

FTC and DOJ Workshop Highlights Antitrust Considerations in Labor Markets

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The Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) hosted a two-day [virtual workshop](#) on December 6 and 7 titled “Making Competition Work: Promoting Competition in Labor Markets.” The agencies had previously been tasked by President Biden’s “[Executive Order on Promoting Competition in the American Economy](#)” (the “Executive Order”) with addressing economic competition in labor markets. Among other priorities, the Executive Order called on the agencies to collaborate in assessing ways to promote worker mobility and address imbalances in labor markets as well as to update previous guidance in the area (see [here](#) for our prior blog post on the specific actions that the Executive Order aims to promote in this area).

Throughout the workshop, the DOJ and FTC sought input from the legal community regarding the initiatives set out by the Executive Order, including updates to merger guidelines and guidance for human resource professionals, as well as suggestions for addressing potential concerns with certain employment contract terms, such as non-compete agreements. Across the two days, the DOJ and FTC collected a wide range of suggestions that will likely lead to increased activity in this area in the near future.

Enforcer Priorities

The workshop began with opening remarks from Lina Khan, Chair of the FTC, and Jonathan Kanter, in his first public appearance after being confirmed as head of the DOJ’s Antitrust Division (see [here](#) for more information on Kanter’s appointment and [here](#) for more information on Khan’s appointment). Both Kanter and Khan emphasized that enforcers will be working in lockstep on their priorities, including promoting competition in labor markets. Pursuant to the Executive Order’s direction to the agencies to strengthen their guidance on information-sharing among employers, the DOJ has started reviewing the previously issued [joint guidance from 2016](#) for human resource professionals, which, among other guidance, notably announced that the DOJ would begin prosecuting certain “naked” no-poach and wage-fixing agreements between competing employers as criminal antitrust violations. Khan noted that the FTC will also be scrutinizing employment contracts and certain terms as unfair or deceptive practices that might harm workers. Additionally, Kanter and Khan were also in agreement regarding the applicability of the existing horizontal merger guidelines to labor markets, concluding that they apply equally to labor markets as to any other market and will be scrutinized through such a lens.

The main refrain from government officials on subsequent panels was also that of collaboration or a “whole-of-government” competition policy. While collaboration between the DOJ and FTC in this area is not new, speakers from different agencies highlighted specific potential avenues of cross-over and joint action. For instance, representatives from the Department of Labor and the Department of the Treasury joined the workshop, showing a new level of participation in the discussion. These representatives acknowledged that they have a role to play in addressing competition concerns in labor markets, such as wage stagnation, and are looking to both collaborate with the DOJ and FTC as well as to gain additional training and guidance on antitrust and competition issues in these areas.

Key Topics Addressed by Panelists

Beyond government agencies and officials, the workshop also included economists, academics and researchers, attorneys involved in litigating employment and antitrust issues, and various labor advocacy groups on panels. Panels were moderated by representatives from either the DOJ or FTC, who encouraged general discussions on the current state of the law and the reality of labor market competition and sought input specific to President Biden’s Executive Order and the priorities with which the agencies have been tasked. Panels covered a wide range of topics relevant to workers and labor markets, including litigating labor market cases, information-sharing among employers, collective bargaining and power imbalances between workers and employers, concerns and considerations arising out of the gig economy, and contractual restraints that may affect workers, such as non-compete and non-disclosure agreements.

Merger Review

Further to comments made by Kanter and Khan, various panelists, including economists and labor advocates, touched on the need for the DOJ and FTC to evaluate the effects of mergers on competition in labor markets and the potential effects that any particular merger may have on workers’ wages and working conditions. For instance, labor advocacy groups raised hospital mergers as an example, stating they may have adversely affected health care professionals, both in terms of lost income and reduced ability to relocate to a new employer. These panelists took the view that such mergers could lead to market concentration and monopsony power, potentially limiting consumer choice and worker mobility (see [here](#) for our prior blog post on monopsony power). Similarly, Tim Wu, Special Assistant to the President for Technology and Competition Policy, discussed in his keynote speech that merger review has not focused enough on the effects on workers and emphasized that President Biden’s Executive Order called upon the DOJ and FTC to revisit the merger guidelines in this connection.

Restrictive Covenants

Another key topic discussed throughout the workshop was restrictive covenants in employment contracts, including non-compete clauses, confidentiality terms, training repayment agreements, and non-disclosure agreements. Panelists discussed the potential effects that such contractual terms may have on worker mobility as well as the protections they provide to companies in securing their confidential information, trade secrets, and client relationships. President Biden’s Executive Order specifically encouraged the FTC to engage in rulemaking on this issue, “to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” Panelists from labor advocacy groups, government agencies, and economic institutes generally supported limiting such agreements, especially those that are applied indiscriminately to low-wage workers. However, some panelists also noted that this has historically been an area of state law and should not be addressed too broadly by the federal government.

Other panelists emphasized that studies on the effects of such agreements are inconclusive, and enforcers should look to reality rather than relying upon theory and doctrine. For instance, when discussing litigation involving no-poach agreements in the franchise context, panelists noted that wages were higher before the elimination of no-poach agreements and lower once such agreements were no longer in place, contrary to relevant theories. Panelists who work in the private sector also emphasized that confidentiality agreements promoted companies to invest in innovation and were therefore beneficial to consumers. Their view was that additional research would be necessary to understand the best balance to strike in such agreements.

Gig Economy Workers

Labor advocacy groups shared stories of workers who were subject to temporary employment contracts and lower wages for work likewise being performed by full-time employees. Panelists discussed the differences in bargaining power both between gig economy workers and companies and between gig economy workers and full-time employees. One panel discussed the merits of extending the antitrust labor exemption to cover certain gig economy employees in order to provide the ability to unionize and engage in collective action without the risk of being prosecuted under antitrust laws. Relatedly, labor advocacy groups also called on the FTC to exercise its prosecutorial discretion in the meantime and refuse to bring enforcement actions against workers who have engaged in such activity. Other panelists pushed back on such ideas, noting that these were not antitrust issues at all, and instead should be addressed under the labor law umbrella.

Takeaways

President Biden’s Executive Order, along with the actions already underway and the recent workshop, highlights the labor market as a priority area in antitrust enforcement. The agencies involved in the workshop emphasized their intent to implement cohesive approaches to carry out the Executive Order and address labor market concerns.

The business and legal community can expect to see updated guidance and potential rulemaking in the months and years ahead related to issues such as mergers and their effects on employee wages and mobility, employment contracts and the potential for curtailing non-compete provisions, and the classification of temporary—particularly gig economy—workers as employees. The workshop also discussed Senator Klobuchar’s “[Competition and Antitrust Law Enforcement Reform Act](#),” recognizing that potential legislative change to the antitrust laws to address monopsonies may be forthcoming as well. In the interim, it is likely that the DOJ and FTC will continue to aggressively enforce antitrust laws in labor markets through litigation efforts, such as the various criminal indictments brought by the DOJ in the past year. See [here](#) for additional information on recent decisions in the DOJ’s first criminal wage-fixing case and [here](#) for constitutional challenges to such criminal indictments in labor markets.

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