

Antitrust Issues in Labor Markets

An expert Q&A on the antitrust issues that can arise for companies when making business decisions that affect employees or labor markets and how the change in presidential administrations may impact policymaking and enforcement.

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What should in-house counsel know about how the antitrust laws apply to labor markets?

Antitrust enforcers have made clear that they consider the antitrust laws to apply to competition in labor markets in the same way that they apply to markets for goods and services. While the Biden administration has been among the most active in investigating and prosecuting activities impacting labor, early indications are that the Trump administration agrees, at least with the theory.

On January 16, 2025, in the final days of the Biden administration, the Federal Trade Commission (FTC) and Antitrust Division of the Department of Justice (DOJ) issued revised [Guidelines for Business Activities Affecting Workers](#) (Labor Guidelines), identifying a non-exhaustive list of activities that are subject to

investigation. The Labor Guidelines establish that the DOJ may investigate and prosecute certain agreements as felony conspiracies, including agreements:

- With competitors on the wages that employees are paid.
- To not solicit or hire each other's employees.

Other types of agreements and conduct that could draw scrutiny include exchanging competitively sensitive information about compensation or terms of employment, non-compete provisions in employment agreements, and even nondisclosure agreements, exit fee provisions, and other impediments to workers' ability to move between employers.

Relatedly, mergers have been, and likely will continue to be, scrutinized for any adverse impact on competition in a labor market. While investigations by antitrust agencies had focused almost exclusively on the impact in output (or product) markets, the antitrust agencies have recently investigated whether mergers may affect competition for the labor employed by the merging parties, resulting in lower wages and benefits or otherwise worsening working conditions, and have included these claims in litigated cases.

(For more on the Labor Guidelines, see [Key Takeaways: US Antitrust Agencies Adopt New Guidelines for Business Activities Impacting Workers](#) on Practical Law; for more on how the federal antitrust agencies analyze labor markets, see [Antitrust Labor Markets in M&A](#) on Practical Law.)

What were some of the major initiatives of the Biden administration relating to labor and antitrust?

The Biden administration was vocal and active in pursuing novel applications of the antitrust laws to labor markets, including through enforcement actions, rulemakings, and policy, such as the updated Labor Guidelines.

In 2023, the Biden administration's FTC promulgated a rule that would prohibit employers from entering into or enforcing non-compete clauses in employment contracts with any worker who is not a senior executive. As authority for the rule, the FTC asserted that the Federal Trade Commission Act authorized the agency to define "unfair methods of competition" to ban virtually all employee non-compete agreements. Opponents of the rule have challenged the FTC's authority to promulgate the rule, and despite split views among the federal courts on its legality, implementation of the rule has been paused. (To track developments relating to the non-compete rule, see [FTC Non-Compete Clause Rulemaking Tracker](#) on Practical Law.)

The Biden administration's DOJ and FTC also released revised Merger Guidelines in 2023 clarifying that the agencies use the same or similar tools to analyze "the effects of a merger of buyers, including employers as buyers of labor" (for more on the 2023 Merger Guidelines, see [Key Takeaways: US Antitrust Agencies Adopt New Merger Guidelines](#) and [How Antitrust Agencies Analyze M&A](#) on Practical Law). Both agencies brought complaints to enjoin mergers on the theory that a merger would reduce competition between buyers of labor.

While the previous Trump administration brought the first criminal prosecutions against company executives relating to no-poach agreements, the Biden administration's DOJ continued and expanded that approach with charges against company executives for no-poach agreements and wage-fixing agreements. However, none of those charges have resulted in convictions.

Finally, the DOJ and FTC under President Biden also entered into Memoranda of Understanding with the Department of Labor and the National Labor Relations Board (NLRB) to formalize a commitment to agency coordination on labor antitrust issues, including sharing data and information (see FTC: [Press Release, FTC, DOJ Partner with Labor Agencies to Enhance Antitrust Review of Labor Issues in Merger Investigations \(Aug. 28, 2024\)](#)).

What are the top labor market enforcement challenges that are likely to face the Trump administration?

At the top of the list is that the Trump administration must find a way to balance President Trump's populist views with the historical conservative "small government" philosophy.

Trump designated FTC Commissioner Andrew Ferguson to lead the FTC as Chairman. Chairman Ferguson is already on record as agreeing that "the antitrust laws protect employees from unlawful restraints of the labor markets as much as they protect any output market" and that prosecutorial resources should be devoted to such investigations, consistent with the progressive views of Biden officials (see [Dissenting Statement of Commissioner Andrew N. Ferguson, In re: Guardian Service Indus. Inc., No. 2410082 \(Dec. 4, 2024\)](#)).

At the same time, Trump's policymakers have suggested that some of the labor initiatives of the Biden administration exceed the agencies' statutory authority — a common and mainstream Republican criticism of a wide range of Democratic initiatives. For example, then-Commissioner Ferguson issued a withering criticism of an initial proposal to add a Labor Markets section to the Hart-Scott-Rodino (HSR) form, stating that there is "nowhere near" enough evidence that there are enough labor competition problems in mergers to justify the regulatory burden of the proposal (see [Concurring Statement of Commissioner Andrew N. Ferguson, In re: Amendments to the Premerger Notification and Report Form and Instructions, No. P239300 \(Oct. 10, 2024\)](#), at 12 n.93; for more on the HSR form, see [HSR Rule Changes](#) in the January 2025 issue of *Practical Law The Journal*).

What changes to labor market enforcement are likely to play out under the Trump administration?

First, many observers expect the FTC under the Trump administration to undo (or cease to defend in ongoing litigation) the non-compete rulemaking.

The Trump administration is also likely to roll back the just-issued Labor Guidelines, if for no other reason than that they strenuously objected to their issuance in the last days of the "lame-duck Biden-Harris FTC"

(see [Dissenting Statement of Commission Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Antitrust Guidelines for Business Activities Affecting Workers, No. P251202 \(Jan. 16, 2024\)](#)).

Less likely, at least early on, is significant revision to the 2023 Merger Guidelines and their focus on the labor impact of mergers. Chairman Ferguson has expressed concern about revising the merger guidelines each political cycle, which he sees as undermining their authority, and is generally supportive of investigating potential harms to workers.

How should companies contemplating M&A transactions in 2025 prepare on the labor market issue?

Although merging parties should not expect a significant sea change in scrutiny of agreements and transactions that harm workers, they should prepare for the possibility that they could receive requests for labor-related information. Comprehensive antitrust counseling should therefore account for the risk of delay due to the investigation of the potential impact of the merger on workers. Parties should anticipate potential requests for information regarding, and analysis of, labor market issues, including analysis based on relevant Department of Labor data and applicable NLRB decisions.

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