U.S. Antitrust Enforcers Warn Of Continued Action Against Collusive Conduct Impacting Workers In U.S. Labor Markets During Pandemic

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Antitrust/Competition

The Department of Justice Antitrust Division and the Federal Trade Commission's Bureau of Competition issued another reminder yesterday that the COVID-19 pandemic does not exempt companies from complying with federal antitrust laws. The agencies' latest statement focuses on the labor force and emphasizes the agencies' intent to protect workers responding to the pandemic by enforcing antitrust laws against those who engage in anticompetitive conduct.

The agencies indicated that they will pay particular attention to conduct affecting workers providing essential services during the crisis, including but not limited to health care, grocery store, pharmacy, and warehouse workers. They will continue to investigate anti-competitive wage-fixing and no-poach agreements, non-compete provisions in contracts, and exchanges of competitively sensitive worker information such as compensation and benefit information. The agencies will be on high alert for agreements to suppress competition for worker compensation or benefits at all stages of the employment process, including hiring, recruiting, and retention.

The agencies warned that they may bring criminal prosecutions against naked wage-fixing or no-poach agreements and that they may bring civil enforcement actions against activity that invites collusion but falls short of an agreement. In addition to collusive activity, the agencies stated that they may bring actions to stop unilateral conduct that harms competition in a particular labor market.

While the joint statement does not signify a departure from the agencies' previous positions on these issues, it does reinforce that companies should exercise continued vigilance regarding antitrust compliance in the current climate. Well-meaning competitor collaborations, information sharing, and benchmarking on best practices in response to the public health crisis can create efficient, pro-competitive benefits that are consistent with the antitrust laws, if undertaken with proper guidance and oversight. For example, there may be legitimate needs to collaborate and exchange information relating to worker health and safety during the crisis. But such discussions should be structured carefully to avoid spillover – or the appearance of spillover – into worker pay, hours, and benefits, which pose heightened risk of antitrust scrutiny.

As a result, it is important to seek advice of antitrust counsel to discuss appropriate guardrails *before* engaging in competitor collaborations. Indeed, where companies want guidance from the DOJ or FTC prior to engaging in collaborating activities relating to public health and safety, the agencies have committed to responding expeditiously – within seven calendar days of receiving the information that they deem necessary – and have already provided a favorable opinion for one collaboration among several major medical suppliers to coordinate on the manufacture, sourcing, and distribution of medical supplies.

The COVID-19 pandemic and related considerations are omnipresent today, but months from now, actions may be viewed under a different light, whether by the federal or state government agencies, private parties, or courts. Companies therefore should be mindful not just of the technicalities of the law but also of avoiding the appearance of any unlawful conduct that could become a lightning rod for future investigation or suit.

For more information, see "Competition Guardrails for Collaborating in Response to COVID-19" or visit Covington's COVID-19 Toolkit.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Antitrust/Competition practice:

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