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Enforcement Focus on Labor Agreements

Series 2, 10 in 10: Issue 10

Recent actions by the Biden administration, including the Treasury Department's report on the State of Labor Market Competition in the U.S. Economy, the Memorandum of Understanding between the Department of Labor ("DOL") and Department of Justice Antitrust Division ("DOJ") to combat labor collusion, and statements by various officials indicate there will be continued, aggressive antitrust enforcement by this administration. The focus of these efforts is anticompetitive labor agreements including no-poach, wage fixing and non-competes. These actions are on the heels of President Biden's executive order on antitrust last year that requested that the federal antitrust agencies vigorously enforce the antitrust laws and specifically called out enforcement in the labor markets.

BACKGROUND

Anticompetitive labor agreements such as no-poach and wage fixing are a significant enforcement priority of the current administration. A no-poach arrangement is an agreement between two or more employers that restrains any of them from cold-calling, soliciting, recruiting, hiring or otherwise competing for each other's employees. A wage fixing agreement is an agreement among two or more employers to fix wages for similarly situated employees.

In 2016, the DOJ and U.S. Federal Trade Commission ("FTC") issued joint guidance regarding anticompetitive conduct regarding these types of agreements ("2016 Guidance").¹ Among other things, this guidance classified naked no-poach agreements, meaning those agreements unrelated or unnecessary to a larger legitimate collaboration between employers, as a *per se* violation of the Sherman Act. A *per se* violation is a



practice so inherently anticompetitive that it is deemed illegal without inquiry into its competitive effects.

Importantly, the 2016 Guidance also stated DOJ's intention to pursue criminal charges against both individuals and companies that entered into naked no-poach agreements. This was a departure from their historical practice of enforcing no-poach agreements in the civil context only and marked a significant enforcement escalation as criminal violations of the Sherman Act carry hefty fines and potential jail time. In particular, criminal violations of the Sherman Act carry maximum penalties for companies of \$100 million and for individual executives \$1 million and 10 years in jail.

RECENT DEVELOPMENTS

Following President Biden's executive order on antitrust in July 2021, there have been several developments to address his request for increased antitrust enforcement in labor markets including:

- In December 2021, the FTC and DOJ held a "Workshop on Competition" to discuss efforts to promote competitive labor markets and worker mobility, including whether there should be an outright ban on non-competition agreements.²
- On March 7, 2022, the U.S. Treasury Department issued a report called the State of Labor Market Competition in the U.S. Economy.³ The report noted that the labor market is characterized by high levels of employer power, and that noncompete agreements are contributing to low wages and worse working conditions. The report made a number of recommendations, including raising the minimum wage, making it easier for workers to organize and increasing antitrust enforcement in labor markets.
- On the same day, Attorney General Garland delivered remarks at the White House Roundtable in response to the Treasury Department report. Garland stated that lack of competition harms the American economy, and "employer concentration and anticompetitive labor practices undermine the free and fair labor markets upon which the integrity of our economy depends."⁴
- The Chairman of the FTC, Lina Khan, also delivered remarks at the White House Roundtable in response to the Treasury Department report. She stated that "[t]he report highlights several ways in which a lack of fair competition is hurting workers. A priority of mine at the Federal Trade Commission has been to ensure that we are using our tools and authorities to tackle unfair methods of competition that affect workers"
- On March 10, 2022, the DOJ Antitrust Division and the Labor Department signed a memorandum of understanding to protect workers from employer collusion, to ensure improved compliance with labor laws, and to promote competitive labor markets and worker mobility.⁵ This memorandum memorializes an agreement between the two agencies to share information with each other in certain circumstances, creating new risks for parties subject to DOJ antitrust investigations.

TAKEAWAYS

The recent developments should put companies on notice that the DOJ (and FTC) intend to follow through with, and expend significant resources on, the administration's request to aggressively enforce the antitrust laws against



anticompetitive labor agreements. That means more costly and lengthy investigations for companies and possibly more criminal indictments. As a result, companies should ensure that they have implemented robust and up-to-date compliance training, programs and policies and are closely monitoring DOJ and FTC enforcement actions.

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¹ DOJ and FTC Antitrust Guidance for Human Resource Professionals (Oct. 2016), available at <https://www.justice.gov/atr/file/903511/download>.

² Press Release, Department of Justice Office of Public Affairs, Department of Justice Antitrust Division and Federal Trade Commission to Hold Workshop on Promoting Competition in Labor Markets (Oct. 27, 2021), available at <https://www.justice.gov/opa/pr/departments-justice-antitrust-division-and-federal-trade-commission-hold-workshop-promoting>.

³ *State of Labor Market Competition in the U.S. Economy*, U.S. TREASURY DEP'T (Mar. 7, 2022), available at <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

⁴ Press Release, Department of Justice Office of Public Affairs, Attorney General Merrick B. Garland Delivers Remarks at the White House Roundtable on the State of Labor Market Competition in the U.S. Economy (Mar. 7, 2022), available at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-white-house-roundtable-state-labor>.

⁵ Press Release, Department of Justice Office of Public Affairs, Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), available at <https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers>.