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Memorandum

FTC and DOJ New Worker Guidelines Summarize Outgoing Administration's Aggressive Enforcement

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On January 16, the FTC and DOJ (the "Agencies") jointly published Antitrust Guidelines for Business Activities Affecting Workers (the "Worker Guidelines"). In issuing the Worker Guidelines, the Agencies purport to replace the Agencies' 2016 Antitrust Guidance for Human Resource Professionals (the "HR Guidance").

The Worker Guidelines cap a flurry of activity by the outgoing Biden administration to revise the Agencies' antitrust guidance for businesses, including the DOJ's withdrawal of three decades-old health care policy statements in February 2023, the Agencies' issuance of new Merger Guidelines in December 2023, the DOJ's issuance of a new Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations policy in November 2024, and the Agencies' withdrawal of the Antitrust Guidelines for Collaborations Among Competitors in December 2024.

The Worker Guidelines also build on a series of steps taken by the Agencies during the Biden administration to develop labor impacts as a theory of antitrust harm in merger enforcement. These steps include adding a section in the new Merger Guidelines about the impact of mergers on workers and other suppliers to the merging parties and adding a "Labor Markets" section to the new HSR Form currently scheduled to take effect in February.

It is not clear, however, whether the Agencies will stand by the Worker Guidelines under the incoming Trump administration. The Worker Guidelines read like a list of greatest hits of the Biden administration's most aggressive labor market enforcement efforts, most of which suffered significant losses in the courts and many of which may not reflect the incoming administration's approach or views. Punctuating this sentiment, the FTC's two Republican Commissioners (among them the next FTC Chair) voted against approving the Worker Guidelines and issued a dissent stating 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."

Worker Guidelines

The Worker Guidelines are organized into five sections describing types of business agreements that may violate the antitrust laws:

1. **Wage-fixing and no-poach agreements**, which may be per se illegal and subject to criminal prosecution by the DOJ.

2. **No-poach agreements in the franchise context**, which are typically, but not always, evaluated under the rule of reason rather than the per se rule.
3. **Exchanges of competitively sensitive information relating to workers**.
4. **Employee non-compete agreements**.
5. **Other agreements that restrict workers' freedom to leave their job**. These types of agreements have elsewhere been referred as "de facto" or "functional" non-compete agreements (*e.g.*, overly broad NDAs, training repayment agreements).

There are two other sections that explain the breadth of the Worker Guidelines' application. A sixth section confirms that these guidelines apply with equal force to agreements with independent contractors as well as employees. A seventh section warns businesses that false or misleading claims about potential worker earnings may violate federal laws against unfair, deceptive, or abusive practices. While the FTC's Bureau of Consumer Protection also began working with the U.S. Department of Labor to investigate and challenge unfair, deceptive or other unlawful employment practices, the FTC has alluded in recent actions to the potential for bringing antitrust actions against such conduct if the deceptive conduct negatively affects competitive conditions. A final section encourages the public to report the above activities or other suspicious behavior to the Agencies.

1. Naked Wage-Fixing and No-Poach Agreements May Be Subject to Criminal Prosecution

The first section of the Worker Guidelines addresses agreements not to recruit, solicit, or hire workers ("no-poach agreements") and agreements to fix wages or terms of employment ("wage-fixing agreements"). According to the Worker Guidelines, the Agencies look to the substance of an agreement rather than its precise form. Thus, an agreement between businesses not to make recruiting cold calls to one another's workers may constitute a no-poach, even if workers are able to move between the companies by other means.

Although these agreements can violate the antitrust laws and expose violators to both criminal and civil liability, the DOJ has traditionally only brought criminal antitrust prosecutions against per se unlawful agreements, such as price-fixing, bid rigging, and market allocation. The Agencies consider wage-fixing and no-poach agreements that are not subordinate to a broader business collaboration (so-called "naked" agreements) to be per se illegal, regardless of whether the agreement results in any actual harm such as lower wages. When these agreements are subordinate to a broader business collaboration (*e.g.*, a joint venture) and are reasonably necessary to achieve procompetitive aims of the collaboration, the agreements are likely to be evaluated under the antitrust rule of reason's balancing test and will typically not be subject to criminal enforcement.

Courts have confirmed at the pleading stage that no-poach and wage-fixing agreements may constitute per se violations of antitrust law, but the DOJ has had limited success in securing convictions in these cases. The DOJ has lost the four criminal no-poach cases it has brought to trial under the Biden administration, although it has secured at least one guilty plea. Nonetheless, the DOJ has emphasized that it intends to continue to prosecute no-

poach and wage-fixing agreements criminally and will not be deterred by the recent setbacks. This section of the Worker Guidelines affirms that commitment.

2. Franchise No-Poach Agreements May Violate The Antitrust Laws

The second section of the Worker Guidelines elaborates on no-poach agreements associated with franchise arrangements. The Worker Guidelines note that illegal no-poach agreements can include agreements between franchisors and franchisees as well as agreements among franchisees.

They further state that franchise no-poach agreements may be per se illegal. Franchise no-poach agreements are frequently subordinate to the broader franchise collaboration, and therefore not subject to the per se rule. However, that is not necessarily the case with every franchise no-poach agreement, as the Seventh Circuit recently held that, at least in connection with McDonald's franchises, a more rigorous factual review was necessary before it could reject the possibility of treating franchise no-poach agreements as per se unlawful.

3. Sharing Competitively Sensitive Information—Including Wage Information—With Competitors May Violate Antitrust Laws

The third section of the Worker Guidelines describes how the exchange of compensation or other employment information may violate the antitrust laws. The Worker Guidelines state that exchanging competitively sensitive information may be illegal when the exchange is likely to have an anticompetitive effect, regardless of whether that effect was intended. This is consistent with the Agencies increasingly aggressive approach towards information exchanges in recent years.

This section notes in particular that information exchanges facilitated by or through a third party that are used to generate wage or other benefit recommendations can be unlawful, even if the exchange does not require businesses to strictly adhere to those recommendations. This is an area of emerging law, particularly as it relates to a series of ongoing algorithmic price fixing cases. In at least one civil suit, a court rejected the Worker Guidelines' argument that participation in information exchange via third party algorithm is illegal even if the competitors using the algorithm are not required to accept the algorithm's pricing recommendations. It remains to be seen how successful the Agencies will be in pursuing this theory.

4. Non-Compete Clauses Can Violate Antitrust Laws

The fourth section of the Worker Guidelines states that the Agencies may investigate and act against non-competes and other restraints on worker mobility that limit competition. The FTC has taken action against non-competes directly and has also imposed conditions restricting non-competes in the context of mergers and investigations into other antitrust violations.

In April 2024, the FTC issued a rule banning most non-compete agreements, but in August 2024 the rule was blocked from going into effect by a federal district court. That litigation is currently under appeal, but regardless of its outcome, the Agencies retain the authority to challenge non-compete provisions on a case-by-case basis.

5. De Facto Non-Competes Can Also Be Unlawful

The fifth section of the Worker Guidelines addresses a number of other restrictive agreements that—like non-competes—may impede worker mobility or otherwise undermine competition. Elsewhere, these types of restrictions have been described as "de facto" or "functional" non-competes. The Worker Guidelines provides the following examples of agreements that could potentially violate antitrust laws if they are so broad as to prevent a worker from accepting another job or starting a business:

- Non-disclosure agreements,
- Training repayment agreement provisions,
- Non-solicitation agreements, and
- Exit fee and liquidated damages provisions.

Takeaways

In releasing their Worker Guidelines, the Agencies announced their aim to provide examples and cite cases to explain how the Agencies analyze business practices affecting workers that may violate the antitrust laws. Like the new Merger Guidelines, the Worker Guidelines lay out the Biden administration's aggressive approach to enforcement, notwithstanding the more limited success that the Agencies have seen in pressing some of the theories to judgment in court.

There is a great deal of uncertainty as to whether the approaches in the Worker Guidelines will be taken up by the Agencies under the incoming Trump administration. Regardless of whether or not the Worker Guidelines are withdrawn by the next administration, they provide an articulation of the case law on labor issues that can be picked up by future enforcers and private plaintiffs.

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