

Another Step Towards Increased Antitrust Enforcement in Labor Markets

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Since the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued the 2016 Antitrust Guidance for Human Resource Professionals indicating that the agencies would criminally prosecute companies for illegal no-poach or wage-fixing agreements, the agencies have not been shy about their increased focus on labor market issues and greater scrutiny of wage-fixing and no-poach agreements. President Biden's Executive Order on Promoting Competition in the American Economy included initiatives aimed at promoting worker mobility, further confirming the administration's focus on competition in labor markets. For more information on the Executive Order's spotlight on labor, see [here](#). Following the Executive Order, the FTC and DOJ held a workshop highlighting antitrust considerations in labor markets in December of last year, which we covered [here](#).

In the latest interagency collaborations, the FTC and National Labor Relations Board (NLRB) entered into a [memorandum of understanding](#) last week aimed at rooting out practices that harm workers in the gig economy and other labor markets, enhancing enforcement administered by the agencies and promoting interagency collaboration and outreach to protect workers against unfair methods of competition and labor practices. The agreement outlines ways in which the two agencies will work together going forward on labor-market concentration, one-sided contract terms, and labor developments in the gig economy. Similarly, the NLRB and DOJ entered into a new [memorandum of understanding](#) on July 26 creating a formal partnership between the two agencies to better protect free and fair labor markets, focusing on "the rights of workers to obtain fair market compensation and to freely exercise their legal rights under the labor laws."

These agreements will allow for greater coordination between the agencies and have the potential for increased enforcement as a result. As NLRB General Counsel Jennifer Abruzzo stated, "[c]ompanies facing unfair labor practices or legal action can expect that there will be enhanced information sharing and potentially coordinated investigations or prosecutions where cases involved potential violations of labor law and antitrust laws."

As the latest memorandum of understandings and the agencies' statements make clear, labor markets are likely to remain a focus of enforcement agencies going forward. Companies should therefore keep the following best practices in mind and consult with antitrust counsel to the extent a potential violation is identified:

- Review all agreements with other companies, including affiliate companies, distributors, and customers, to ensure that there are no provisions restricting or recruiting each other's employees.

- Survey managers and HR employees to ensure no informal agreements with other companies to restrict hiring, wages, or employment benefits exist.
- Implement compliance programs to prevent employees from engaging in potentially anticompetitive hiring or recruiting practices, including ensuring the company’s compliance program aligns with the DOJ’s guidance and training managers and employees with hiring responsibilities on antitrust risks in the labor market.
- To the extent the company is contemplating entering into an agreement that potentially restricts hiring or recruiting employees, ensure the restrictions are both necessary and narrowly tailored to achieve a procompetitive purpose associated with a broader collaboration and document such procompetitive justifications.

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Authors

[Sofia Arguello](#)

[Lauren Duxstad](#)

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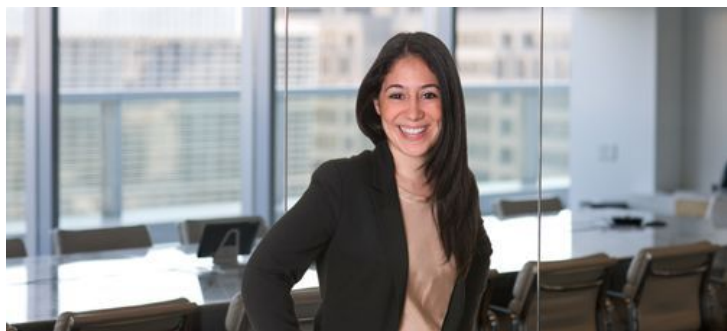
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[Sofia Arguello](#)



Lauren Duxstad

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