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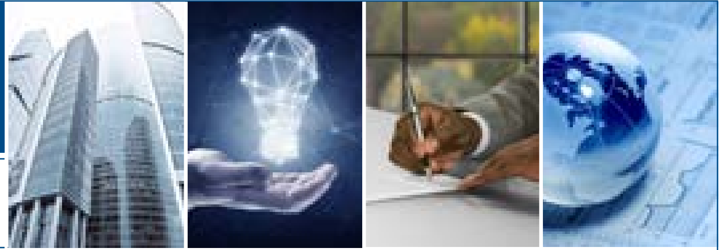

Antitrust/Labor & Employment ADVISORY ■

APRIL 17, 2020

Federal Antitrust Agencies Remind Businesses That Colluding on Labor Issues Remains Illegal During Pandemic

By Adam Biegel, John Snyder, and Hilla Shimshoni

While the U.S. Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) have made clear the U.S. antitrust laws are flexible enough to allow certain collaborations to fight the spread of the coronavirus (COVID-19), on April 13, 2020, they reaffirmed their commitment to cracking down on companies that collude with rivals on employment issues. They warned that enforcers "will not hesitate to hold accountable those who seek to use COVID-19 as an opportunity to prey on working Americans by subverting competition in labor markets."

The warning, issued in a joint statement, serves as an important reminder to employers – especially those in health care, grocery, and other essential sectors – that the agencies are "on alert" for agreements – as opposed to independent decisions by companies – to lower wages or to reduce salaries or hours worked to address the crisis. Companies searching for answers about how to respond to the unprecedented labor issues raised by the pandemic need to be cautious about joint activities with other employers. Although "some cooperation" for legitimate purposes may be warranted due to COVID-19, "[e]ven in times of crisis, we choose a policy of competition over collusion," said Makan Delrahim, assistant attorney general for antitrust.

Both businesses and individuals, the agencies cautioned, can face civil and criminal liability for collusion or other anticompetitive conduct in labor markets.

The agencies' warning is consistent with their stated priority to crack down on employment-related collusion and anticompetitive conduct. The agencies noted that they have challenged a wide range of such conduct in the past, from unlawful wage-fixing and no-poach agreements to anticompetitive noncompete agreements and the unlawful exchange of competitively sensitive employee information, including salary, wages, benefits, and compensation data. It is also in line with growing interest from state attorneys general and Congress. And it follows a number of no-poach lawsuits filed by private plaintiffs in recent years.

Executives, legal departments, and human resources managers should implement internal safeguards to reduce antitrust risks as they relate to employment, recruitment, and retention. In particular, companies and trade associations should remember that:

- A wide range of employers may qualify as competitors in labor markets – including companies that provide different products or services.

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- The usual antitrust rules apply to competitive intelligence and information-sharing in a crisis. Companies must have a legitimate procompetitive purpose for sharing and use appropriate safeguards and avoid direct exchanges or discussions about non-public wage levels, employment terms and conditions, and costs.
- Stand-alone agreements either to fix salaries or employment terms or to refrain from hiring or soliciting a competitor's employees are always unlawful and can subject businesses and individuals to criminal prosecution.
- Even absent an actual agreement to restrict competition, the FTC pursues civil enforcement actions against companies and individuals that invite others to collude.
- Certain procompetitive information exchanges and industry initiatives on these subjects may be legal. Counsel can help you navigate the legal risks, identify appropriate safeguards, and even consider seeking expedited government review.

Alston & Bird has formed a multidisciplinary task force to advise clients on the business and legal implications of the coronavirus (COVID-19). You can view all our work on the coronavirus across industries and subscribe to our future webinars and advisories.

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