

Antitrust Agencies Issue Revised Labor Guidance in Waning Days of Biden Administration

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On January 16, 2025, the U.S. Department of Justice, Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) released new Antitrust Guidelines for Business Activities Affecting Workers (“2025 Labor Guidelines”) and withdrew the 2016 Antitrust Guidance for Human Resource Professionals (“2016 HR Guidance”).

The 2025 Labor Guidelines sweep more broadly than the 2016 HR Guidance but often provide less guidance; repeatedly asserting that restrictions “may” or “can” violate the antitrust laws without instruction on how to analyze the question. The guidelines also do not break much new ground beyond the Statements of Interest and Consent Decrees that the agencies filed under former President Biden. Indeed, the agencies repeatedly cite these court submissions in the 2025 Labor Guidelines as support for their views, even though they do not have precedential value. These documents (and the 2025 Labor Guidelines themselves) do not always reflect the state of the law.

The 2025 Labor Guidance may also not reflect the views of the current Trump Administration. The guidance was voted out of the FTC over the dissent of the two Republican Commissioners, who criticized the decision to issue enforcement guidance days before the administration change as a “senseless waste of Commission resources.” It remains to be seen whether the agencies will further modify the new guidelines under President Trump.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or to the Cleary authors below.

BAY AREA

Heather S. Nyong'o
+1 415 796 4480
hnyongo@cgsh.com

WASHINGTON

Jeremy Calsyn
+1 202 974 1522
jcalsyn@cgsh.com

Jeremy Newman
+1 202 974 1587
jnewman@cgsh.com

NEW YORK

Alan M. Levine
+1 212 225 2810
alevine@cgsh.com

Michael Albano
+1 212 225 2438
malbano@cgsh.com

Joseph M. Kay
+1 212 225 2745
jkay@cgsh.com



I. Background

The antitrust agencies have focused on alleged collusion in labor markets over the past 15 years. In 2010, the DOJ brought its first civil no-poach enforcement action against tech companies that allegedly agreed not to cold call one another's employees.¹ Those cases resulted in consent decrees with the DOJ and \$435 million in civil settlements. The now-withdrawn 2016 HR Guidance was built on those tech cases. The 2016 HR Guidance announced that it was issued "to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of antitrust laws."² The 2016 HR Guidance addressed two categories of potential violations: (1) agreements among employers concerning employee recruitment or terms of compensation, and (2) the sharing of sensitive information relating to labor matters with competitors.³

The 2016 HR Guidance also announced that the DOJ planned to criminally prosecute "naked" no-poach and wage-fixing agreements that are not reasonably related to a procompetitive business relationship.⁴

The DOJ under the first Trump Administration brought the first labor-focused criminal cases. The Biden Administration accelerated this trend in its early years and repeatedly emphasized the role of antitrust laws in

labor-related matters. Under President Biden, the DOJ and FTC also brought several enforcement actions that charged the use of non-competes as unfair methods of competition, and used final orders in merger reviews as opportunities to ban non-compete clauses for the transacting firms.⁵ The agencies have also been active in filing amicus briefs and statement of interests in support of civil plaintiff challenges to labor-facing agreements.⁶

II. The New 2025 Labor Guidelines

The new 2025 Labor Guidelines were issued on January 16, 2025. Simultaneous with their release, the agencies rescinded the 2016 HR Guidance. Compared to the 2016 HR Guidance, the 2025 Labor Guidelines address a broader range of labor-related antitrust theories, but provide less concrete instruction on how to analyze potential violations.

No-poach and wage-fixing agreements. The 2025 Labor Guidelines state that businesses "that compete with each other for workers may be committing an antitrust crime if they enter into an agreement not to recruit, solicit, or hire workers or to fix wages or terms

¹ DOJ, Press Release, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements, (Sep. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee#:~:text=According%20to%20the%20complaint%2C%20the%20directly%20soliciting%20each%20other%27s%20employees.>

² DOJ & FTC, Antitrust Guidance for Human Resource Professionals at 1 (October 2016) ("2016 HR Guidance"), <https://www.justice.gov/atr/file/903511/dl?inline.>

³ *Id.* at 3 – 6.

⁴ *Id.* at 3.

⁵ See, e.g., *United States v. DaVita Inc.*, 2022 WL 266759 (D. Colo. Jan. 28, 2022); FTC, Press Release, FTC Approves Final Order Requiring Building Service Contractor to Stop Enforcing No-Hire Agreement (Jan. 17, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-approves-final-order-requiring-building-service-contractor-stop-enforcing-no-hire>

[agreement](https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-illinois-attorney-general-take-action-against-grubhub-harming-diners-workers-small-businesses); FTC, Press Release, FTC, Illinois Attorney General Take Action Against Grubhub for Harming Diners, Workers, and Small Businesses (Dec. 17, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-illinois-attorney-general-take-action-against-grubhub-harming-diners-workers-small-businesses>; FTC, Press Release, FTC Approves Final Order Requiring Divestitures of Hundreds of Retail Gas and Diesel Fuel Stations Owned by 7-Eleven, Inc. (Nov. 10, 2021), [https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-approves-final-order-requiring-divestitures-hundreds-retail-gas-diesel-fuel-stations-owned-7.](https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-approves-final-order-requiring-divestitures-hundreds-retail-gas-diesel-fuel-stations-owned-7)

⁶ See, e.g., Brief for the United States of America and the Federal Trade Commission as Amici Curiae in Support of Neither Party, *Deslandes v. McDonald's*, No. 22-2333 (7th Cir. Nov. 18, 2022), Dkt. No. 51; Corrected Brief For The United States of America as Amicus Curiae in Support of Plaintiffs-Appellants, *Giordano v. Saks & Company LLC* No. 23-600 (2d Cir. Aug. 7, 2023), Dkt. No. 89.

of employment.”⁷ While the 2016 HR Guidance focused on prohibiting “naked” restraints of trade between competitors without a procompetitive business relationship, the 2025 Labor Guidelines elide the distinction between the type of naked collusive conduct that could raise criminal concern and non-solicit/no-hire agreements that appear in many routine business contracts.⁸ The DOJ further takes the view that “it does not matter” that an agreement may not “completely prohibit hiring the other company’s workers,” even though this is contrary to the decision in the DOJ’s failed attempt to criminally prosecute *United States v. Patel* for alleged hiring restrictions in 2023.⁹

Franchise agreements. The new guidelines specifically address hiring restrictions included in franchise agreements. The 2025 Labor Guidelines state that such agreements “can be *per se* illegal under the antitrust laws.”¹⁰ The 2025 Labor Guidelines approach on hiring restrictions in the franchise context continues to deviate from the approach taken by the first Trump Administration in its statement of interest in *Stigar v. Dough Dough*.¹¹ The DOJ stated in that case (a class action brought by franchisee employees) that the “*per se* rule does not apply to all no-hire and no-solicitation agreements” and that restraints “imposed by agreement between [franchisor and franchisee] are usually vertical and thus assessed under the rule of reason.”¹² The 2025 Labor Guidelines only warn that such agreements can be *per se* illegal without further guidance.¹³

Information sharing. Like the 2016 HR Guidance, the 2025 Labor Guidelines address sharing competitively

sensitive information relating to labor with competitors. The 2025 Labor Guidelines state that exchanging “competitively sensitive compensation or other employment information with a competitor may be unlawful when the information exchange has, or is likely to have, an anticompetitive effect, whether or not that effect was intended.”¹⁴ The guidelines also mention that sharing this information “through an algorithm or through a third party’s tool or product” may be illegal.¹⁵

Other labor theories. The 2025 Labor Guidelines state that there may be potential antitrust liability for the inclusion of specific terms or conditions within employee contracts, including non-compete provisions and any other “restrictive, exclusionary, or predatory employment conditions that harm competition,” the latter being a catch-all that includes “overly broad non-disclosure agreements, training repayment agreement provisions . . . and exit fee or liquidated damages provisions.”¹⁶

Non-compete clauses. The 2025 Labor Guidelines say that non-compete clauses may violate antitrust laws because they restrict “workers from switching jobs or starting a competing business.”¹⁷ Non-competes were a focus during the Biden Administration and the FTC issued a final rule banning most non-compete agreements in April 2024.¹⁸ This rule was struck down by the Northern District of Texas,¹⁹ although an appeal remains pending.

“Restrictive” agreements. The 2025 Labor Guidelines state that the agencies may “investigate and take action

^D DOJ & FTC, Antitrust Guidelines for Business Activities Affecting Workers at 4 (Jan. 16, 2025) (“2025 Labor Guidelines”).

⁸ *Id.*, n. 15.

⁹ Rule 29 Order at 12 & n.2, 13, 18, *United States v. Patel*, No. 3:21-cr-220 (D. Conn. Apr. 28, 2023), Dkt. No. 599 (finding an agreement “constrain[ed] the [job] applicants ‘to some degree’” but did not “allocate” a market).

¹⁰ 2025 Labor Guidelines at 5-6.

¹¹ Corrected Statement of Interest of the United States of America, *Joseph Stigar v. Dough Dough, Inc.* No. 2:18-cv-00244 (Mar. 8, 2019), <https://www.justice.gov/atr/case-document/file/1141731/dl?inline>.

¹² *Id.* at 16.

¹³ 2025 Labor Guidelines at 5-6 (“Such an agreement can be *per se* illegal under the antitrust laws.”).

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 2 (“Such an agreement can be *per se* illegal under the antitrust laws.”).

¹⁷ *Id.* at 7.

¹⁸ FTC, Press Release, FTC’s final rule will generate over 8,500 new businesses each year, raise worker wages, lower health care costs, and boost innovation (April 23, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>.

¹⁹ *Ryan LLC v. FTC*, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024).

against other restrictive agreements that impede worker mobility or otherwise undermine competition,”²⁰ such as some (1) non-disclosure agreements “when they span such a large scope of information that they function to prevent workers from seeking or accepting other work” after leaving their job, (2) training repayment agreement provisions that require persons to repay training costs, (3) non-solicitation agreements that prohibit a worker from soliciting former clients or customers of the employer, and (4) exit-fee and liquidated damage provisions that “require workers to pay a financial penalty for leaving their employer.”²¹ The 2025 Worker Guidelines do not attempt to provide guidance on how to assess whether these agreements are anticompetitive in a given market.

False earning claims. The 2025 Labor Guidelines state that the “Agencies may investigate and take actions against businesses that make false or misleading claims about potential earnings that workers . . . may realize.”²² FTC has brought several enforcement actions against companies for allegedly advertising that workers would earn more in compensation or tips than they did.²³ The 2025 Labor Guidelines do not explain the antitrust violations at issue in these claims.

Independent contractors. The 2025 Labor Guidelines include general statements that the antitrust laws’ prohibition against anticompetitive conduct applies to independent contractors.²⁴ The guidelines provide an example that an agreement between two platform businesses “to fix the compensation of independent contractors” who use those platforms “may constitute the type of *per se* violation of the antitrust laws that [] exposes the platforms to criminal liability.”²⁵

III. Key Implications

No-poach and wage-fixing agreements continue to carry significant risk. The 2025 Labor Guidelines do not change the agencies’ position that no-poach and wage-fixing agreements are potentially subject to

criminal prosecution. Agencies will continue to scrutinize, and potentially prosecute, agreements among competing employers to restrict competition for hiring or worker compensation.

Other portions of the 2025 Labor Guidelines are broader than the 2016 HR Guidance, but do not create much new guidance. The 2025 Labor Guidelines are largely a summary of Biden Administration Statements of Interest and Consent Decrees. None of those documents, including the 2025 Labor Guidelines, have precedential value and some contradict prior agency statements and the law. The guidelines also provide very little guidance on how to evaluate antitrust risk within the broad categories of conduct identified as potential antitrust violations. It remains to be seen whether the Trump Administration will take steps to modify the 2025 Labor Guidelines.

It is important that employees outside of the HR organization receive training on labor-facing antitrust risk. The agencies focused on Human Resources professionals in the 2016 HR Guidance. However, employees throughout organizations are occasionally confronted with hiring restrictions and could benefit from antitrust compliance training on hiring restrictions, wage fixing, and wage and benefit information exchange. The DOJ’s other recent guidance on corporate compliance programs emphasizes the importance of training on labor-facing risk across an organization.²⁶ The new guidance is helpful in clarifying this.

IV. Conclusion

The 2025 Labor Guidelines were issued in the last days of an outgoing administration over the dissent of the incoming FTC Chair. The guidelines thus may not reflect current agency priorities or views and the current iteration may take an overly narrow view of potential legal and factual defenses available to companies confronted with the issues addressed in the guidelines.

²⁰ 2025 Labor Guidelines at 9 – 10.

²¹ *Id.* at 9.

²² *Id.* at 11.

²³ *See id.* (citing several complaints brought by FTC against Uber, Arise Virtual Solutions, and Grubhub).

²⁴ *Id.* at 10.

²⁵ *Id.*

²⁶ DOJ, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations at 2 (Nov. 2024), <https://www.justice.gov/atr/media/1376686/dl>.

It is particularly important in the current enforcement environment that companies work with experienced antitrust counsel on labor-facing antitrust risk.

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