

# Recent Antitrust Developments Underscore Administration's Focus on Labor Markets

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02 / 08 / 22

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One Manhattan West  
New York, NY 10001  
212.735.3000

1440 New York Avenue, N.W.  
Washington, D.C. 20005  
202.371.7000

As the Biden Administration enters its second year, the White House and antitrust enforcers at the Department of Justice (DOJ) and the Federal Trade Commission (FTC) continue to focus on the intersection between antitrust and labor.

President Biden signaled that labor-related antitrust would be an administration priority in July 2021 when he issued a sweeping executive order, "[Promoting Competition in the American Economy](#)," that urged the two antitrust agencies to consider, among other things: amending the merger guidelines to incorporate labor market harms; employing the FTC's rulemaking authority to curtail the use of employment terms that may limit worker mobility; and revising the 2016 Antitrust Guidance for Human Resource Professionals (2016 HR Guidance) to better protect workers from wage collusion. Since then, antitrust enforcers have been advancing these priorities in both their policy and enforcement efforts.

In December 2021, the agencies hosted a virtual workshop where top officials addressed numerous labor-related antitrust topics. Meanwhile, high-profile indictments and recent pre-trial wins underscore DOJ's targeting of criminal labor market misconduct. In all, these developments suggest that labor will remain top-of-mind for the antitrust agencies in 2022.

## Key Administration Officials Outline Approach to Labor Market Issues

In the December 6-7, 2021, workshop, titled "Making Competition Work: Promoting Competition in Labor Markets," DOJ, FTC and other administration officials offered a preview of their labor-oriented policy priorities.

In his first public appearance since his confirmation, Assistant Attorney General Jonathan Kanter, who heads DOJ's Antitrust Division, emphasized his commitment to improving labor competition and noted that DOJ is already considering whether to update published guidance, including the 2016 HR Guidance, to better protect worker access to labor markets.

In her remarks, FTC Chair Lina Khan said that the FTC is redoubling its commitment to scrutinizing mergers that have anticompetitive effects on labor markets and is investigating the extent to which contractual terms such as noncompete provisions may violate existing law.

In his keynote address, Special Assistant to the President Tim Wu noted that Section 2 of the Sherman Act should be enforced against monopolies and monopsonies alike and that worker classification issues (e.g., whether firms use contracts to avoid classifying their workers as employees) should be scrutinized under antitrust law.

The workshop's panel discussions among scholars, practitioners, government officials and policy experts also touched on potential reform efforts. For example, the first panel explored how merger reviews might inquire into labor markets. Another panel contemplated the legality of employment terms like noncompete agreements, training repayment agreements and nondisclosure agreements.

In other discussions, participants debated whether the agencies should abandon or adjust the safe harbor for information exchanges outlined in the 2016 HR Guidance, whether statutory antitrust exemptions may extend to gig-economy workers seeking to bargain collectively and whether the FTC may use its authority under Section 5 of the Federal Trade Commission Act to address worker "misclassification."

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An important theme that emerged throughout the two days of conversation was cross-agency collaboration. During the “Building a ‘Whole-of-Government’ Competition Policy” panel, policymakers and antitrust enforcers from across the federal government discussed the tools that government agencies may utilize to better coordinate on labor market issues. Likewise, both Assistant Attorney General Kanter and Chair Khan touted the importance of collaboration between the antitrust agencies. Chair Khan’s comments on collaboration built on the FTC’s November policy statement that outlined plans to expand the agency’s criminal referral program to further prevent and deter criminal antitrust misconduct, including cases involving wage-fixing and other labor-related conduct.

## Labor Misconduct Continues To Be a Criminal Antitrust Enforcement Priority

On the criminal enforcement front, DOJ’s efforts to investigate and prosecute no-poach and wage-fixing agreements continue to ramp up, with notable pre-trial wins and new high-profile indictments recently.

In late November, a federal judge in the Eastern District of Texas denied a motion to dismiss by defendants facing criminal antitrust charges of (i) conspiring to fix wages for physical therapists and therapist assistants in the Dallas-Fort Worth area and (ii) obstructing an FTC investigation into their conduct. It is DOJ’s first criminal prosecution of a wage-fixing agreement and a prominent example of cross-agency collaboration in the criminal context.

In denying the defendants’ motion, the court confirmed that wage fixing is *per se* illegal under the Sherman Act, reasoning that wage fixing is tantamount to price fixing and that the antitrust laws fully apply to labor markets.<sup>1</sup>

Similarly, on January 28, 2022, a federal judge in the District of Colorado denied a motion to dismiss by defendants accused of entering into “no-poach” agreements concerning health care employees, reasoning that the alleged agreements can be subject to *per se* treatment as horizontal market allocation agreements.<sup>2</sup>

DOJ is also currently litigating motions to dismiss in a related Northern District of Texas case in which the defendants are accused of participating in the same no-poach scheme alleged in

the Colorado action,<sup>3</sup> and a District of Nevada case in which the defendants are accused of conspiring to suppress wages for Las Vegas school nurses.<sup>4</sup>

Separately, in mid-December, a federal grand jury in Connecticut indicted several high-ranking aerospace engineering employees — including a former director of global engineering services at a major aerospace company and executives at several outsource engineering suppliers — for allegedly engaging in a nearly decade-long “no-poach” scheme that affected thousands of engineers and other skilled workers in the aerospace industry.

In announcing the charges, DOJ stated that the indictment is the first in an ongoing investigation into labor market allocation in the aerospace engineering services industry. Numerous putative class action civil suits have since been filed by former employees, who generally allege that the companies’ alleged no-poach agreement deprived them of free and fair competition in the market for their services and thus both suppressed their wages and limited their mobility.

DOJ continues to pursue criminal wage-fixing and no-poach cases in 2022. On January 27, a federal grand jury in Maine returned an indictment charging four home health care agency managers with conspiring (i) to fix the wages of personal support specialist workers and (ii) not to hire each other’s workers during the COVID-19 pandemic. In its announcement of the charges, DOJ reported that its investigation into the personal support specialist industry is ongoing.

## Key Takeaways for 2022

While the agencies have been promising increased antitrust enforcement in labor markets since at least 2016, their virtual workshop and recent criminal antitrust enforcement initiatives suggest that the regulation of competition in labor markets has in fact become a top priority for them 2022. On the policy front, the agencies seem ready to update antitrust guidance to reflect labor market considerations, and on the enforcement front, the agencies seem poised to continue aggressively pursuing labor misconduct criminally, particularly against those who engage in wage fixing and enter into no-poach agreements.

<sup>1</sup> *United States v. Jindal*, No. 4:20-CR-00358, 2021 WL 5578687 (E.D. Tex. Nov. 29, 2021).

<sup>2</sup> *United States v. DaVita Inc.*, No. 1:21-CR-00229, 2022 WL 266759 (D. Colo. Jan. 28, 2022).

<sup>3</sup> *United States v. Surgical Care Affiliates*, No. 3:21-CR-00011 (N.D. Tex.).

<sup>4</sup> *United States v. Hee*, No. 2:21-CR-00098 (D. Nev.).

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## Contacts

**Karen M. Lent**

Partner / New York  
212.735.3276  
karen.lent@skadden.com

**Tara L. Reinhart**

Partner / Washington, D.C.  
202.371.7630  
tara.reinhart@skadden.com

**Julia K. York**

Partner / Washington, D.C.  
202.371.7146  
julia.york@skadden.com

**Zachary C. Siegler**

Associate / New York  
212.735.3547  
zachary.siegler@skadden.com

**Michael A. Lanci**

Associate / New York  
212.735.3423  
michael.lanci@skadden.com