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Compliance Update

DOJ Antitrust Division Continues Focus on Conduct in Labor Markets

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The Department of Justice (DOJ) Antitrust Division (Division), together with the Department of Labor (DOL) and the Federal Trade Commission (FTC), recently issued two new sources of guidance continuing the increased focus on anticompetitive conduct in labor markets and its impact on workers. On January 14, 2025, the Division issued a joint statement with the DOL, Occupational Safety and Health Administration (OSHA), cautioning companies that the use of non-disclosure agreements (NDAs) which deter individuals from reporting antitrust violations may limit a company's eligibility for corporate leniency and influence the Division's charging decisions. And only two days later, the Division, joined by the FTC, issued updated Antitrust Guidelines on Business Practices that Impact Workers (the Guidelines), instructing "how both the FTC and DOJ [will] assess whether business practices affecting workers violate the antitrust laws."

Together, these two directives reflect antitrust enforcers' growing attention to competition in labor markets, highlighting renewed scrutiny of specific employers' practices such as the use of NDAs, no-poach and non-compete agreements, and information-sharing.

DOJ and OSHA Joint Statement on Non-Disclosure Agreements that Deter Reporting of Antitrust Crimes

The Division and OSHA's joint statement on NDAs emphasizes the importance of transparency by employers and employee-reporting mechanisms in preventing antitrust violations. Specifically, the statement advises that corporate NDAs that effectively deter individuals from reporting antitrust crimes undermine the goals of whistleblower protection laws, including the Criminal Antitrust Anti-Retaliation Act of 2019 (the CAARA). The statement warns that a company's use of NDAs to deter individuals from reporting antitrust violations, whether intentional or otherwise, may (1) constitute separate federal criminal violations; (2) jeopardize its ability to satisfy its obligations under the Antitrust Division's corporate leniency policy; and (3) be taken into account and cost the employer when the Division makes charging decisions and sentencing recommendations.

This cautionary message mirrors, in part, the Division's recent update to the Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations guidelines. The updated Corporate Compliance guidelines, issued in November 2024, announced that, in making charging decisions and sentencing recommendations, prosecutors will now consider:

- Whether a company has an anti-retaliation policy;
- Whether employees are trained regarding the provisions of the CAARA;

- Whether NDAs leveraged by the company are used or enforced to effectively deter employees from reporting antitrust violations; and
- Whether the employer's policies make clear that employees can report antitrust violations without facing adverse employment consequences.

DOJ and FTC Antitrust Guidelines on Business Practices that Impact Workers

The Guidelines explain how the DOJ and FTC assess whether certain business practices affecting workers could violate antitrust laws. The Guidelines, which significantly expand the 2016 Antitrust Guidance for Human Resource Professionals, outline "specific types of agreements or business practices that may violate the antitrust laws," such as the use of non-competes, agreements to fix wages (wage-fixing agreements), agreements not to poach employees (no-poach agreements) and the sharing of information about wages, or other terms of compensation, among companies that compete for workers. The Guidelines make clear that such business practices may violate antitrust laws when they harm competition for employees.

Companies should take note of the Guidelines as related to each identified agreement or practice:

- ***Non-Compete Agreements***. The Guidelines specifically highlight the anticompetitive nature of non-compete agreements. Although the FTC recognizes that its rule banning non-competes is currently being challenged (an order from the Northern District of Texas setting aside the rule is currently on appeal in the Fifth Circuit), it states that the agency "retains the legal authority to address non-competes through case-by-case enforcement actions under the FTC Act," as well as other federal laws such as the National Labor Relations Act and the Packers and Stockyards Act. This statement signals that antitrust enforcers have not abandoned scrutiny of non-competes despite the recent enforcement roadblocks.
- ***No-Poach and Wage-Fixing Agreements***. Under the new Guidelines, businesses who compete with each other for workers may violate antitrust laws if they agree not to recruit, solicit, or hire workers from each other, or if they agree to fix compensation or other terms of employment. The scope of what constitutes a prohibited no-poach or wage-fixing agreement under the new guidelines is broad, reaching even those agreements that merely restrict hiring or that simply coordinate wages without setting a specific wage. Notably, these agreements could still be illegal "even if they did not result in *actual harm* such as lower wages," nor can employers avoid liability by entering into the agreements through an intermediary, such as a member association. The Guidelines, unlike those from 2016, now subject no-poach provisions in franchise agreements to antitrust scrutiny, stating that agreements in which the franchisor and franchisee agree not to compete for workers can be *per se* illegal. Similarly, the Guidelines state that a franchisor may violate antitrust laws by "organizing or enforcing a no-poach agreement among franchisees that compete for workers."
- ***Information Sharing***. The Guidelines state the sharing of competitively sensitive information with competitors about terms and conditions of employment, such as compensation or benefits, may violate the antitrust laws. Such an information exchange may be unlawful when it has, or is likely to have, an anticompetitive effect, *whether or not that effect was intended*. Furthermore, like no-poach and wage-fixing agreements, information exchanges may still violate antitrust laws even when executed through a third-party intermediary, including through an algorithm or other software. Exchanges that are used to generate wage or other benefit *recommendations* can be unlawful even if a participating company does not adhere to those recommendations. Critically, the updates remove the 2016 guidelines' assurance that information exchanges will be protected from criminal prosecution. This brings the Guidance into lockstep with the messaging laid out in the division's Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations guidelines published in November 2024.
- ***Other Restrictive***, ***Exclusionary***, ***or Predatory Employment Conditions***. The Guidelines identify several other restrictive employment conditions that could violate antitrust laws. NDAs and non-solicitation agreements can violate antitrust laws if they "span such a large scope of

information" that they effectively prevent workers from seeking or accepting other work. Provisions requiring departing employees to repay training costs, or other exit or liquidated damages provisions that "require[e] workers to pay a financial penalty for leaving their employer" can also be deemed anticompetitive. Additionally, the Guidelines warn that a company's false or misleading claims about an employee's earnings or compensation potential could trigger an antitrust investigation, highlighting as examples recent FTC actions against Amazon, Uber and Grubhub for advertising workers would earn substantially more than they ultimately did.

- ***Independent Contractors***. Finally, the Guidelines clarify that antitrust laws prohibit anticompetitive conduct directed at "workers," a term that includes *both* employees and independent contractors.

Client Takeaways

It is important to note that the issuances by the DOJ, FTC and OSHA come at the tail-end of the Biden administration and there is the potential for rescission over the next four years—particularly given the joint FTC-DOJ Guidelines were only narrowly approved by the FTC in 3-2 vote. Commissioners Andrew N. Ferguson and Melissa Holyoak, the two Republican FTC Commissioners, voted against the issuance of the Guidelines and filed a joint dissenting statement characterizing the issuance as a "senseless waste of resources" given the "hand[ing] over the baton" to a new administration in "mere days." Nevertheless, we recommend employers review their polices and relevant standing agreements, as well as any information sharing practices for compliance with the DOJ-OSHA Joint Statement and the DOJ-FTC's new Guidelines, and contact counsel directly with any questions.

We at Paul Hastings are continuing to watch this space as employers, investors and regulators continue to scrutinize their business practices. We will provide an update as any new information comes to light in this new administration. In the interim, please contact us to continue the discussion.

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