

THOUGHT LEADERSHIP

LEGAL UPDATES

PUBLISHED: APRIL 15, 2020

Services

Antitrust & Competition

Antitrust Counseling & Compliance

Professionals

WENDY K. ARENDS

MADISON:

608.258.7382

WENDY.ARENDS@

HUSCHBLACKWELL.COM

MARK B. TOBEY

AUSTIN:

512.479.9740

MARK.TOBAY@

HUSCHBLACKWELL.COM

Antitrust Agencies' Warning to Employers: COVID-19 No Excuse for Labor Market Collusion

Governments, manufacturers, healthcare providers, pharmacies, grocery stores, distributors, and others at the front lines of the coronavirus pandemic (COVID-19) continue to work as quickly as possible to respond to the crisis. This unprecedented response has resulted in competitor collaborations on the delivery of healthcare services, manufacturing processes, and supply chain reorganization. While recognizing that these arrangements provide significant public health benefits, the Federal Trade Commission (FTC) and U.S. Department of Justice Antitrust Division (DOJ) cautioned that competing collaborators should remain aware of the potential antitrust risks of agreements on hiring and employment practices, including the sharing or disclosure of competitively sensitive wage, compensation, or benefits information.

Timing and Tenor of DOJ and FTC Statement is Notable

The FTC and DOJ recently issued a joint statement saying 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.”

They cautioned that COVID-19 does not provide a free pass for competitors or a dominant company to engage in anticompetitive conduct that lowers wages or reduces hours for physicians, nurses, first responders, as well as employees who provide other essential services in pharmacies, grocery stores, or as part of the nation’s supply chain. They also urged individuals who have information regarding potential harm to competition in a labor market to email their complaints to the agencies.

Agreements or Communications Regarding Wages, Benefits, or Employee Mobility May Violate Antitrust Law

Their guidance serves as a reminder and caution of the potential antitrust risks faced by competitors, including those in the healthcare industry, who are agreeing on or communicating about labor and employment-related issues. The antitrust agencies previously communicated their position on anticompetitive conduct with respect to competitors who agree on wages, benefits, or hiring practices in guidance and enforcement actions, most notably in the *2016 Antitrust Guidance for Human Resource Professionals*.

In addition to naked wage-fixing and no-poaching agreements between competitors, the FTC and DOJ have challenged unlawful noncompete agreements and the anticompetitive exchange of competitively sensitive information such as salary, wages, benefits, and compensation data.

An agreement (or invitation) to collude on the terms of employment or hiring can be demonstrated by direct or indirect evidence, including communications regarding salary, wages, benefits, or other competitively sensitive information.

That said, if communications or agreements between competitors regarding labor and employment issues are reasonably necessary to achieve the benefits or goals of a legitimate collaboration or other arrangement (COVID-19-related, or otherwise) between the parties, then they may be lawful.

Assuming information regarding salary, wages, benefits, or other terms of employment is disclosed using appropriate safeguards as outlined by DOJ and FTC guidance, then the risk of antitrust liability is significantly reduced or eliminated.

The antitrust agencies may also challenge a dominant employer's unilateral anticompetitive conduct that harms competition in a labor market, also referred to as monopsony power. Companies 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.

Contact Husch Blackwell

Husch Blackwell's antitrust team continues to monitor the antitrust agencies' guidance and enforcement actions in this area. Should you have any questions, please contact Wendy Arends, Mark Tobey, or your Husch Blackwell attorney.

Comprehensive CARES Act and COVID-19 Guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly

changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.