COVID-19: ANOTHER WARNING FROM THE U.S. ANTITRUST AGENCIES – ANTICOMPETITIVE CONDUCT IN LABOR MARKETS RISKS CRIMINAL AND/OR CIVIL LIABILITY

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By: Lauren Norris Donahue, Sang-yul Lee, Erinn L. Rigney, Brian J. Smith

The U.S. Department of Justice Antitrust Division ("Division") and the Federal Trade Commission ("FTC") (collectively, the "Agencies") issued a joint statement on April 13, 2020, warning employers, staffing companies, and recruiters against anticompetitive conduct disadvantaging workers during the COVID-19 crisis ("Joint Statement"). [1] While acknowledging the need for cooperation between the government, private businesses, and individuals in order to address the spread of COVID-19, the Agencies announced that they "are on alert for employers, staffing companies (including medical travel and locum agencies), and recruiters, among others, who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked." Accordingly, companies and individuals involved in the hiring, recruitment, or retention of workers — particularly doctors, nurses, first responders, and those who work in grocery stores, pharmacies, warehouses, and for other essential businesses and service providers on the front lines of the current crisis — should ensure compliance with the antitrust laws to avoid criminal and/or civil liability.

What do companies need to know? Below, we:

- review the types of labor market conduct that risks running afoul of the antitrust laws;
- summarize the key points from the Agencies' Joint Statement; and
- provide practice tips for mitigating antitrust risk and avoiding the significant consequences that can result from antitrust investigations, enforcement proceedings, and civil litigation.

ANTICOMPETITIVE CONDUCT IN THE LABOR MARKETS

The purpose of the antitrust laws is to promote a competitive marketplace. A competitive marketplace among employers "helps actual and potential employees through higher wages, better benefits, or other terms of employment."[2] Firms that compete to hire or retain employees are considered competitors in the labor marketplace, even if those firms do not compete in the same product or service market. Employers may violate the antitrust laws when they agree not to compete for employees, especially when there is no legitimate business justification for such a restraint. Examples of such agreements include:

- Wage-fixing agreements, whereby competing employers form an agreement "about employee salary or other terms of compensation, either at a specific level or within a range."[3]

- "No Poach" or "No Hire" agreements, whereby competing employers agree "to refuse to solicit or hire th[e] other company's employees."[4]

An agreement need not be formal or in writing to violate the antitrust laws — any kind of informal or tacit agreement such as a "gentlemen's agreement" or some other implied understanding concerning employee compensation or recruiting is similarly prohibited. In this regard, unlawful arrangements may be inferred from circumstantial evidence. For example, exchanges of competitively sensitive information related to terms of employment, compensation, or recruitment strategies among competitors can be used to infer an agreement.

Violations of the antitrust laws can result in serious consequences for employers or any individual directly or indirectly involved in an illegal agreement. Such consequences include:

- Criminal Prosecution under felony charges for both the corporation and culpable individuals (i.e., internal management, human resources personnel, or third parties). In October 2016, the Agencies announced a major policy shift and publicized their intent to criminally prosecute naked wage-fixing or no-poach agreements — that is, agreements separate from or not reasonably necessary to achieve a legitimate business purpose between the employers. While the Division has yet to actually prosecute a criminal no-poach or wage-fixing case, corporations found guilty of criminal violations of the antitrust laws face significant fines (up to $100 million), and individuals may be subject to imprisonment (up to 10 years) and significant fines (up to $1 million).
- Civil Enforcement Actions by the Agencies and state attorneys general that can result in civil fines and broad-ranging injunctions governing future conduct.
- Private Civil Lawsuits by employees, competitors, or third parties alleged to have been injured by the violation. Such lawsuits can be extremely costly to defend, both in terms of monetary costs and business disruption, including lost time of officers and employees, and can result in joint and several and treble damages (three times the losses suffered by the complaining party) and payment of the plaintiff's attorneys' fees.

THE AGENCIES' JOINT STATEMENT

On March 24, 2020, the Agencies issued a joint statement that addressed competitor collaborations amid COVID-19, detailed an expedited antitrust review procedure, and provided guidance for collaborations of competitor businesses working to protect the health and safety of Americans during the COVID-19 pandemic.[6] Therein, the Agencies recognized the increased need for, and procompetitive benefits of, certain types of collaborations during this time. The Agencies specifically noted that "health care facilities may need to work together in providing resources and services to assist patients, consumers, and communities affected by the pandemic and its aftermath," while other "businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies."[7] The Agencies committed to providing "expeditious guidance" to any individuals or businesses responding to the national emergency "about how to ensure their efforts comply with the federal antitrust laws."[8]

The April 13 Joint Statement is a follow-up warning from the Agencies. Like the March 24 statement on competitor collaborations, the Joint Statement acknowledges the need for "unprecedented cooperation between federal, state, local, and tribal governments, private businesses, and individuals" to address the spread of COVID-19 and

"protect the health and safety of Americans." However, the Agencies provided the following warnings to "companies and individuals involved in the hiring, recruiting, retention, or placement of workers:"

- "COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis."[9]
- "The Agencies are on alert for employers, staffing companies (including medical travel and locum agencies), and recruiters, among others, who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked."
- "[T]he Agencies have challenged 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."
- "[T]he Division may criminally prosecute companies and individuals who enter into naked wage-fixing and no-poach agreements. Even absent a collusive agreement, the [FTC] may pursue a civil enforcement action against companies and individuals that invite others to collude."
- "The Agencies may also use their civil enforcement authority to challenge unilateral anticompetitive conduct by employers that harms competition in a labor market (monopsony power)."

PRACTICAL TIPS FOR MITIGATING ANTITRUST RISK IN THE LABOR MARKET

As the Agencies acknowledge, there is an increased need for coordination among employers in order to address and respond to the COVID-19 pandemic. This is particularly true for employers who are providing essential services needed to respond to the crisis, such as health care providers, first responders, grocery stores, pharmaceutical companies, certain manufacturers, and transportation firms. Essential businesses may face labor shortages and struggle to maintain their workforce due to the effects of COVID-19, and therefore, they should be aware of the antitrust risks involved when they engage in coordination or collaboration with competitors. Further, as businesses take advantage of the newly enacted federal loan programs, such as the Paycheck Protection Program or "PPP" under the CARES Act,[10] they should be cognizant of potential anticompetitive behavior, as some businesses may have difficulty in restoring their workforce to the requisite pre-pandemic levels. When companies evaluate tactics to retain employees and attract talent, they should tread carefully to avoid any missteps that could be seen as manipulation of the labor market. There are many permissible ways for employers to engage in procompetitive collaborations, but such collaborations also carry an increased risk of running afoul of the antitrust laws, and companies are advised that any information sharing or agreements related to an employee's wages or employment opportunities will likely face antitrust scrutiny.

Companies considering or currently engaging in coordination or collaboration with competing employers in response to the COVID-19 crisis should:

- Consult with antitrust counsel prior to either (1) sharing competitively sensitive employment information about wages, salaries, benefits, terms of employment, or recruitment strategies; or (2) coordinating with labor market competitors about the hiring or compensation of employees. Such conduct — if limited in time and scope — may be necessary to facilitate competitor coordination in response to the pandemic. However, exceptions to the rule against coordination by labor market competitors would be on a case-by-

case basis and highly fact-specific. Consulting with antitrust counsel prior to engaging in such conduct will mitigate the risk of violating the antitrust laws.

- Put safeguards in place, such as firewalls and other screens, to guard against inadvertent exchanges of competitively sensitive employment information, especially in the areas of salary, wage rates, and benefit levels. Management-level employees involved in such collaboration who have responsibility for or access to competitively sensitive employment information should be trained and knowledgeable on the type of information that can and cannot be exchanged with their collaboration partners.
- Consider seeking approval and/or guidance from the Agencies. Both the Division's Business Review Process and the FTC's Advisory Opinion Process provide opportunities for companies and individuals to ask the Agencies to evaluate proposed conduct, and the Agencies have committed to responding "expeditiously to all COVID-19-related requests."

Additionally, all companies should:

- Refrain from engaging in agreements — or potentially problematic communications — with competitors regarding wages, salaries, benefits, terms of employment, or recruitment strategies that do not serve a legitimate purpose. If you believe such an agreement serves a legitimate business purpose (such as a joint venture), antitrust counsel should be consulted to ensure the defensibility of the agreement.
- Abstain from sharing competitively sensitive information regarding wages, salaries, benefits, terms of employment, or recruitment strategies with competitors. Competitors that share this type of information, absent a reasonable, legitimate purpose for doing so, risk violating antitrust laws since such information sharing can be used as evidence of an implicit illegal agreement. Again, if you believe such an exchange serves a legitimate business purpose, antitrust counsel should be consulted to ensure the defensibility of the exchange and assist in putting proper safeguards around the exchange.
- Review your company's compliance programs to ensure that proper policies and procedures are in place and that management and human resources professionals are appropriately trained to avoid potentially problematic discussions with competing employers.

K&L Gates antitrust practice members defend individuals and companies in a wide variety of criminal cases and civil litigation in the United States, including against allegations of no-poach agreements. The labor, employment and workplace safety practice group also counsels on a wide variety of labor and employment issues — including non-compete clauses — and provides corporate training on how to remain compliant with federal and state labor and employment laws.

FOOTNOTES

[1] Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets, Dep't of Justice Antitrust Div. & Fed. Trade Comm'n (Apr. 13, 2020).

[2] EP'T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 20, 2016).

[3] *Id.*

[4] *Id.*

[5] While the government has always considered such agreements illegal under the antitrust laws, the Agencies — prior to 2016 — only used their civil enforcement authority to challenge these types of agreements.

[6] Joint Antitrust Statement Regarding COVID-19, Dep't of Justice Antitrust Div. & Fed. Trade Comm'n (Mar. 24, 2020).

[7] *Id.*

[8] *Id.*

[9] *See* Joint Statement, *supra* note 1, at 1.

[10] Pub. L. 116-136 (2019–2020).

KEY CONTACTS

LAUREN NORRIS DONAHUE
PARTNER

CHICAGO
+1.312.807.4218
LAUREN.DONAHUE@KLGATES.COM

SANG-YUL LEE
PARTNER

CHICAGO
+1.312.807.4373
SANGYUL.LEE@KLGATES.COM

ERINN L. RIGNEY
ASSOCIATE

CHICAGO
+1.312.807.4407
ERINN.RIGNEY@KLGATES.COM

BRIAN J. SMITH
ASSOCIATE

CHICAGO
+1.312.807.4202
BRIAN.J.SMITH@KLGATES.COM

