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EMPLOYERS BEWARE: AGGRESSIVE AND EXPANSIVE LABOR-FOCUSED ANTITRUST ENFORCEMENT WILL REMAIN THE NEW NORMAL

To Our Clients and Friends:

In the past year, the U.S. Federal Trade Commission ("FTC") and Department of Justice's Antitrust Division ("DOJ") have put antitrust enforcement in the employment context at center stage. Last week, those efforts were put to their first true test in trials in Texas and Colorado—where juries failed to convict any defendant of wage-fixing, unlawful no-poach agreements, or any other antitrust violation. But employers should not rest easy; the DOJ has already confirmed that it is undaunted. And both the DOJ and FTC appear ready to bring novel enforcement actions against agreements and consolidations that allegedly restrain competition in labor markets.[1] These developments, should put employers on high-alert to ensure that their hiring, recruitment, non-compete, and employee classification and compensation policies and practices conform with antitrust laws.

Wage-Fixing, No-Hire, No-Poach, and Non-Solicit Agreements

For more than five years, following the DOJ and FTC's 2016 "Antitrust Guidance for Human Resource Professionals," the DOJ has been vocal about its intent to criminally prosecute "naked" wage-fixing and no-hire, no-poach and non-solicit agreements between horizontal competitors.[2] This intention has become reality over the past 18 months, with a number of criminal indictments against both companies and individual executives for alleged wage-fixing, no-poach, and non-solicit agreements. Those efforts have now been tested at trial.

Late last week, a jury in Texas returned its verdict after a eight-day trial of two health care staffing executives accused of fixing the rates paid to physical therapists and therapist assistants in the Dallas-Fort Worth area. The jury acquitted the defendants of violating the Sherman Act, but did convict one defendant for obstructing a related FTC investigation.[3] In response to the verdict, a DOJ official said, "In no way should the verdict today be taken as a referendum on the Antitrust Division's commitment to prosecuting labor market collusion, or on our ability to prove these crimes at trial."[4] And late Friday, a Colorado jury acquitted defendants DaVita Inc. and its former CEO Kent Thiry of all charges after a nearly two-week trial regarding an alleged no-poach agreement.[5]

Still, the DOJ's docket remains full of labor-related actions demonstrating that "commitment to prosecuting labor market collusion." In December 2021, for example, the DOJ announced indictments of six executives at companies in the aerospace industry for alleged no-poach and non-solicitation agreements.[6] The DOJ currently has five pending criminal cases against both companies and

individual executives for their alleged participation in wage-fixing, no-poach and non-solicit agreements. These cases are expected to proceed toward trial throughout 2022.

Outside the criminal context, DOJ has also recently taken a harder line on whether certain no-poach and non-solicit agreements should be treated as *per se* violations—meaning that they would be deemed illegal irrespective of any inquiry into procompetitive justifications or anticompetitive effects—as opposed to being reviewed under the rule of reason standard, which requires such inquiry. In particular:

- In November 2020, the DOJ filed an amicus brief in the Ninth Circuit arguing that no-poach provisions can be deemed "ancillary" to a procompetitive venture only upon a fairly demanding showing by the defendant that they are "reasonably necessary" to the overall agreement.[7] The Ninth Circuit rejected the DOJ's arguments,[8] but if the DOJ's position were adopted by other courts it would mean that companies would have to show that a no-poach or non-solicit agreement entered into in the context of a transaction, joint-venture, or other legitimate arrangement between competitors was "reasonably necessary" to the execution or implementation of that overall agreement, otherwise it could be considered *per se*

- In December 2021, the DOJ filed a statement of interest in a putative class action involving outpatient medical center employees in which it directly equated no-poach agreements with horizontal market allocation schemes, urging the court that "[t]he anticompetitive potential" of such market allocation schemes "justifies their facial invalidation even if procompetitive justifications are offered for some."[9] The DOJ also argued that employers need not enter "quid pro quo" or "bilateral commitments" to allege an agreement in violation of the antitrust laws.

- In February 2022, the DOJ filed a motion for leave to file a statement of interest in a case involving alleged no-poach and non-solicit agreements in the franchise context.[10] The DOJ indicated that statements of interest it filed in franchise cases in 2019—in which the DOJ argued that the *per se* rule was unlikely to apply in the franchise context—"do not fully and accurately reflect the government's current views." The court denied the DOJ's motion, and thus how exactly the DOJ's views in the franchise context have evolved remains unseen, although the other activity discussed above may provide some indication.

Mergers that Allegedly Reduce Competition for Labor

On January 18, 2022, in a joint press conference, the FTC and DOJ announced that they were launching a joint public inquiry aimed at strengthening enforcement against anticompetitive mergers. FTC Chair Lina Khan took a "spotlight" to the effects of mergers in labor markets in particular, asking whether the agencies' merger guidelines adequately assess whether mergers may lessen competition in labor markets, thereby harming workers. That includes whether the guidelines should consider factors beyond wages, salaries, and financial compensation, and whether the cost savings derived from elimination of jobs are a cognizable efficiency.[11]

Likewise, labor market considerations in merger review was addressed as part of the December 2021 FTC and DOJ workshop on "Promoting Competition in Labor Markets." Chair Kahn and Jonathan Kanter, head of the DOJ's Antitrust Division, reiterated that the current horizontal merger guidelines

apply equally to labor markets and Tim Wu, Special Assistant to the President for Technology and Competition Policy, voiced the view that merger review has not focused sufficiently on the effects on workers.

The DOJ's November 2021 lawsuit to block Penguin Random House's acquisition of Simon & Schuster was perhaps a harbinger of things to come, focusing on the alleged harm the merger would have on workers—in that case, authors—who, according to the complaint, rely on competition between the major publishers to ensure they are fairly compensated for their work.[12] The DOJ argued that the merger would reduce such competition, leading to less compensation for authors, and thus a declining quality and quantity of published books.

Employment Contracts, Including Non-Compete and Non-Disclosure Provisions

Antitrust enforcers have also signaled that they will more aggressively challenge employment contracts and agreements between employers that increase labor market frictions.

In February 2022, the DOJ submitted a statement of interest in a Nevada state court lawsuit filed by a group of anesthesiologists alleging that non-compete provisions in their employment agreements (with a contractor to sell their services to a hospital system) violate state law.[13] The DOJ used the case as an opportunity to advance its position that such non-compete restrictions could be considered *per se* violations of Section 1 of the Sherman Act. Notably, the DOJ argued that the non-compete restriction was not merely a vertical one (between employer and employee), but horizontal in so far as, at the time the agreement was made, the plaintiff anesthesiologists could sell their services directly to the hospital system at issue, in competition with the contractor who contracted with the hospital system on their behalf. That is, in the DOJ's view, the non-compete was akin to a horizontal no-hire agreement between competitors. And even if the non-compete is considered a vertical agreement, the DOJ argued that it raises "significant concerns" because it can "effectively freeze" much of the local market for anesthesiology services.

Of course, no court has yet endorsed the unprecedented theory advanced by DOJ—that a unilateral decision to use a non-compete provision could be deemed *per se* unlawful—but the case illustrates the degree to which DOJ is continuing to aggressively push the boundaries of antitrust law in this area.

In addition, at the DOJ/FTC December 2021 workshop, speakers attacked mandatory arbitration agreements and class action waivers as anticompetitive, but they did not address how to reconcile a competition law focus on arbitration with the Federal Arbitration Act. Panelists and enforcers also criticized agreements between employers which facilitate coordination (e.g., information sharing and benchmarking agreements) or reduce competition (e.g., no-poach agreements). Enforcers recognized that these agreements can enhance competition in some cases, but also signaled that they may treat non-compete and information sharing agreements as presumptively illegal unless they are narrowly tailored to a facially obvious procompetitive business justification. Enforcers also stated their intention to reconsider enforcement safe harbors.

Employee Misclassification

At the DOJ/FTC December 2021 workshop, FTC speakers discussed the possibility of challenging employee misclassification as an unfair method of competition under Section 5 of the FTC Act. This would reflect a significant shift in the law and an unprecedented expansion of the scope of the FTC Act. Specifically, the FTC signaled that it considers an employer's intentional misclassification of its employees as independent contractors to be an unfair method of competition because misclassification gives non-compliant employers a cost advantage over employers which follow labor guidelines.

The DOJ also voiced concerns that misclassification can lead to competitive harm in an *amicus* brief filed last month in an NLRB case in which the NLRB is considering whether to overturn its current independent-contractor standard.[14] The DOJ brief argued that misclassification can lead to competitive harm in part because workers cannot "resist" unfavorable terms and conditions "without the organizing rights and protections provided by the NLRA." The DOJ further suggested that the existing independent contractor standard is "ambiguous" and that the ambiguity "encourage[s] employers to misclassify their workers." The DOJ then connected these concerns to the labor exemption from the antitrust laws, noting that, "[e]ven if the Antitrust Division were to exercise its prosecutorial discretion not to pursue action against workers whose status as employees is unclear, the threat of private antitrust lawsuits and treble damages might nonetheless substantially chill worker organizing, since employers and other interested parties would remain free to pursue antitrust litigation." In other words, the DOJ seems to be suggesting that the risk of private sector enforcement of the Sherman Act is chilling union organization, and that the NLRB should clarify the law to deprive employers of that potential claim in the context of independent contractor workers.

Executive Action and Administrative Rulemaking

President Biden's July 2021 Executive Order on Promoting Competition in the American Economy specifically encouraged the FTC to engage in rulemaking "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[15] And the FTC has signaled it will act on the Executive Order's instruction to prohibit or otherwise curtail non-compete agreements.[16] While the FTC recently streamlined its rulemaking procedures and gave the Chair more control over the process,[17] rulemaking is a protracted process that often takes years. To implement a rule, the FTC must develop a factual record; draft and issue a proposed rule; invite and consider the public's comments on the proposal; and then revise and finalize the rule in light of those comments and the evidence in the record. A rule that gives insufficient attention to important problems identified by commenters, such as the absence of statutory authority or constitutional problems, is legally vulnerable. Thus, companies concerned about prohibitions against non-compete agreements and other potential rules should begin making plans to ensure those concerns are amply documented before the FTC when rulemaking proceedings begin.

President Biden's Executive Order also tasked the Treasury Department, in consultation with the DOJ, the FTC, and the Department of Labor, to investigate the effects of an alleged lack of labor market competition on the U.S. labor market. The Treasury Department's report, issued last month, concluded that "a careful review of credible academic studies places the decrease in wages" relative to what they would have been in a "fully competitive market" at "roughly 20 percent."[18] The report further noted that employers' "[w]age-setting power is also evident in the large number of workers who are subject to

rules and agreements that limit their ability to switch jobs and occupations and, hence, their bargaining power." There is little doubt that enforcers (along with plaintiffs' attorneys) will seize upon such language to support antitrust claims against employers.

Takeaways

After five years of looking for ways to use antitrust laws to improve mobility and competition in the labor markets, the FTC and DOJ appear ready to bring novel enforcement actions against agreements and consolidations that restrain competition in labor markets. The potential antitrust risks associated with the labor practices discussed above run the gamut from civil DOJ, FTC or state AG investigations and lawsuits to, in some (potentially growing number of) instances, criminal prosecution, alongside the ever-present threat of private civil litigation. In the merger context, companies have to consider potential second requests stemming from labor market concerns where there are otherwise no antitrust issues.

It is therefore now more important than ever that companies ensure that their hiring, employment, and compensation policies and practices conform with antitrust laws. That includes:

- Consider labor market issues early in the M&A context. Expect heightened scrutiny not only where a transaction results in concentration or among parties with a history of collusion, but also where there is a history of attempted unionization, prior discrimination or wage and hour litigation, and or disputes about employee classification. Scrutiny may also extend to non-competes, no-hire, and no-poach provisions within purchase agreements. Consider the rationale for any such provision, and in particular whether it addresses a risk arising out the transaction.

- Check in on your employment agreements, and consider whether provisions that could be viewed as limiting employee mobility (such as non-competes) are state of the art. This includes considering the duration, scope, and purpose of those provisions, and whether the provision is tailored to achieve the company's objectives.

- Be particularly mindful of enforcer interest in private equity acquisitions, agriculture, healthcare, technology, transportation, and shipping.

- Understand that the antitrust enforcers are equally interested in all categories of workers, from low-wage to highly trained workers.

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[1] Outside the U.S., European enforcers have also indicated that they intend to take a tougher enforcement stance with respect to no-poach and other labor market agreements. *See* Client Alert: *EU Competition Commissioner Signals Tougher Enforcement of No-Poach and Other Labor Market Agreements*, Gibson, Dunn & Crutcher (Oct. 26, 2021).

[2] A "no-hire" agreement is one in which a company or individual agrees not to hire any employee from another company, while a "no-poach" or "non-solicit" agreement is one in which a company or

individual agrees not to recruit or solicit employees from another company. The DOJ generally treats all of these types of agreements similarly.

[3] *United States v. Jindal*, *United States v. Rodgers*, Case No. 20-CR-358 (E.D. Tex. Apr. 14, 2022).

[4] Ben Penn, "DOJ's First Criminal Wage-Fixing Case Ends Mostly in Defeat," *Bloomberg Law* (Apr. 14, 2022).

[5] *United States v. Da Vita Inc*, Case No. 1:21-CR-00229 (D. Colo. Apr. 15, 2022).

[6] Department of Justice, Antitrust Division, *Six Aerospace Executives and Managers Indicted for Leading Roles in Labor Market Conspiracy that Limited Workers' Mobility and Career Prospects*, Press Release (Dec. 16, 2021).

[7] Brief of Amicus United States of America in Support of Neither Party, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc*. (9th Cir. Nov. 19, 2020).

[8] *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc*., 9 F.4th 1102 (9th Cir. 2021).

[9] Statement of Interest of the United States of America, *In re Outpatient Medical Center Employee Antitrust Litig.*, Case No. 1:21-cv-00305 (N.D. Ill. Nov. 9, 2021).

[10] Motion for Leave to File Statement of Interest by United States of America, *Deslandes v. McDonald's USA, LLC, et al.*, Case No. 19-cv-05524 (N.D. Ill. Feb. 17, 2022).

[11] Federal Trade Commission, Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022).

[12] Department of Justice, *DOJ Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster*, Press Release (Nov. 2, 2021).

[13] Statement of Interest of the United States, *Beck et al. v. Pickert Medical Group, P.C., et al.*, Case No. CV21-02092 (2d Jud. Dist. Nev. Feb. 25, 2022).

[14] *See The Atlanta Opera, Inc. and Make-Up Artists & Hair Stylists Union*, Case No. 10-RC-27692.

[15] *See Client Alert: President Signs Executive Order Directing Agencies to Address Wide Range of Businesses' Competitive Practices, Including Non-Compete Agreements*, Gibson, Dunn & Crutcher (July 9, 2021).

[16] Chair Khan had also proposed banning non-compete agreements prior to her appointment. *Rohit Chopra & Lina Khan*, The Case for "Unfair Methods of Competition" Rulemaking, 87 U. Chi. L. Rev. 357, 373 (2020).

[17] Statement of FTC Commissioner Rebecca Kelly Slaughter (July 1, 2021).

[18] U.S. Department of the Treasury, *The State of Labor Market Competition* (Mar. 7, 2022).

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