

STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

*Regarding Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability
As Prepared for Delivery*

Open Commission Meeting
January 14, 2025

Following a vote of commissioners, the Federal Trade Commission publishes its Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability today.¹ In substance, the Policy Statement explains that the labor exemption may shield from antitrust liability organizing and bargaining efforts that are focused on the compensation or labor conditions of workers, even if those workers are classified as independent contractors. The Statement reflects a well-supported examination of the plain text, original meaning, and legislative history of the two statutes with provisions that constitute the labor exemption—the Clayton Act and Norris-LaGuardia Act—as well as United States Supreme Court and circuit court case law interpreting these and related labor statutes.

While the Policy Statement builds on recent enforcement and policy work by the Commission, its importance transcends both its substance and political administrations: The Statement provides clarity on a question of antitrust liability that has unfortunately persisted in the law for decades even though it is critical for a group of workers whose services play an increasingly significant role in the lives of everyday Americans. I am therefore deeply grateful to the dedicated staff of the Office of Policy Planning and Bureau of Competition for their diligent and insightful work in producing the Policy Statement.

The Policy Statement’s guidance on the protection that the labor exemption may provide workers classified or misclassified as independent contractors has profound, real-world stakes for several sectors of our economy. This is evident from even a cursory examination of the market realities of gig work—in which people contract with companies to “earn income from providing on-demand work, often through a digital service like an app.”² Most of us are familiar with gig work in ride hailing and food delivery services, but the model is increasingly expanding to other segments of the modern economy, including janitorial work, construction, home repair, healthcare, and hospitality, to name only a few. Indeed, one study found that 16% of Americans earned money from an online gig platform.³

Companies offering gig work often classify their workers as independent contractors instead of traditional employees. The Policy Statement makes clear that these companies classify their workers as independent contractors “even though in practice these firms may tightly prescribe their workers’ tasks and compensation in ways that run counter to the promise of independence.”⁴ The Statement also

¹ Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability, (Jan. 14, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/p251201laborexemptionpolicystatement.pdf.

² FTC Policy Statement on Enforcement Related to Gig Work, at 4 (Sept. 15, 2022), <https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work>.

³ See Monica Anderson, Colleen McClain, Michelle Faverio, and Risa Gelles-Watnick, *The State of Gig Work in 2021*, Pew Research Center, at 31 (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/> (reporting that 58% of current or recent gig workers said that money earned via gig jobs has been “essential or important for meeting their basic needs”).

⁴ Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability, at 4 (Jan. 14, 2025).

points to evidence that gig workers typically “have lower incomes and may earn less than the minimum wage.”⁵ It is no surprise, therefore, that gig workers have begun exploring the idea of forming unions to bargain with online platforms.⁶

In this pivotal moment of gig workers and other independent contractors finally receiving FTC guidance on the shield that the labor exemption may provide them from antitrust liability, I find myself reflecting on my time at the Commission thus far. When I first started, the government was moving in the wrong direction on the issue of labor protections and benefits for an ever-expanding group of independent contractors. In January 2021, for example, the outgoing Trump Department of Labor finalized its Independent Contractor Status under the Fair Labor Standards Act’s rule, an interpretation that was restrictive, erroneous, and would exacerbate the problem of worker misclassification.⁷ I pushed back, submitting a comment when the rule was initially proposed that explained those short comings and the negative repercussions on the FTC’s competition mission.⁸ I described the high concentration and pervasive monopsony power that characterized many labor markets.⁹ I also explained how promulgating a rule that facilitated worker misclassification would give companies that engaged in that practice an “unfair competitive advantage over their rivals, reduc[e] worker bargaining power, and increas[e] the likelihood of more workers being subjected to anticompetitive contract terms.”¹⁰ Further, I warned that the proposal would “create legal uncertainty about the application of the antitrust exemption for labor organizing, which could deprive workers of this important tool used to counter the enormous bargaining power that employers enjoy over their workers.”¹¹

Since then, the government has corrected course, focusing instead on competition policy and enforcement that better fit the market realities and power asymmetries that independent contractors face. For example, in 2021, President Biden issued his Executive Order on Promoting Competition in the American Economy.¹² In 2022, the Commission issued its Policy Statement Related to Gig Work.¹³ In 2023, the Commission and Department of Justice Antitrust Division jointly issued updated Merger Guidelines.¹⁴ Guideline 10 in particular articulated the analytical framework that the Commission and DOJ use in examining whether a merger involving competing buyers may substantially lessen competition for workers, creators, suppliers, or other providers.¹⁵ And late last year, the FTC successfully litigated its challenge to the largest grocery store merger in American history—Kroger’s proposed acquisition of Albertsons. The court broke new ground by finding that the proposed union grocery labor

⁵ *Id.* at 5.

⁶ *Id.*

⁷ Independent Contractor Status under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021).

⁸ *See, e.g.*, Rebecca K. Slaughter, Comm’r, Fed. Trade Comm., Comment Letter on Dep’t of Labor Notice of Proposed Rulemaking re: Independent Contractor Status under the Fair Labor Standards Act (Oct. 26, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582178/comment_of_commissioner_rebecca_kelly_slaughter_on_the_department_of_labor_proposed_rule_on_0.pdf.

⁹ *Id.*

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² Promoting Competition in the American Economy, Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (Jul. 9, 2021).

¹³ FTC Policy Statement on Enforcement Related to Gig Work, at 4 (Sept. 15, 2022).

¹⁴ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, MERGER GUIDELINES, at 23 (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

¹⁵ *Id.* at 3.

market was “a plausible, relevant market for antitrust purposes.”¹⁶ Specifically, the court found “plausible” the FTC’s explanation of how eliminating competition between Kroger and Albertsons would harm union grocery workers by reducing their bargaining leverage during negotiations.¹⁷

So, I am heartened by the tremendous progress that has been made on employing the FTC’s policy and enforcement tools to address market realities to which workers, regardless of their classification or misclassification, are subject. Today’s Labor Exemption Policy Statement drives that work forward. And I am hopeful that the next administration advances this mantle in delivering on its own promises to protect American workers from harms in their respective marketplaces.¹⁸

¹⁶ *Federal Trade Commission v. The Kroger Co.*, Case No. 3:24-cv-00347-AN, 2024 WL 5053016, at *62 (D. Or. Dec. 10, 2024).

¹⁷ *Id.*

¹⁸ *See, e.g.*, Dissenting Statement of Commissioner Andrew N. Ferguson, In the Matter of Guardian Service Industries, Inc. (Dec 4, 2024) at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/guardian-ferguson-dissenting-statement-final.pdf (“The Commission is wise to focus its resources on protecting competition in labor markets. After all, the antitrust laws protect employees from unlawful restraints of the labor markets as much as they protect any output market.”); Concurring Statement of Commissioner Andrew N. Ferguson, In the Matter of Planned Building Services, Inc. (Jan. 6, 2025) at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/2410029-planned-building-ferguson-concurrence-redacted.pdf (“[T]he Commission should devote resources to protecting competition in labor markets.”).