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Antitrust Enforcers Are Increasingly Focused on Labor Markets, and Not Just in the Merger Context

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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

Annie Villanueva Jeffers
Partner / New York
212.735.2515
annie.villanueva@skadden.com

Justine M. Haimi
Counsel / New York
212.735.2344
justine.haimi@skadden.com

Key Points

- Federal and state antitrust regulators have increasingly turned their attention to competition in labor markets, both in the merger context and where noncompete agreements limit employees' freedom to change jobs.
- The FTC is expected to vote soon on a rule banning new noncompete agreements and requiring rescission of existing noncompetes — rules that could force businesses to reexamine how they protect trade secrets and sensitive information.
- Revised federal merger guidelines identify potential effects on labor as a reason to challenge transactions, and some states have cited potential effects on labor in challenging deals.
- Given this increased focus, companies should review existing noncompetes and restrictive covenants, ensure that alternative safeguards are in place to protect trade secrets and other competitive information, and update compliance programs to address no-poach and wage-fixing conduct.

Labor markets have been a focus of antitrust regulators at the Department of Justice (DOJ) and Federal Trade Commission (FTC) since the Obama administration. Indications are that enforcers will be even more aggressive across the board, raising labor concerns in order to prevent mergers and change employers' behavior.

Under the Biden administration, the two agencies have pursued enforcement actions focused on protecting workers from alleged unfair methods of competition, both in the context of merger investigations and in criminal investigations. At the FTC, pending rulemaking would prohibit most noncompete agreements.

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Given that the Trump administration also adopted labor issues as part of the antitrust approach that has taken hold over the past decade, nothing suggests a change in administration would lessen the government's commitment to protecting employees using antitrust tools. It is clear that labor issues will be central in antitrust analyses going forward.

Noncompete Rulemaking and Enforcement

The FTC is expected to vote on a final rule banning noncompete agreements in April 2024. First proposed in January 2023, the rule would, if implemented:

- Ban employers from entering into noncompete clauses with their employees and independent contractors.
- Require employers to rescind existing noncompete clauses and inform their employees that these are void.

The proposed rule would not prevent employers from entering into other forms of restrictive covenants with workers (such as nondisclosure and nonsolicitation restrictions), as long as they are not written so broadly as to constitute *de facto* noncompete clauses.

Still, the new rule could have far-reaching consequences on companies' efforts to protect trade secrets and other competitively sensitive information when employees leave a firm. For example, a nondisclosure agreement seeking to protect such information could be deemed to be unenforceable because it effectively precludes an employee from finding new work in the same field.

In accordance with its general opposition to noncompetes, in 2023, the FTC required three companies and two individual owners to drop noncompete restrictions on workers ranging from low-wage employees to engineers.

Increased scrutiny of and hostility toward post-employment noncompetes has also been seen at the state level, as discussed below.

Labor and Merger Investigations

The agencies have memorialized their focus on labor impacts as a theory of harm in merger enforcement. The DOJ and FTC's recently revised merger guidelines for the first time identified possible effects on labor as a reason to challenge potential transactions.

Going forward, the agencies will assess whether a merger will create dominance in buy-side labor markets by evaluating the merging companies' ability to cut or freeze wages, slow wage growth, exercise increased leverage in negotiations, or generally degrade benefits and working conditions without causing workers to quit. (See "Managing Deal Risks in a Challenging Regulatory Environment: Strategies and Deal Terms.")

Consistent with the new guidelines, the DOJ and FTC recently proposed major changes to the premerger filings required under the Hart-Scott-Rodino (HSR) Act, which are expected to be finalized this year. To assist with screening for labor issues, a new "Labor Markets" section of the HSR form would be added, requiring merging parties to submit information about the largest categories of workers employed by each party and the geographic areas where these employees work, as well as identification of labor violations in the past five years.

A high-profile example of the DOJ's focus on labor issues in challenging a merger was its successful blocking of Penguin Random House's proposed acquisition of Simon & Schuster in October 2022. The DOJ alleged negative effects on author compensation and stated that the decision "reaffirms that the antitrust laws protect competition for the acquisition of goods and services from workers."

State attorneys general have also been following suit in challenging mergers using labor-based theories of harm. For example, on February 14, 2024, Colorado's attorney general sued to block the Kroger-Albertsons supermarket merger, citing "a history of collusion between Kroger and [Albertsons] in the form of unlawful no-poach and non-solicitation agreements" as "highly probative of likely harm from a merger." A similar complaint filed by Washington state on January 15, 2024, notes the specialized, and unionized, workers employed by the parties and alleges that the merger would give the combined company an incentive to close unionized stores, but ultimately did not base any of its claims on labor market impacts.

The issue came to a head on February 26, 2024, when the FTC, eight states and the District of Columbia filed a complaint seeking a preliminary injunction to prevent the Kroger-Albertsons merger from closing. The plaintiffs allege that the merger would harm competition for labor, and specifically union labor, as Kroger and Albertsons are the two largest employers of union grocery labor in the United States.

The plaintiffs assert that, in local markets defined in a grocery labor union collective bargaining agreement (CBA), the merger would reduce the ability of unions to play Kroger and Albertsons against one another during CBA negotiations, including through credible strike threats. The plaintiffs cite real world examples of unions securing more favorable salaries and benefits for workers by generating competition between the two grocery chains.

A parallel administrative proceeding filed by the FTC is set to go to trial in July 2024.

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Criminal Prosecution of No-Poach and Wage-Fixing Agreements

The DOJ and FTC have also pursued labor-related criminal actions, with mixed success. In November 2023, the DOJ voluntarily dismissed with prejudice a no-poach case ready for trial after losing four prior no-poach cases (some that also included wage-fixing allegations) in the prior three years.[1] However, the agency did secure a corporate plea agreement in a no-poach case that also involved wage-fixing allegations,[2] and it has another wage-fixing case pending against an individual.[3]

Despite the DOJ's imperfect track record, Assistant Attorney General Jonathan Kanter, head of the Antitrust Division, stated in a Brookings Institution panel discussion in October 2023 that "protecting workers from criminal behavior that harms their ability to get better wages, to realize upward mobility in their lives by getting access to better jobs, better training and opportunities to provide for their families is fundamental and foundational to the work we do as antitrust enforcers."

Takeaways

In light of the continued and increasing focus on labor at the federal and state levels, companies must keep labor issues top of mind both in the ordinary course of business and when pursuing transactions.

As preparation, companies should:

- Collect and review agreements with employees (especially low-wage workers) that contain noncompetes and other restrictive covenants.
- Monitor the FTC's noncompete rule and state laws regarding noncompetes as well as other restrictive covenants.
- Be ready to revise and/or rescind any noncompetes or other restrictive covenants that run afoul of existing and new federal or state noncompete laws.
- Ensure that alternative safeguards are in place to protect trade secrets and other competitive information, especially in the event that a firm's noncompete or other restrictive covenants are deemed unenforceable. For example, consider protecting such information through carefully tailored nondisclosure agreements and explore means other than specific performance for enforcing such agreements. Options could include provisions designed to incentivize workers not to breach such agreements (*e.g.*, paying severance only if a nondisclosure covenant is not violated or providing retention bonuses for employees who have knowledge of sensitive information) and/or liquidated damages provisions that comply with applicable law.
- When considering transactions, analyze the effects of potential transactions on workers, particularly where the merging parties' workforces are highly specialized and limited geographically.
- Continue to include training on and monitor no-poach and wage-fixing conduct in compliance programs. Enforcers are learning from past no-poach and wage-fixing cases, and prior jury losses will inform the DOJ's approach to criminal prosecutions in the future.

[1] *See United States v. Jindal*, Case No. 23-cr-358 (E.D. Tex. 2020) (jury acquitted defendants on no-poach and wage-fixing charges but found one defendant guilty of obstructing the FTC's investigation of the allegations); *United States v. DaVita Inc.*, Case No. 21-cr-00229 (D. Colo. 2021) (jury acquitted defendants on all charges); *United States v. Patel*, Case No. 21-c4-00220 (D. Conn. 2021) (court ordered acquittal of all defendants prior to jury deliberations); *United States v. Manahe*, Case No. 22-cr-00013 (D. Me. 2022) (jury acquitted defendants on all charges).

[2] *See United States v. Hee*, Case No. 21-cr-00098 (D. Nev. 2021).

[3] *See United States v. Lopez*, Case No. 23-cr-00055 (D. Nev. 2023).

One Manhattan West / New York, NY 10001 / 212.735.3000
1440 New York Ave., N.W. / Washington, D.C. 20005 / 202.371.7000