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DOJ and FTC Issue Warning on Anticompetitive Conduct Affecting Labor Markets During the COVID-19 Pandemic

Key Takeaways

- A new DOJ-FTC Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets is an important reminder that anticompetitive labor practices may lead to civil or even criminal liability in certain circumstances.
- Companies should ensure that relevant personnel, including those working in human resources, receive antitrust training; and should review antitrust compliance policies to ensure they are up-to-date, thoughtful, comprehensive and effective.

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On April 13, the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued a Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets. The Statement follows several recent pronouncements from the agencies related to their enforcement efforts in this area and serves as an important reminder that, as the agencies wrote: "Companies and individuals involved in the hiring, recruiting, retention, or placement of workers should be aware that anticompetitive conduct runs the risk of civil and/or criminal liability."

In the Statement, the agencies say that they "wish to make clear to the public that although there are many permissible ways that firms can engage in procompetitive collaboration, COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis." In particular, the agencies "are on alert for employers, staffing companies (including medical travel and locum agencies), and recruiters, among others, who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked." Several past agency enforcement actions have involved allegations of anticompetitive labor practices in the health care industry.

The statement highlights key areas of potential concern.

- **Naked wage-fixing and no-poach agreements, which the DOJ may prosecute criminally**: According to the DOJ, a "wage-fixing agreement is an agreement between employers not to compete on employee salary, benefits, or other terms of compensation, either at specific levels or within a range;"

and a "no-poach agreement is an agreement between two or more employers—or their third-party agents or intermediaries (e.g., recruiters)—not to cold-call, solicit, recruit, hire, or otherwise compete for each other's employees."

The DOJ and FTC Antitrust Guidance for Human Resource Professionals, released in October 2016, states that naked agreements between firms not to "poach" or solicit each-others' employees are "per se" violations of the antitrust law. In early 2018, the DOJ said that it intends to prosecute these agreements as crimes if the unlawful agreement was continued or entered into after October 2016. While the DOJ has not yet publicly announced any criminal charges in this area, officials have on numerous occasions reiterated the DOJ's enforcement intentions and have indicated that there are active criminal investigations. We note that the Antitrust Division's leniency program is available to companies and individuals who report these types of violations and meet the requirements of the program, and have written previously about the benefits of antitrust compliance programs in relation to DOJ enforcement policy.

It should be noted that, as explained by the FTC, if a "firm collaborates with other firms as part of a legitimate collaborative activity, no-poaching agreements or other restraints on recruiting workers may be reasonably necessary to that undertaking" and therefore fall outside the category of per se illegality. However, as the FTC recently explained, "restrictions on soliciting employees must be narrowly tailored to protect the value to the business of the personnel at issue; they should not act as a de facto no-poach agreement."

- **Anticompetitive non-compete agreements**: While non-compete agreements which limit the ability of employees to join competitors may be defensible, they may in certain contexts attract scrutiny from enforcers. For example, in 2012 the FTC required a provider of acute care hospital services to release its staff cardiologists from non-compete agreements where the FTC determined, among other things, that the market for the provision of adult cardiology services was highly concentrated and the provider employed 88 percent of the cardiologists in the local area. Many factors contribute to the legal analysis of non-compete agreements; and, beyond federal enforcement agency considerations, various state laws are particularly relevant.

- **The unlawful exchange of competitively sensitive employee compensation information, such as salary, wages and benefits**: According to the FTC, "exchanging competitively sensitive information about your company's compensation rates or other terms of employment can raise antitrust concerns if it has an anticompetitive effect on compensation – even if the exchange does not result in an agreement on wages or other terms of employment." In the mid-1990s, the DOJ entered into a consent decree with hospitals, a hospital association and a hospital human resources professional association in Utah. This matter involved allegations that the defendants "exchange[d] nonpublic prospective and current information about overall budgets, nursing budgets, and registered-nurse entry wages with the purpose and effect of stabilizing registered-nurse entry wages and limiting the amount and frequency of registered-nurse entry wage increases."

- **Invitations to collude, which the FTC may pursue as civil enforcement matters**: The agencies' guidance for human resource professionals states that if one company approaches a competing company and suggests that the two firms "agree[] not to recruit or hire each other's employees," this "amounts to a solicitation to engage in serious criminal conduct." While the element of an actual agreement necessary for a per se violation of the antitrust laws may not be present, the FTC may seek to establish civil liability for a so-called invitation to collude. In the past, the FTC has brought enforcement actions against such conduct under Section 5 of the FTC Act, which prohibits unfair methods of competition. For example, in 2018, the FTC settled charges that owners of competing companies providing therapist staffing services to home health agencies "agreed to lower their therapist pay rates to the same level and also invited several of their competitors to lower their rates in an attempt to keep therapists from switching to staffing companies that paid more."

- **Unilateral conduct by an employer using monopsony power to harm competition in a labor market**: In the past, courts have entertained claims against companies allegedly misusing monopsony power – that is, their power as dominant buyers of goods or services. Increasingly, the enforcement agencies are alert to possible anticompetitive effects of monopsony power in labor markets. For example, in the context of evaluating proposed mergers, both agencies have said they will examine the potential effects of a transaction on labor issues, including whether a transaction could result in a firm with increased buyer power for individuals' labor. Last autumn, a DOJ official testified before Congress that "[i]t is well-founded that mergers of competing employers can enhance buy-side market power, just as mergers of competing sellers can enhance sell-side market power. Because labor is an input that merging parties buy, [DOJ] staff assess whether a proposed transaction would allow the merged firm to reduce competition substantially in a labor market and use its enhanced bargaining power to depress workers' wages and benefits, including salary, commissions, and reimbursements." The FTC has similarly said it examines labor issues in evaluating transactions.

The labor market antitrust statement follows the agencies' recent DOJ-FTC Joint Antitrust Statement Regarding COVID-19, which provides, among other things, guidance for collaborations between businesses working to advance health and safety during the COVID-19 pandemic. (We discussed that statement in a prior memorandum.) The statements, taken together, are important reminders that any collaborative activity among competitors should be thoughtfully analyzed for antitrust risk, which may arise in a variety of contexts and not only in the sale of goods or services, but also in the purchase of labor.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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