 63d Cong. (1914); 51 Cong. Rec. 2142–44 (1914) (introduced January 22 by Rep. Henry D. Clayton); S. 4160, 63d Cong. (1914); 51 Cong. Rec. 2256–57 (1914) (introduced January 24 by Sen. Newlands).

[7] S. 1730, 63d Cong. (1913); 50 Cong. Rec. 876 (1913) (introduced May 1).

[8] H.R. 9299–301 (1913), 63d Cong.; 50 Cong. Rec. 5939 (1913) (introduced Nov. 17).

[9] H.R. Doc. No. 63-625, at 6 (1914).

[10] *Id.*

[11] H.R. 15613, 63d Cong. (1914); *see also* 51 Cong. Rec. 6648, 9910–11 (1914). For the text of the bill as originally passed, see Federal Trade Commission Bill, Comparative Print, S. Doc. No. 63-573 (1914).

[12] H.R. 15652, 15654, 15660, 63rd Cong. (1914); 51 Cong. Rec. 6714 (1914) (introduced Apr. 14).

[13] *See* George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Proc. Acad. Pol. Sci. 114, 116 (1926).

[14] H.R. Rep. No. 63-533, pts. 2–3 (1914).

[15] *See, e.g.*, William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, Antitrust, Fall 2011, at 106.

[16] For a detailed legislative history of the FTC Act, see Gregory J. Werden, *Unfair Methods of Competition under Section 5 of the FTC Act: What Is the Intelligible Principle?*, 85 Antitrust L.J. 819, 821–40 (2024).

[17] William S. Stevens, *Unfair Competition*, 29 Pol. Sci. Q. 282 (1914).

the Senate debate on Section 5.[18] But no member of Congress suggested inserting Stevens's list into the FTC Act. Commissioner Bedoya was correct in stating that Congress "chose to *avoid* lists of specific practices."[19]

Commissioner Bedoya asserted in his 2022 statement that Congress "delegated the specifics for determining unfair methods of competition to the FTC and the courts."[20] But every senator in the 63rd Congress knew that such a delegation was unconstitutional.[21] Senator Moses E. Clapp put it this way: "[I]f this proposed law does mean . . . that this commission may declare a thing unlawful which Congress has not declared unlawful . . ., then it is the abdication of legislative power, pure and simple, and is the most revolutionary proposition that has come before Congress in the long history of this Republic."[22]

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Commissioner Bedoya argues that worker misclassification "might be" an unfair method competition by reference to "port drayage" in California—short-haul trucking from ports.[24] In 2007 Los Angeles and Long Beach instituted port rules forcing the retirement of high-polluting trucks. The rules required trucking companies to classify drivers as employees, but the Ninth Circuit held the requirement was preempted by federal law.[25] Freed of that requirement, hundreds of small trucking companies made their drivers independent contractors.

Many drivers were treated badly, but they were not without remedies. As of 2018, more than 400 drivers had been awarded in excess of $45 million by the California Department of Labor Standards Enforcement. Legislation then helped the drivers collect the awards.[26] Commissioner Bedoya did not indicate what more the FTC could have done to help the drivers. A unanimous Supreme Court held in 2021 that the FTC could not seek equitable monetary relief,[27] and hundreds of cease-and-desist orders seem both impractical and inadequate.

Commissioner Bedoya argued that the arrangement between the trucking companies and the drivers was a method of competition because it involved a vertical restraint. But Commissioner Bedoya identified no restraint imposed on the drivers. His objection to the terms of the contracts

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[18] 51 Cong. Rec. 11108 (comments of Sen. Newlands), 11230 (comments of Sen. Joseph T. Robinson), 11300 (comments of Sen. William E. Borah) (1914).

[19] Bedoya Statement, *supra* note 3, at 6.

[20] *Id.* at 3.

[21] *See* ICC v. Goodrich Transit Co., 224 U.S. 194, 214 (1912) ("The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.").

[22] 51 Cong. Rec. 13063–64 (1914).

[23] *Id.* at 13145.

[24] Bedoya Speech, *supra* note 1, at 10–12. For the facts of the situation, Commissioner Bedoya relied on Brett Murphy, *Rigged: Forced Into Debt. Worked Past Exhaustion. Left With Nothing*, USA Today (June 16, 2017), https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/.

[25] Am. Trucking Ass'n v. City of Los Angeles, 660 F.3d 384, 407–08 (9th Cir. 2011).

[26] Cal. Lab. Code § 2810.4.

[27] AMG Capital Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

was that they unreasonably restricted compensation, rather than that they unreasonably restricted competition.

Commissioner Bedoya observed that "what happened to the port truckers seems to have clearly worsened competitive conditions,"[28] pointing only to the fact that the port truckers previously owned their trucks and could have gone elsewhere if inadequately compensated. But the drivers ceased to be truck owners because they could not afford the new trucks required by the rules.[29] If competitive conditions worsened, which is doubtful, misclassification was not the cause.

The debate indicated that Congress intended Section 5 to reach the sort of unfair conduct that had created monopolies, and to do so before the anticompetitive effects were realized.

Commissioner Bedoya argued that the FTC should "work on the same problem" as the Labor Department and the NLRB because the FTC can "stop unfair practices in their incipiency, before harms to workers and other market actors are cemented."[30] But the incipiency notion expressed in the debate on Section 5 is not so expansive. The debate indicated that Congress intended Section 5 to reach the sort of unfair conduct that had created monopolies, and to do so before the anticompetitive effects were realized.

As Senator Henry F. Hollis lamented, "The Department of Justice deals with monopoly as an accomplished fact. It did not attack the Oil Trust or the Tobacco Trust until after they had destroyed competition and obtained monopoly of the markets."[31] Congress intended the FTC to act before the Justice Department had acted in those cases, but not before conduct posed any threat to competition. And unfair labor practices surely can violate federal labor law without threatening competition, as happened with port drayage.

Commissioner Bedoya is not the first to link unfair labor practices with unfair methods of competition. In June 2, 1937, testimony on the proposed Fair Labor Standards Act,[32] Robert H. Jackson asserted that, "by prohibiting the use of substandard labor conditions by those who compete with employers who use fair labor standards, the great majority of employers who really desire to treat labor fairly are thereby protected against the unfair methods of competition of those who utilize sweatshop methods to gain a competitive advantage."[33] Jackson was in charge of the Antitrust Division at the time, but his contention was only that unfair labor practices affect interstate commerce.

To protect workers, the Fair Labor Standards Act (and other laws) imposed significant burdens on employers, and those burdens gave employers an incentive to treat employees as independent contractors. Worker misclassification is a problem created by regulation, and regulation is addressing it. The Labor Department's new Worker Classification Rule[34] became effective on

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[28] Bedoya Speech, *supra* note 1, at 11.

[29] The cities of Los Angeles and Long Beach determined that it likely "would be prohibitively expensive for independent owner operators" to buy new trucks required by the rules. *Am. Trucking Ass'n*, 660 F.3d at 393. The average annual income for drayage drivers was under $34,000. Jon Haveman & Christopher Thornberg, Beacon Econ., Clean Trucks Program: An Economic Policy Analysis 16 (Feb. 2008). For a variety of reasons, the best option was determined to be converting the drivers into employees, but the Ninth Circuit barred that option.

[30] Bedoya Speech, *supra* note 1, at 6.

[31] 51 Cong. Rec. 12146 (1914).

[32] Pub. L. 75-718, 52 Stat. 1060, codified at 29 U.S.C. §§ 201–19.

[33] *Fair Labor Standards Act of 1937: Hearings before the S. Comm. on Education & Labor and the H. Comm. on Labor*, 75th Cong. 3 (1937) (statement of Robert H. Jackson).

[34] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (2024) (to be codified at 29 C.F.R. § 795). The new rule replaces a 2021 rule. Independent Contractor Status Under the Fair Labor Standards Act. 86 Fed. Reg. 1248 (2021).

The prohibition on unfair methods of competition should be used to protect competition in markets for goods, services, and labor. And labor law should be used to protect workers from unfair labor practices, including misclassification.

March 11, 2024. The FTC has no role in the interpretation or enforcement of the Rule, nor should it adopt what amounts to a separate rule.

Rather than use every tool in the toolbox, we should use the tool designed for the job at hand. The prohibition on unfair methods of competition should be used to protect competition in markets for goods, services, and labor. And labor law should be used to protect workers from unfair labor practices, including misclassification.

Under the leadership of Chair Lina M. Khan, the FTC has shifted some of its focus to labor markets, especially in merger enforcement. While U.S. competition law undoubtedly protects competition in labor markets,[35] Commissioner Bedoya's concern with worker misclassification is not that it harms competition in labor markets. And the FTC is not authorized to correct all economic injustice. ●

[35] Conduct related to collective bargaining, however, is exempt. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 236–37 (1996); United Mine Workers v. Pennington, 381 U.S. 657, 664–65 (1965).