US antitrust enforcers on high alert for collusion in labor markets during COVID-19 pandemic

ANTITRUST AND COMPETITION: NOVEL ISSUES IN A POST-CORONAVIRUS WORLD

Antitrust Alert

COVID-19 Alert

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As businesses continue to adapt to the ever-changing market dynamics in the wake of the coronavirus disease 2019 (COVID-19) pandemic, the US antitrust enforcers are continuing to respond in their own right – most recently announcing that they are on high alert for anticompetitive conduct in the US labor markets.

DLA Piper recently reported that the US Department of Justice (DOJ) and Federal Trade Commission (FTC) issued a Joint Antitrust Statement Regarding COVID-19, in which they announced an expedited procedure for evaluating proposed collaborations among competitors and other businesses working to address the pandemic. While the agencies committed to responding to business review requests related to COVID-19 on an expedited basis, taking into consideration certain exigent circumstances in reviewing those proposed joint efforts, the agencies also took the opportunity to remind the public that they stand ready to hold accountable any individuals or businesses who attempt to use COVID-19 as an opportunity to subvert competition. They specifically warned that they will not hesitate to pursue civil violations of the antitrust laws or prosecute any criminal violations of the antitrust laws.
Recently, the DOJ and FTC issued yet another Joint Antitrust Statement, this time highlighting the agencies’ specific focus on COVID-19 and competition in labor markets and announcing that antitrust enforcers are closely monitoring employer coordination to disadvantage workers. The agencies acknowledge that addressing the spread of COVID-19 may require unprecedented cooperation between private businesses and individuals, among others, in order to protect the health and safety of Americans. However, the agencies also warn employers that COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers who are on the front lines of addressing the pandemic.

The joint statement comes in the wake of the agencies’ longstanding efforts to challenge unlawful wage-fixing and no-poach agreements, anticompetitive non-compete agreements, and the unlawful exchange of competitively sensitive employee information, including salary, wages, benefits, and compensation data. In particular, the Joint Statement highlights that the agencies are on high alert for employers, staffing companies (including medical travel and locum agencies), and recruiters who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked. The Joint Statement warns that “[c]ompanies and individuals involved in the hiring, recruiting, retention, or placement of workers should be aware that anticompetitive conduct runs the risk of civil and/or criminal liability.”

This Joint Statement serves as a keen reminder that, although the COVID-19 pandemic has undoubtedly created unprecedented challenges for businesses, the antitrust laws apply in the same manner, force, and effect, to any competitor collaborations or agreements. As a result, businesses contemplating participating in any competitor collaborations to address the challenges arising out of the COVID-19 pandemic, including those in the labor markets, are encouraged to consider the following:

- Consulting with antitrust counsel prior to establishing competitor collaborations and consulting periodically throughout the process regarding compliance with the antitrust laws;
- Analyzing the intent and overall competitive effect of the contemplated collaboration, including the potentially anticompetitive effect of the collaboration;
- Memorializing in writing the business justifications for engaging in the collaboration, as well as any procompetitive or pro-consumer benefits that may arise as a result of the collaboration;
- Ensuring that any agreement is in writing and narrow in scope – both with respect to the objective of the cooperative relationship and the extent to which activities are combined to enforce or ensure compliance with the collaboration;
- Employing a neutral third party to manage any data that is shared between companies/brands, when reasonable and practicable given the business realities;
- Aggregating any data that is shared between companies;
- Limiting and implementing safeguards against the exchange of competitively sensitive information;
- For any party involved in the collaboration, or discussions about the collaboration, who receives confidential information about the other party, considering whether and to what extent they should be subject to certain firewalls.

See the agencies’ April 13 Joint Antitrust Statement.

DLA Piper’s Global Antitrust and Competition Group is working closely with a wide range of businesses to navigate this complex and evolving legal environment. Stay tuned for further developments.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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