The DOJ and FTC Release New Guidance for Business Activities Affecting Workers

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On January 16, 2025, the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) (together, the Agencies) released the Antitrust Guidelines for Business Activities Affecting Workers (Guidelines), replacing their Antitrust Guidance for Human Resource Professionals (Oct. 2016) (HR Guidance). To promote "clarity and transparency for the public," the Guidelines purport to explain how the Agencies will assess a broad set of business practices affecting workers in determining whether the practices violate the antitrust laws. The HR Guidance provided "principles to help HR professionals and the companies they represent avoid running afoul of the antitrust laws as they relate to agreements and communications among employees." In contrast, the new Guidelines address a wide array of conduct, including noncompete agreements between employers and employees and "[o]ther restrictive, exclusionary, or predatory employment conditions."

Unlike the earlier HR Guidance, which had the support of all five FTC commissioners when released late in the Obama administration, the Guidelines released this year were supported only by the FTC's three Democrats. The two Republicans — President Trump's selection to chair the FTC, Commissioner Andrew Ferguson, and Commissioner Melissa Holyoak — dissented. Now-Chair Ferguson wrote that the commission majority "should not replace existing guidance mere days before they hand over the baton," explaining that "the Biden-Harris FTC announcing its views on how to comply with the antitrust laws in the future is a senseless waste of Commission resources. The Biden-Harris FTC has no future." Given the pointed rejection of the Guidelines by the new FTC Chair, how well these Guidelines will hold up under the new administration is an open question, with the distinct possibility the Agencies will either revise the Guidelines or rescind them in favor of the 2016 HR Guidance.

General Principles Under the 2025 Guidelines

The Guidelines identify a few general principles and enforcement priorities, such as the treatment of wage-fixing and no-poach conspiracies among employers, that are largely consistent with the earlier HR Guidance that was put in place by the Obama administration and adhered to by the first Trump Administration and by the Biden Administration until the very end of its tenure. The Guidelines do therefore carry over useful guidance on principles likely to persist in the new administration, including the following:

- Agreements do not need to be explicit or written to violate the antitrust laws. Thus, mutual understandings or so-called gentlemen's agreements, just like formal contracts, can run afoul of the antitrust laws.
- The *per se* rule and rule of reason apply to labor market restraints. Thus, certain "types of agreements are illegal regardless of their effects," while in "other cases, the Agencies perform a deeper analysis, examining the impact of the agreement on workers by impairing the competitive process, suppressing competition, or the actual or likely effects of the conduct in the affected labor market."
- Businesses can be competitors for workers, even if the businesses provide different products or services. For example, "airplane manufacturers and their part suppliers may both hire from the same market for engineers," and thus may be deemed by the Agencies horizontal competitors in that market despite their vertical relationship.

New to the Guidelines is a section articulating another principle: The "antitrust laws apply to agreements that businesses reach with independent contractors." Citing the "growth of technology platforms such as smartphone apps" that enable businesses to

"use independent contractors rather than employees to match workers who provide labor with consumers seeking their services," the Guidelines state that these kinds of platform businesses are subject to the antitrust laws "with respect to both their employees and independent contractors." Thus, the Guidelines assert that "an agreement between two or more competing platforms to fix the compensation of independent contractors offering their services via the platforms may constitute the type of *per se* violation of the antitrust laws that … exposes the platforms to criminal liability."

Activities the Agencies Believe May Violate the Antitrust Laws

The Guidelines list activities that, in the Agencies' view, *may* constitute an antitrust violation. Notably, the Guidelines address not only agreements among competing employers, but also address agreements that employers have with their own employees — unlike the HR Guidance, which had explicitly disclaimed addressing "contracts between an employer and an employee, including non-compete clauses." The activities that the Agencies identify as possible antitrust violations include noncompete, nonsolicitation and nondisclosure clauses; training repayment, exit fee and liquidated damages agreements; and "other restraints on worker mobility." Important to note, though, is that some of the Agencies' theories in this context are not grounded in, or are largely untested under, antitrust law.

The Guidelines "encourage anyone with information about" the listed activities to report them to the Agencies, despite the clear caveats that the activities "may or may not" constitute an antitrust violation; that nothing in the Guidelines "should be construed as mandating a particular outcome in any specific case"; and that the Guidelines do not limit "the discretion of any U.S. government agency to take any action, or not to take action, with respect to matters under its jurisdiction."

While these caveats introduce some ambiguity about what the Agencies believe violates the antitrust laws, the Guidelines nevertheless provide guidance on areas of caution and, in particular, areas of potential risk for criminal charges.

Wage-Fixing and No-Poach Agreements

Like the earlier HR Guidance, the Guidelines emphasize (i) that wage-fixing and no-poach agreements between businesses that compete with each other for employees may violate antitrust laws, even if the agreements did not result in actual harm, and (ii) that the DOJ may "criminally investigate and, where appropriate, bring felony charges against the participants in these agreements." Also, the Guidelines now appear to open the door to civil enforcement in at least some wage-fixing or no-poach cases, stating, "Even if criminal charges are not pursued, these agreements may also be subject to civil liability." The DOJ has overcome legal challenges to its wage-fixing and no-poach indictments and obtained one guilty plea, but has had difficulty obtaining convictions at trial. Given the past statements and criminal charges by the Biden administration and first Trump administration in this context, continued criminal investigations of suspected wage-fixing and no-poach agreements are likely to remain the norm, though the DOJ may be especially cautious in its charging decisions.

The Guidelines explain that the Agencies "focus on the substance" of the agreements, rather than the particular form. The Guidelines' list of wage-fixing and no-poach agreements includes:

- Agreements to align, stabilize or coordinate compensation (including wage rates, salary, bonuses, benefits or other terms of employment).
- Agreements to set starting points, specific levels, ranges or ceilings for compensation.
- Agreements to use a benchmark to calculate compensation.
- Agreements not to hire each other's employees (including current, former or potential employees).
- Agreements not to solicit or cold-call each other's employees or otherwise restrict the ability to hire employees, even if a particular agreement "does not completely prohibit hiring the other company's workers."
- Agreements to request permission from another company before trying to hire an employee.

Franchise No-Poach Agreements

In a separate section addressing agreements in the franchise context, the Guidelines state that an agreement between a franchisor and franchisee not to compete for workers can be *per se* unlawful, and a franchisor organizing or enforcing a no-poach agreement among franchisees may itself violate the antitrust laws. The Guidelines also note that no-poach agreements among franchisees "may violate other federal and state laws," citing by example two state laws (but not identifying any other federal laws). Consistent with this guidance, the DOJ and FTC have filed amicus briefs in private actions in the franchise context, for example, arguing in one case that no-hire or no-solicitation provisions can be horizontal agreements and, if so, that they are *per se* illegal unless they qualify as ancillary restraints.

Notably, this franchise-specific section of the Guidelines does not mention criminal enforcement. And, to date, none of the DOJ's criminal wage-fixing or no-poach charges arose in the franchise context.

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Sharing Information About Wages, Terms and Conditions of Employment

The Guidelines also list sharing competitively sensitive compensation or other employment information among employers as a potential violation. The Guidelines tie the potential violation to "when the information exchange has, or is likely to have, an anticompetitive effect," indicating the Agencies' intent to approach such information exchanges, which fall short of wage-fixing or no-poach agreements, as civil, rule-of-reason cases. The Guidelines also emphasize that "[p]roviding competitively sensitive information through an algorithm or through a third party's tool or product may also be unlawful." The prior affirmative guidance from the HR Guidance for when an information exchange may be *lawful* is omitted in favor of an example of what the Agencies view as an unlawful wage information exchange, specifically an alleged exchange of sensitive compensation information, including current and future wages, facilitated by a third party.

Noncompete Clauses

The Agencies opine that noncompete clauses — provisions in employer-employee agreements that "restrict workers from switching jobs or starting a competing business" — "decrease competition for workers" and also "harm competition by preventing other businesses from obtaining enough workers to enter a market or prevent potential competitors from forming, thereby blocking competitors from competing effectively with the original employer." In the Agencies' view, such provisions "can violate the antitrust laws" as well as other federal laws, including the National Labor Relations Act and the Packers and Stockyards Act, and state laws that ban unfair or deceptive practices or noncompete arrangements.

The FTC attempted to prohibit most noncompete clauses with a rule issued in April 2024, but a court issued an order setting aside the rule in August 2024, holding that the rule exceeded the commission's statutory authority. That order is under appeal in the Fifth Circuit. For details about the FTC's noncompete rule, see our September 2024 *Insights* article "FAQs About the Set-Aside of the FTC's Ban on Noncompetes."

Even without the rule, the Guidelines explain that the "Agencies may investigate and take action against noncompetes and other restraints on worker mobility that limit competition." The Guidelines note several FTC enforcement actions alleging that the use of noncompete agreements was an unfair method of competition in violation of Section 5 of the FTC Act as well as instances where FTC settlements of merger complaints included provisions requiring parties "to cease using, enforcing, and/or entering into non-compete clauses." The Guidelines also note a DOJ deferred prosecution agreement in which a defendant agreed not to enforce its noncompete provisions in certain circumstances to remediate the harm of its market-allocation conspiracy. In this case, the criminal charge alleged a conspiracy to allocate cancer treatments and did not allege the noncompete provisions were themselves unlawful or even facilitated the conspiracy. The noted examples show the dearth of enforcement actions challenging noncompete clauses on antitrust grounds.

Other Restrictive, Exclusionary or Predatory Employment Conditions

The Guidelines also include a catch-all category, noting the Agencies may investigate and take action against "restrictive agreements that will impede worker mobility or otherwise undermine competition." Such restrictions, in the Agencies' view, "can harm labor market competition by preventing workers from seeking better, higher-paying jobs" and "can also harm competition for goods and services by raising entry barriers for new businesses." The Agencies provide an illustrative list of such potentially anticompetitive restrictions, including:

- Nondisclosure agreements that "span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their jobs."
- Training repayment agreements that "function to prevent a worker from working for another firm or starting a business."
- Nonsolicitation agreements that are so broad their prohibition on soliciting former clients or customers prevents a worker from seeking or accepting another job or starting a business.
- Exit fee and liquidated damages agreements that require workers to pay a financial penalty for leaving their employer when these agreements "prevent workers from working for another firm or starting a business."

Notably, the Guidelines eschew a categorical approach for these restrictions, emphasizing that the analysis and legality of such a restriction depends on the specific facts and circumstances. It is also noteworthy that these antitrust theories are largely untested, and the Agencies cite only one enforcement action, a consent decree with a poultry processor resolving allegations that termination payment provisions in its contracts with poultry growers violated the Sherman Antitrust Act and the Packers and Stockyards Act.

False Earnings Claims

Lastly, the Guidelines state that the Agencies "may investigate and take action against businesses that make false or misleading claims about potential earnings" that workers may realize, noting

actions by the FTC against an online retailer, a ride-sharing company, a customer service gig work platform and a food delivery company. None of these actions included antitrust claims, but rather alleged unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act or consumer fraud statutes.

The Future of the Guidelines

The tenor of the Guidelines stands in contrast to the HR Guidance that had been in place for more than eight years. The HR Guidance spoke directly to HR professionals and described what conduct created a risk of violating the antitrust laws, focusing on agreements or communications among employers. The HR Guidance included a question-and-answer section that allowed HR professionals to understand the boundaries of lawful conduct using real-world examples. The Guidelines no longer contain this kind of "guidance," instead offering broad statements about what *may* be unlawful and expanding their coverage to provisions in employee contracts. While the Guidelines purport to articulate the DOJ's and FTC's approach (from which the Republican FTC commissioners, including the new chair, dissented) to various antitrust issues affecting labor — including a range of conduct by employers that previously had not been part of any joint policy statement — it remains to be seen whether the Trump administration's FTC and Antitrust Division will revise the Guidelines, or even withdraw them entirely and revert to the HR Guidance. The answer will likely have to await the arrival of the third Republican commissioner at the FTC and Gail Slater, President Trump's nominee for the top antitrust role at the DOJ (or action by the interim leader of the Antitrust Division).