

April 14, 2020

FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE ISSUE JOINT STATEMENT REGARDING COVID-19 AND COMPETITION IN LABOR MARKETS

To Our Clients and Friends:

The COVID-19 pandemic has drastically reshaped the economy in many ways, and labor markets are not immune to its impact. As demands for goods and services—and the workers required to meet those demands—shift, employers should carefully consider the antitrust implications of any steps they might take to adjust to changing markets.

On April 13, the Federal Trade Commission’s Bureau of Competition and the Justice Department’s Antitrust Division issued a joint statement announcing that both agencies are “on alert” for collusion or anticompetitive conduct in labor markets.^[1] The joint statement acknowledges that the COVID-19 pandemic “may require unprecedented cooperation” between governments, private businesses, and individuals to address the needs of Americans. However, in keeping with the agencies’ recent focus on competition in labor markets, the joint statement warns employers, staffing companies, and recruiters that the agencies are closely monitoring labor markets for unlawful coordination that harms workers, particularly the “essential service providers on the front lines of addressing the crisis,” including doctors, nurses, first responders, and employees of grocery stores, pharmacies, and warehouses.

The joint statement provides several examples of conduct in labor markets that may subject employers to liability under the antitrust laws, including wage-fixing agreements, no-poach agreements, anticompetitive non-compete agreements, and the unlawful exchange of competitively sensitive employee information such as salary, wages, benefits, and compensation data. Wage-fixing and no-poach agreements, in particular, may be criminally prosecuted. Moreover, even in the absence of an agreement among competitors, the agencies warn that they may use their civil enforcement authority to challenge companies and individuals that invite others to collude or that engage in unilateral conduct that harms competition in a labor market.

Employers can take several practical steps to promote compliance with antitrust laws in employment decisions:

- Review the Department of Justice and Federal Trade Commission’s Antitrust Guidance for Human Resources Professionals, which provides guidance on lawful and unlawful practices in labor markets.^[2]
- Review Gibson Dunn’s recent WebEx presentation discussing updates on antitrust enforcement concerning no-poach and non-compete agreements.^[3]

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- Ensure that employees responsible for employment decisions receive antitrust training and understand that the antitrust laws may apply to their conduct, potentially subjecting the company and themselves as individuals to liability.
- If you become aware of conduct that may implicate the antitrust laws, contact counsel immediately.

[1] Federal Trade Commission & Department of Justice, *Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets* (Apr. 13, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf.

[2] Department of Justice & Federal Trade Commission, *Antitrust Guidance for Human Resources Professionals* (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>; *see also* Gibson Dunn, *Antitrust Agencies Issue Guidance for Human Resource Professionals on Employee Hiring and Compensation* (Oct. 26, 2016), <https://www.gibsondunn.com/antitrust-agencies-issue-guidance-for-human-resource-professionals-on-employee-hiring-and-compensation/>.

[3] Gibson Dunn, *Webcast: Antitrust Update on No-Poach and Non-Compete Agreement Enforcement* (Feb. 27, 2020), <https://www.gibsondunn.com/webcast-antitrust-update-on-no-poach-and-non-compete-agreement-enforcement/>.



Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact your usual contacts or any member of the Firm's Coronavirus (COVID-19) Response Team, any of member of the Antitrust and Competition Group, or the following authors.

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