OPINION

U.S. Antitrust Focus on Labor Markets Continues to Accelerate

By Bruce McCulloch, Meredith Mommers **February 7, 2022**

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The **Federal Trade Commission** (FTC) and the **U.S. Department of Justice** (DOJ) have historically focused antitrust enforcement on price fixing and other anticompetitive conduct in sales markets. However, over the past few years, the agencies have increased their scrutiny of labor markets in response to growing recognition that there is an intersection with antitrust. This scrutiny has only increased since last summer, when President **Biden** signed Executive Order 14036, Promoting Competition in the American Economy, which contains a number of labor initiatives.

Because labor markets are a clear focus of the current administration, labor-related issues are a higher priority for the agencies than ever before. This heightened scrutiny increases antitrust exposure for companies, highlighting the need for new and specialized compliance measures.

Increased Enforcement

The FTC and DOJ issued HR-related guidance over five years ago, signaling their commitment to enforcing antitrust laws against employers engaging in anticompetitive conduct in U.S. labor markets. This guidance warned companies for the first time that wage-fixing and no-poach agreements would be prosecuted criminally. In late 2020, the DOJ brought its first criminal wage-fixing case, which was quickly followed by the agency's first criminal no-poach case in 2021. Under pressure from both the **Trump** and Biden administrations and Congress, the DOJ has actively sought these cases and is now bringing them, as evidenced by the multiple wage-fixing and no-poach cases it brought in 2021. Although most of these cases involve the health care industry, the DOJ's December 2021 indictment of six individuals in the aerospace industry (in U.S. v. Patel) suggests that all industries will face more scrutiny.

The U.S. antitrust agencies also face political pressure to prevent mergers that will harm labor markets. As a result, the agencies are increasingly concerned with transactions that may lead to increased monopsony power (i.e., where a market has few buyers and many sellers), particularly in heavily concentrated labor markets. The agencies are demanding labor market-related information during merger reviews. Merging parties must be prepared to address potential labor-related

concerns as well as traditional anticompetitive theories of harm. In addition, transacting companies are likely to face greater scrutiny of their terms and conditions related to noncompetes and the exchange of HR-related information in the context of due diligence.

Evolving Antitrust Law

Although it remains to be seen whether Congress will enact new antitrust laws, the U.S. antitrust agencies continue to be very active. Based on recent policy statements, the agencies have signaled that they are willing to sue, which may result in enforcement-friendly precedent. The DOJ's first criminal wage-fixing case is a recent example, where the district court judge held that such conduct can be a per se violation of the Sherman Act (in U.S. v. Jindal). This precedent is likely to embolden the agency to bring more cases, and may lead antitrust authorities in other jurisdictions to pursue similar enforcement actions outside the U.S.

The FTC and the DOJ may also issue new guidance in response to the executive order. In particular, the Biden Administration targeted the merger guidelines in the context of consolidation across the economy. In response, the agencies have rescinded their vertical guidelines and are reviewing their horizontal guidelines. The agencies recently issued a merger enforcement request for information (RFI) for public comment, which includes questions that target labor-related concerns. Ultimately, it may be several months before we see new agency-issued guidance.

Antitrust Compliance

Businesses cannot afford to wait and see how this new wave of antitrust enforcement plays out; they should be auditing their HR practices now. Significantly, in the labor context, "competitor" includes any business

that competes to hire the same employees, irrespective of whether that business makes similar products or provides similar services. Companies need to be alert to the increased scrutiny around compensation and hiring practices and proactively prepare for potential further restrictions resulting from stepped-up antitrust enforcement. HR professionals, particularly those responsible for recruitment, should be included in antitrust compliance programs. According to recent DOJ guidance, the effectiveness of a company's compliance program will be evaluated, in part, by whether the program is tailored to address the specific risks that may arise for the business. At minimum, companies' compliance programs should address specific HR and hiring practices, so those individuals understand the limits for communicating with competitors.

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