

Antitrust regulators warn against anticompetitive employer practices during pandemic



Paul J. Covaleski

608.284.2619

pcovaleski@gklaw.com



Allison W. Reimann

608.284.2625

areimann@gklaw.com

In recent years the U.S. Department of Justice Antitrust Division (DOJ) and U.S. Federal Trade Commission (FTC), the two federal agencies responsible for enforcing U.S. antitrust laws, have increasingly scrutinized certain agreements between competing employers. For example, as reflected in a [2016 guidance document for human resource professionals](#) and elsewhere, the agencies have expressed particular concern about agreements not to hire or solicit competitors' employees via "no-poach" and non-solicitation agreements that have no reasonable relation to some other legitimate business concern. Their attention has also been focused on unreasonably restrictive non-competes, agreements to fix wages or benefits, and unreasonable sharing of competitively sensitive wage and benefit information.

Earlier this week, the U.S. antitrust agencies extended this concern to the context of the 2019 novel coronavirus (COVID-19) pandemic, issuing a [joint statement](#) and [press release](#) addressing anticompetitive employment practices during the health crisis and "affirming the importance of competition for American workers." The DOJ and FTC previously [recognized](#) that the COVID-19 pandemic "will require unprecedented cooperation between federal, state, and local governments and among private business to protect Americans' health and safety." However, the new joint statement sternly warns employers against using the pandemic—and perhaps, implicitly, the associated economic fallout—as an excuse to engage in anticompetitive conduct at the expense of employees who are on the front lines of the crisis, such as doctors, nurses, first responders, grocery store and pharmacy employees, and warehouse workers.

The joint statement warns employers, staffing companies (including medical travel and locum agencies), recruiters and others that the antitrust agencies will be "on alert" for "agreements to suppress or eliminate competition with respect to compensation, benefits, hours worked, and other terms of employment, as well as the hiring, soliciting, recruiting, or retention of workers." The agencies also remind employers that they are prepared to criminally prosecute "naked" wage-fixing and no-poach agreements and will civilly enforce other types of unreasonably anticompetitive collusive activity that negatively impacts employees. The agencies intend to take civil action against even unilateral conduct that harms competition for employees, such as in cases where one or a few employers control a relevant labor market and unreasonably exploit their competitive position in the labor market.

Three key considerations for employers

Employers should be mindful of the following as it relates to actions taken in response to or as a result of the pandemic that concern wages, benefits, hiring and retention of employees:

1. Collusion prohibitions won't give way during the pandemic: Employers long have been prohibited under U.S. antitrust law from colluding with competitors to suppress wages and benefits or otherwise unreasonably

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice and does not create an attorney-client relationship. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

restrain competition in labor markets. The recent joint statement reminds employers that these prohibitions will not give way during this extraordinary time. On the contrary, the antitrust agencies are prepared to take civil or even criminal action to address anticompetitive conduct impacting employees.

2. Exercise caution with competitor collaborations: As the antitrust agencies have recognized, [the COVID-19 pandemic may justify collaborations among competitors](#) to address the needs of the crisis. Such cooperation may potentially include sharing of know-how and resources, perhaps even sharing of employees in some circumstances. However, except as reasonably necessary to further a legitimate collaboration to address the crisis, companies should avoid reaching agreements that would suppress or fix employees' wages, benefits or other compensation. Additionally, employers should avoid prohibiting the solicitation or hiring of each other's employees and sharing competitively sensitive information regarding wages, benefits or other compensation.
3. Major employers with frontline pandemic workers need to be even more careful: Companies with significant power in labor markets that include workers impacted by the crisis, such as health care workers, grocery employees and first responders, also must exercise caution when taking unilateral action to cut wages or benefits or change hiring and retention practices. Such actions should have a clear economic justification to avoid a perception of exploiting the crisis in an anticompetitive manner to critical workers' detriment.

Consult with counsel

Companies should consult with antitrust counsel before reaching agreements with competitors in response to the pandemic that may impact wages, benefits, hiring, retention or working conditions of employees. Employers with considerable power in labor markets also should seek counsel before taking action that negatively impacts wages, benefits, hiring, retention or working conditions of employees on the front lines of the pandemic.