

FTC and DOJ Jointly Issue Antitrust Guidelines Related to Labor

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Practically on the eve of the inauguration, the Federal Trade Commission (FTC) and the Department of Justice, Antitrust Division (DOJ), jointly issued [antitrust guidelines](#) for business activities affecting workers. The FTC's vote to approve the guidelines was split 3-2 along party lines, with the Republican commissioners issuing a brief dissenting statement.

The guidelines, which replace the 2016 [Antitrust Guidance for Human Resource Professionals](#), explain how the agencies identify and assess whether business practices affecting workers violate the antitrust laws.

As the acting assistant attorney general of the DOJ notes, "[f]or more than a century, the antitrust laws have protected workers from unlawful schemes, abuses of bargaining power, and restrictions on their mobility." The guidelines outline specific types of arrangements or business practices that may violate the antitrust laws, such as non-solicitation agreements between two companies, no-poach agreements between a franchisor and franchisee or among franchisees of the same franchisor, information exchanges involving compensation or other sensitive terms of employment, restrictions on workers' freedom to leave their jobs, and "other restrictive, exclusionary, or predatory employment conditions that harm competition."

The guidelines provide limited explanation regarding assessment of "other restrictive" provisions. For example, they explain:

- Non-disclosure agreements can violate the antitrust laws when they span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job.
- Training repayment agreement provisions are requirements that a person repay any training costs if they leave their employer. If they function to prevent a worker from working for another firm or starting a business, these provisions can be anticompetitive.
- Non-solicitation agreements that prohibit a worker from soliciting former clients or customers of the employer if they are so broad that they function to prevent a worker from seeking or accepting another job or starting a business, can be anticompetitive.
- Exit fee and liquidated damages provisions requiring workers to pay a financial penalty for leaving their employer can be anticompetitive if they prevent workers from working for another firm or starting a business.

Perhaps the most interesting section of the guidelines relates to false claims regarding workers' potential earnings. Specifically, the guidelines note that the agencies may investigate and take action against businesses that make false or misleading claims about potential earnings that workers may receive (including both employees and independent contractors). The role of the antitrust laws in such situations is not entirely clear, but the guidelines related such false claims to competition by noting that "honest businesses are less able to fairly compete" when workers are attracted to companies by false earnings promises.

The Republican commissioners' dissenting statement was succinct: "[T]he lame-duck Biden-Harris FTC . . . announcing its views on how to comply with the antitrust laws in the future is a senseless waste of Commission resources. The Biden-Harris FTC has no future." While current Republican Commissioner Andrew Ferguson will lead the FTC after the inauguration, the agency will not fully transition to a Republican majority until the anticipated confirmation of Mark Meador. The guidelines, however, provide case citations and interpret case law consistent with the current administration's enforcement priorities in an effort to encourage the continuation of those priorities beyond the transition.

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