Antitrust Guidelines for Business Activities Affecting

Overview[1]

These Guidelines explain how the U.S. Department of Justice's Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") (collectively, the "Agencies") assess whether business practices affecting workers violate the antitrust laws. The Agencies enforce the nation's antitrust laws, which include the Sherman Act, Clayton Act, and Federal Trade Commission Act. These laws provide "a central safeguard for the Nation's free market structures" by promoting open and fair competition.[2]

The antitrust laws protect competition for labor, just as they protect competition for goods and services that companies provide.[3] They protect the freedom of working people to choose the best job for them and their families. Just as vibrant competition for goods and services benefits consumers, competition among employers benefits workers through better wages, benefits, and other terms and conditions for working people. Business practices may violate the antitrust laws when they harm the competitive process, especially if they deprive labor markets of independent centers of decisionmaking[4] or they create or abuse employers' monopsony power.[5] By interfering with free and fair competition for workers, such practices can lead to fewer job opportunities, lower wages, and worse working conditions.[6] Similarly, businesses should be free to hire the right person for a job. Vibrant, open markets to recruit and retain workers create market opportunities that are conducive to new business formation, innovation, and productivity. Conversely, when companies act in ways that harm competition for workers, that behavior might lead to fewer job opportunities for workers, lower wages, and worse job quality. That is why the antitrust laws prohibit certain practices that harm competition for workers.

How to Use These Guidelines: These Guidelines are intended to promote clarity and transparency for the public about how the Agencies identify and assess business practices affecting workers that may violate the antitrust laws.[7] The following sections explain how the Agencies approach

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[1] This document replaces the Antitrust Guidance for Human Resource Professionals (2016). It should not be construed as legal advice, and it has no force or effect of law. It is not intended to create any substantive or procedural rights enforceable at law by any party. Nothing in this statement should be construed as mandating a particular outcome in any specific case, and nothing in this statement limits the discretion of any U.S. government agency to take any action, or not to take action, with respect to matters under its jurisdiction.

[2] N. Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 502 (2015).

[3] See generally Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021); Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219 (1948); Anderson v. Shipowners' Ass'n of Pac. Coast, 272 U.S. 359 (1926).

[4] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 190 (2010) ("[C]oncerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." (internal quotation marks and citations omitted)).

[5] Alston, 594 U.S. at 90 (concluding that the NCAA used its monopsony power to impose restraints that "can (and in fact do) harm competition" for student-athletes' labor).

[6] See Alston, 594 U.S. at 110 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.").

[7] The 2023 Merger Guidelines provide guidance to the public about how agencies consider the effects of business transactions such as mergers and acquisitions on workers. See U.S. Dep't of Just. & Fed. Trade Comm'n,

particular antitrust issues affecting labor. Sections 1–5 discuss specific types of agreements or business practices that may violate the antitrust laws. Certain agreements and other activities may give rise to criminal liability. Other types of agreements may be subject to civil liability rather than criminal prosecution. Section 6 explains that the antitrust laws apply to relationships between businesses and independent contractors. For example, an agreement between businesses to fix the compensation that each pays to independent contractors may violate the antitrust laws, just as an agreement between businesses to fix the wages each pays to workers may violate the antitrust laws. Section 7 explains that false claims about workers' potential earnings may violate federal laws against unfair, deceptive, or abusive practices. Section 8 provides information about reporting potential antitrust violations to the Agencies.

As discussed further in Sections 1–5, the Agencies may investigate certain types of agreements or business practices as potential violations of the antitrust laws. Examples of such agreements include:

1. **Agreements between companies not to recruit, solicit, or hire workers, or to fix wages or terms of employment, may violate the antitrust laws and may expose companies and executives to criminal liability.** Where appropriate, DOJ exercises its authority to bring felony criminal charges against companies and individuals who participate in these conspiracies.

2. **Agreements in the franchise context not to poach, hire, or solicit employees of the franchisor or franchisees may violate the antitrust laws.** No-poach and similar agreements are subject to antitrust scrutiny even if they are between a franchisor and a franchisee or, for example, among the franchisees of the same franchisor.

3. **Exchanging competitively sensitive information with companies that compete for workers may violate the antitrust laws.** This includes exchanges of information about compensation or other terms or conditions of employment, and other exchanges of information that harm competition for workers. Exchanging such information with competitors may be illegal even if companies use a third party or intermediary—including a third party using an algorithm—to share such information.

4. **Employment agreements that restrict workers' freedom to leave their job may violate the antitrust laws.** These include non-compete provisions that prevent workers from leaving their job to join a competing or potentially competing employer; that prevent workers from leaving their job to start a new business; or that require workers to pay a penalty upon leaving their job.

5. **Other restrictive, exclusionary, or predatory employment conditions that harm competition may violate the antitrust laws.** These include overly broad non-disclosure agreements, training repayment agreement provisions, non-solicitation agreements, and exit fee or liquidated damages provisions.

This list is not exhaustive. Listed activities may or may not be an antitrust violation. The Agencies encourage anyone with information about these activities or other potential antitrust violations to report them to the Agencies. See Section 8 below for further information.

General Principles for Analyzing Agreements that Au49eng

informal; express or implicit; and need not be written down or talked about at all. Such agreements are illegal even if they are never carried out. In assessing whether businesses have entered into an illegal agreement, the Agencies consider direct and circumstantial evidence. For example, they may consider whether a business has discussed with another company wages or other potential terms of employment; engaged in parallel behavior that demonstrates a shared understanding; invited another company to participate in a plan to restrict competition for workers followed by action consistent with that plan; or used a common intermediary to obtain competitively sensitive information.

If the Agencies identify an agreement between companies relating to workers, they assess its impact on competition and the competitive process. Some types of agreements are illegal regardless of their effects. In other cases, the Agencies perform a deeper analysis, examining the impact of the agreement on workers by impairing the competitive process, suppressing competition, or the actual or likely effects of the conduct in the affected labor market.[8]

The Agencies also focus on whether the participants in a potential agreement compete for workers. Businesses can compete to hire or retain workers even if they make different products or offer different services. Accordingly, when assessing agreements that affect workers, the Agencies will focus on whether the businesses compete in the same labor markets even if they do not compete as sellers of products or services.

Companies can be labor market competitors even if they have some other collaborative or cooperative relationship, such as a joint venture that produces a good or provides a service. Companies can also be competitors in a labor market even if they are not competitors in downstream markets to produce a good or service. For example, airplane manufacturers and their part suppliers may both hire from the same market for engineers.

[8] United States v. Am. Airlines Grp. Inc., 121 F.4th 209, 220 (1st Cir. 2024).

1. Some types of agreements, including wage-fixing and no-poach agreements, may violate the antitrust laws and can lead to criminal charges

Businesses that compete with each other for workers may be committing an antitrust crime if they enter into an agreement not to recruit, solicit, or hire workers or to fix wages or terms of employment. E e5to reow 0.26 0 Td (m)-2 l.15 TD[(e)o b(r)3 (D[(e)ubj04 Tc 0.00)-2 ((r)3 (ui)-2 (t)-2 (r)3 (evr)3 (el

company's workers, it does not matter if the agreement does not completely prohibit hiring the other company's workers. For example, an agreement not to "cold call" workers is considered a no-solicit agreement regardless of whether the firms are allowed to hire the workers who applied for a position without first being solicited.[13]

When formed between competing or potentially competing employers, these types of agreements—whether entered into directly or through an intermediary[14]—are illegal even if they did not result in actual harm such as lower wages.[15] Nor does it matter if the agreement does not include specific pay rates. For example, an agreement to set a starting point for compensation may be a form of wage fixing under the law.[16]

The DOJ may criminally investigate and, where appropriate, bring felony charges against the participants in these agreements, including both individuals and companies.

The Criminal Antitrust Anti-Retaliation Act (CAARA) provides whistleblower protections for employees, contractors, subcontractors, and agents who report antitrust crimes, including no-poach and wage-fixing agreements.[17]

2. Franchise no-poach agreements may violate the antitrust laws

No-poach clauses in franchise agreements are also subject to antitrust scrutiny. Often, franchisors compete with franchisees for workers.[18] Franchisors sometimes enter into agreements with franchisees in which the franchisor and franchisee agree not to compete for workers. Such an agreement can be per

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seillegal under the antitrust laws.[19] In other words, the agreement itself may be illegal regardless of whether it actually harms workers.

Similarly, a franchisor may violate the antitrust laws by organizing or enforcing a no-poach agreement among franchisees that compete for workers.[20] Agreements among franchisees, either written or unwritten, not to poach, hire, or solicit each other's workers may violate other federal and state laws.[21]

3. Sharing competitively sensitive information—including wage information—with competitors may violate antitrust laws

Sharing competitively sensitive information with competitors about terms and conditions of employment may violate the antitrust laws.[22] Exchanging competitively sensitive compensation or other employment information with a competitor may be unlawful when the information exchange has, or is likely to have, an anticompetitive effect, whether or not that effect was intended.[23] An information exchange may be explicit or it may be implied from the conduct of parties who share competitively sensitive information (for example, information about compensation, benefits, or the terms of an employment contract). In addition, information exchanges may indicate the existence of a wage-fixing conspiracy.

Providing competitively sensitive information through an algorithm or through a third party's tool or product may also be unlawful. For example, the DOJ obtained a court-ordered settlement with a group of poultry processing companies and a data consulting company to resolve allegations that they (i) directly exchanged competitively sensitive information about current and future wages and benefits for plant workers; and (ii) did so through a third-party firm that facilitated the exchange of competitively sensitive compensation information.[24]

Information exchanges facilitated by or through a third party (including through an algorithm or other software) that are used to generate wage or other benefit recommendations can be unlawful even if the exchange does not require businesses to strictly adhere to those recommendations.[25] An agreement

to use shared wage recommendations, lists, calculations, or algorithms can also still be unlawful even where co-conspirators retain some discretion or cheat on the agreement.

Companies can sometimes work together as part of a transaction or collaboration (like a joint venture) in ways that are not illegal. Even if companies are parties to a legitimate transaction or are otherwise involved in a joint venture or other collaborative activity, an agreement between the companies to share information about wages or other terms of employment, including company data regarding worker compensation, may violate the antitrust laws.

4. Non-compete clauses can violate antitrust and other laws

Non-compete clauses that restrict workers from switching jobs or starting a competing business can violate the antitrust laws.[26] By preventing workers from leaving jobs to pursue better employment opportunities, non-competes decrease competition for workers. Non-competes may also harm competition by preventing other businesses from obtainorkbtr buiobttermspei freratploy2.59 -1.15 Td2 (ng(o)2 (mp)

taken action against non-competes when reviewing mergers. In multiple final orders settling charges that certain mergers violated federal antitrust laws, the FTC has required the parties to cease using, enforcing, and/or entering into non-compete clauses.[29]

In April 2024, the FTC issued a final rule banning most non-compete agreements, including provisions that function as non-competes.[30]

5. Other restrictive, exclusionary, or predatory employment conditions can also be unlawful

The Agencies may also investigate and take action against other restrictive agreements that impede worker mobility or otherwise undermine competition.

The following examples illustrate how restrictive conditions could potentially violate the antitrust laws or other federal or state laws.

- **Non-disclosure agreements** can violate the antitrust laws when they span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job. For example, a non-disclosure agreement drafted so broadly as to prohibit disclosure of any information that is "usable in" or "relates to" an industry may be unlawful.[36] Non-disclosure agreements can also violate federal law when they are worded so broadly as to suggest that workers who report potential violations of law to state or federal law enforcement or regulators, or who cooperate with a government investigation, could face lawsuits and adverse employment consequences.[37]
- **Training repayment agreement provisions** are requirements that a person repay any training costs if they leave their employer. Depending on the facts and circumstances, these provisions can be anticompetitive, such as if they function to prevent a worker from working for another firm or starting a business.[38]
- **Non-solicitation agreements** that prohibit a worker from soliciting former clients or customers of the employer similarly can, depending on the facts and circumstances, be anticompetitive, such as if they are so broad that they function to prevent a worker from seeking or accepting another job or starting a business.
- **Exit fee and liquidated damages provisions** require workers to pay a financial penalty for leaving their employer. Depending on the facts and circumstances, these provisions can be anticompetitive,[39] such as if they prevent workers from working for another firm or starting a business.

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[36] See *Brown v. TGS Mgmt.*, 57 Cal. App. 5th 303, 316–19 (2020).

[37] See, e.g., *EEOC v. Astra USA*, 94 F.3d 738, 744–45 (1st Cir. 1996); *FTC v. AMG Services, Inc.*, No. 2:12-CV-00536-GMN-VCF, 2013 WL 12320929, at *4 (D. Nev. Aug. 20, 2013); *Sparks v. Seltzer*; *TC v. Ab15ltzer*. 2:

7. False earnings claims can violate the law

The Agencies may investigate and take action against businesses that make false or misleading claims about potential earnings that workers (including both employees and independent contractors) may realize. For example, the FTC has taken action against an online retailer,[45] a ride-sharing company,[46] a customer service gig work platform,[47] and a food delivery company[48] for allegedly falsely advertising that workers would earn substantially more in compensation and/or tips than they did in reality. When workers are lured to these businesses by false earnings promises, honest businesses are less able to fairly compete for those workers.

8. Report violations

The Department of Justice's Antitrust Division and the Federal Trade Commission encourage anyone who notices any of the above activities or other suspicious behavior and believes that there has been an antitrust violation to report it to either or both offices.

Contact the Antitrust Division's Complaint Center	**Contact the FTC's Bureau of Competition Complaint Intake**
Online complaint portal: https://www.justice.gov/atr/webform/submit-your-antitrust-report-online	Online complaint portal: https://www.ftc.gov/enforcement/report-antitrust-violation
Phone: 202-307-2040; 888-647-3258	
Mail: Complaint Center, U.S. Department of Justice, Antitrust Division 950 Pennsylvania Avenue NW Room 3322 Washington, DC 20530	Mail: Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission 600 Pennsylvania Avenue NW Washington, DC 20580

The Antitrust Division and the FTC encourage anyone seeking to submit a complaint to provide the following types of information with your complaint:

- What are the names of companies, individuals, or organizationsthat are involved?
- How have these companies, individuals, or organizations potentially violated federal antitrust laws?
- What examples can you give of the conduct that you believe may violate the antitrust laws?
- Who is affected by this conduct?
- How do you believe competition may have been harmed?
- How did you learn about the situation?