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April 16, 2020

Federal Trade Commission and Justice Department Issue Joint Statement on COVID-19 and Competition in U.S. Labor Markets

By Steven Bernstein and Lauren Morris

As individuals across the country are working on the front lines of the COVID-19 pandemic as essential service providers, the federal antitrust regulators announced that they are closely monitoring the activities of employers, staffing companies, recruiters, and others in order to protect against anticompetitive conduct that would disadvantage their workers. On April 13, 2020, the Antitrust Division of the Department of Justice (the "DOJ") and the Bureau of Competition of the Federal Trade Commission (the "FTC," and collectively the "Agencies") recognized in their Joint Statement on COVID-19 and Competition in U.S. Labor Markets that the spread of COVID-19 may require unprecedented cooperation among private businesses, individuals, and government entities. The Agencies, however, issued a strong warning that the pandemic is no excuse for anticompetitive conduct that harms workers, and the Agencies "are on alert" for such antitrust violations.

In the Joint Statement, the Agencies make clear that they are closely monitoring labor markets for potential anticompetitive activities involving employers, staffing companies, and recruiters, "such as agreements to lower wages or to reduce salaries or hours worked." The Agencies highlight in the Statement their track record of enforcement against anticompetitive conduct in labor markets, including: "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."

The Agencies also emphasize the civil and criminal sanctions available to address antitrust violations, such as the DOJ's authority to prosecute collusive agreements criminally, the FTC's authority to pursue civil actions even absent an agreement in cases such as invitations to collude, and the civil sanctions available to both Agencies to challenge unilateral conduct that harms competition in a labor market. The Agencies make clear that they "will not hesitate to hold accountable" anticompetitive actors who prey on workers, and the Joint Statement provides contact information at the FTC and DOJ for those interested in lodging a complaint.

Key Takeaways

- This Joint Statement is consistent with the Agencies' commitment to "vigorously enforce the antitrust laws in labor markets" in recent years. (*See, e.g.*, prosecution of "naked," horizontal no-poach and

wage-fixing agreements between competitors subjected to the *per se* framework, as opposed to the rule of reason, which can be found here.)

- Companies should ensure that their employees, particularly those individuals involved in hiring, recruiting, retention, or placement of workers, have received antitrust counseling and understand the consequences of illegal anticompetitive activities impacting workers.
- As the Joint Statement specifically expresses concern regarding the potential for competitive harm to doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, employers in these business areas should recognize that their activities during the pandemic may attract particularly close scrutiny from the antitrust agencies.

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If you have questions concerning the contents of this issue, or would like more information about Weil's Antitrust/Competition practice group, please speak to your regular contact at Weil or to one of the following partners:

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