

Competition EO: Spotlight on Anticompetitive Concerns in Labor Markets

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On July 9, 2021, President Biden issued the [“Executive Order on Promoting Competition in the American Economy”](#) (the “Order”), aimed at promoting economic competition and the interests of workers through the enforcement of antitrust laws, and the White House issued a corresponding [“Fact Sheet”](#) providing additional details behind the Order. (See [here](#) for our prior Competition Corner blog post providing an overview of the Order). A key aspect of the Order includes initiatives strengthening protections for the labor market, a consistent focal point of the Biden administration.

Among the wide-sweeping actions, the Order aims to promote worker mobility by restricting non-compete agreements and seeks to eliminate “unnecessary, cumbersome occupational licensing requirements.” Further, it calls for the overhaul of previous guidance issued in 2016 for human resource professionals to better prevent competing employers from sharing wage and compensation information.

Here are the details:

Non-Compete Agreements

Biden called on the Federal Trade Commission (FTC) to ban or limit non-compete agreements in the private sector by using its statutory rulemaking authority. The Fact Sheet asserts that such non-compete agreements are one way in which companies “stifle competition,” and that “[r]oughly half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers” in a variety of industries. The FTC’s broad administrative rulemaking authority could prove to be the administration’s preferred method of addressing such non-compete agreements, and indeed FTC Commissioner Rohit Chopra has previously stated that rulemaking may be less expensive and lead to less ambiguity than relying on case-by-case adjudication under the FTC Act.²³ However, many states already have laws governing non-compete agreements, and the interaction between any FTC rulemaking and state law—including the extent to which any new FTC action may conflict with and potentially preempt state law—is likely to be the subject of significant future litigation.

The Order does not instruct the FTC as to whether or how to address the legitimate concerns of employers behind non-competes, i.e., to protect trade secrets and other company-proprietary information.

While it will take the FTC some time to draft and finalize rules, a process that allows the public the opportunity to comment, the agency will likely continue to pay ever closer attention to such non-competes and other restrictive covenants in employment agreements. (See [here](#) for our prior blog post regarding the FTC’s focus on non-compete provisions and its ability to regulate such agreements.)

Occupational Licensing Restrictions

The Order directs the FTC to consider promulgating rules that curtail the use of “unnecessary” occupational licensing requirements that may protect incumbent employees while reducing competition from new applicants and otherwise may restrict limit worker mobility. The Fact Sheet notes that “almost 30% of jobs in the United States require a license,” but “[f]ewer than 5% of occupations that require licensing in at least one state are treated consistently across all 50 states.” Such a landscape “locks some people out of jobs, and it makes it harder for people to move between states—particularly burdening military spouses.” On the other hand, since many “occupational licenses are critical to increasing wages for workers and especially workers of color,” and many occupational licenses (such as those pertaining to health care) are motivated by safety concerns, a careful assessment of the various licensing requirements at issue will be necessary. Regardless, most of the licensing requirements are currently determined at the state level, and the FTC will need to carefully consider its rulemaking authority and the role that the federal government can play here.

Antitrust Guidance

The Order calls for revisions to the [Antitrust Guidance for Human Resource Professionals](#) (“Guidance”) that had been jointly issued by the Department of Justice (DOJ) and the FTC in October 2016, emphasizing that the Guidance as is fails to adequately discourage information-sharing about wages among competing employers. Specifically, the Fact Sheet says that the Guidance “allows third parties to make wage data available to employers – and not to workers – in certain circumstances without triggering antitrust scrutiny. This may be used to collaborate to suppress wages and benefits.”

Notably, the Order does not call for any rulemaking to bolster the Guidance, as is the case for non-compete agreements or licensing requirements. Instead, it states that “the Attorney General and the Chair of the FTC are encouraged to consider whether to revise” the Guidance. Even though agreements among employers to suppress wages or compensation are already generally prohibited by the antitrust laws, and are presently being enforced through DOJ action, the FTC and DOJ can be expected to focus now on strengthening the available guidance to further curb the sort of information-sharing that raises antitrust concerns.

Mergers

The Order specifically highlights “labor markets” as markets that the FTC and DOJ should consider in evaluating proposed mergers. It emphasizes that antitrust regulators ought to be cognizant of mergers that may lead to labor monopsonies, or industries that become overwhelmed by a small group of dominant employers. Ultimately, the Order urges these regulators to consider how mergers might contribute to conditions that hinder workers’ mobility and negotiating power for better wages and benefits.

For decades prior to the Order, U.S. antitrust law had prioritized the “consumer welfare” standard in merger review and other actions—evaluating mergers and conduct based on whether they result in increased output and lower prices for consumers. This direction to take greater account of labor conditions in merger review reflects a significant shift toward the “hipster” antitrust school of thought, which seeks to consider a broader basket of public goods in antitrust analysis beyond just consumer welfare. (See [here](#) for our prior blog post regarding FTC Chair Lina Khan’s commitment to increased enforcement efforts at the FTC.) Unlike where the Order proposes proceeding through rulemaking, here the DOJ and FTC will need to fit a labor theory of harm claim into existing case law on mergers. This may prove difficult to do since the consumer welfare standard has been enshrined in decades of court precedent. Indeed, raising wages often results in raised costs for businesses, which may then equate to an

increase in consumer prices. Given the tensions that arise from such an approach, these issues are likely to be litigated aggressively and leave the agencies with an uphill battle.

The Order is now another development in the long line of preceding challenges to anticompetitive employment practices. In particular, the DOJ recently brought its first criminal cases addressing alleged collusion in labor markets, indicting two companies and three individuals for wage-fixing and non-solicitation agreements. These cases are ongoing, carrying the potential for fines of \$100 million or more and possible jail time for individuals. (See [here](#) for our prior Competition Corner blog post on the DOJ’s antitrust indictment for wage-fixing brought against a therapist staffing company’s former owner; and [here](#) for our blog post on the criminal indictment against health care competitors for alleged non-solicitation agreements.)

And, during the COVID-19 pandemic, the DOJ and FTC have emphasized the agencies’ commitment to protecting labor market competition, in particular for essential workers. (See [here](#) for our prior Competition Corner blog post on the FTC’s and DOJ’s focus on frontline workers.)

This article is part of our “Unpacking the Executive Order on Promoting Competition” series. Click [here](#) for other related articles. Please contact a member of the Winston & Strawn Antitrust/Competition Practice Group or your Winston relationship attorney for further information.

¹¹ Fed. Trade Comm’n, Comment of Commissioner Rohit Chopra on Hearing #1 on Competition and Consumer Protection in the 21st Century (Sept. 6, 2018), available at <https://www.ftc.gov/public-statements/2018/09/comment-commissioner-rohit-chopra-hearing-1-competition-consumer>.

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