Clients&FriendsAlert

FTC & DOJ Substantially Revise Guidance on Application of Antitrust Laws to Activities Affecting Workers: Trump Administration Likely to Adopt Some But Not All of the Guidance

January 17, 2025

Two working days before the inauguration of President Trump, the federal antitrust agencies have withdrawn the *Antitrust Guidance for Human Resource Professionals* (2016) ("Guidance Document"),[1] and issued *Antitrust Guidelines for Business Activities Affecting Workers* (2025) ("Guidelines").[2] The 2025 Guidelines, issued over the dissent[3] of FTC Commissioner Andrew Ferguson (President-Elect Trump's designee for FTC Chair) and his Republican colleague, Commissioner Melissa Holyoak, significantly expand upon the 2016 Guidance Document, in part reflecting efforts by the first Trump administration and the outgoing Biden Administration to protect competition in labor markets.

The 2025 Guidelines also reflect an effort to extend controversial policy principles into the incoming Trump Administration and appear to be an attempt to require the new administration to pay a political cost to withdraw from or otherwise lessen the importance of the Guidelines. But, soon-to-be

---

1 U.S. Department of Justice & Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 2016).

2 U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for Business Activities Affecting Workers (Jan. 2025). The Guidelines make clear that the antitrust laws apply to agreements that businesses reach with independent contractors and make no distinction between them and employees. Id. at 10.

Earlier this week the FTC issued a policy statement "clarifying that independent contractors, including gig workers, are shielded from antitrust liability when engaging in protected bargaining and organizing activities." See, generally, Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability (Jan. 14, 2025). Commissioners Andrew Ferguson and Melissa Holyoak dissented from "the Biden-Harris Commission's ... annouce[ment of] its plans for the future" because "it has no future." Dissenting Statement of Commissioner Andrew Ferguson Joined by Commissioner Melissa Holyoak Regarding the Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers From Antitrust Liability (Jan. 14, 2025).

3 Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Antitrust Guidelines for Business Activities Affecting Workers (Jan. 16, 2025).

Chairman Ferguson and Commissioner Holyoak are likely to aggressively reverse the Biden Administration's pre-inaugural policy palooza when they are in the majority.[4]

The 2016 Guidance Document

The 2016 Guidance Document was released by the Obama Administration just prior to the 2016 Presidential election. It made the very non-controversial point that competition among firms for labor leads to higher wages, better benefits and other terms of employment, that the antitrust laws applied to conduct that might affect competition in labor markets and the more controversial (and unsubstantiated) point that consumers benefit from a more competitive work-force.[5] The Guidance Document identified three areas of primary concern: (i) agreements among employers not to recruit certain employees (no-poach agreements); (ii) agreements among employers not to compete on terms of compensation (wage-fixing agreements); and (iii) the sharing of competitively sensitive information – e.g., wages and other forms of compensation – among firms that competed for labor.[6] The Guidance document was clear to state that not all information-sharing efforts were illegal, and, consistent with the 1996 Health Care Guidelines[7], set out a framework that established a safe harbor for such efforts.[8] The seven exemplar questions and answers illustrated these principles and concerns.[9]

The New Guidelines

The 2025 Guidelines carry-over the 2016 Guidance Document's concern with: (i) agreements among firms not to recruit employees; (ii) agreements among firms to fix wages and other forms of compensation; and (iii) the exchange of wage and compensation information among firms competing

---

4 See Dissenting Statement of Commissioner Andrew N. Ferguson Regarding the January 16, 2025 Closed Commission Meeting (Jan. 16, 2025). ("But sauce for the goose is sauce for the gander. Given the zeal with which my Democrat colleagues have rammed through their agenda in the final hours of the Biden-Harris Administration, none of them should be surprised or outraged when the incoming majority implements President Trump's vision with equal vigor.") See also Dissenting Statement of Commissioner Melissa Holyoak Regarding Closed Commission Meeting Held on January 16, 2025 (Jan. 16, 2025). ("Since January 1, 2025, the Commission has voted on more than thirty matters, including seven proposed settlements, five federal court or administrative complaints, three notices or advance notices of proposed rulemaking, one final rule, eight final administrative consent orders, three reports for ongoing 6(b) studies, two enforcement policy or guidance statements, one potential 6(b) study, and several administrative matters.... It is wholly improper for this lame-duck Commission to expedite law enforcement matters, issue notices and advance notices of proposed rulemakings, release new enforcement policy statements and guidance, and issue interim findings from ongoing 6(b) studies.").

5 2016 Guidance at 2.

6 Id. at 3-6.

7 U.S. Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care (Aug. 1996) (withdrawn).

8 2016 Guidance at 5.

9 Id. at 6-9.

for labor. However, they identify substantially more labor market practices that may run afoul of the antitrust laws, and consistent with the Biden Administration's withdrawal[10] of the 1996 Health Care Guidelines, provide no safe-harbor guidance for information exchange programs.

Specifically, the new Guidelines state that the antitrust agencies may investigate the following types of business practices or agreements as potential violations of antitrust law[11]:

- agreements between companies not to recruit, solicit, or hire workers (potentially charged as a criminal violation);[12]
- agreements between companies to fix wages or terms of employment (potentially charged as a criminal violation);[13]
- agreements in the franchise context not to poach, hire, or solicit employees of the franchisor or franchisee, even where such agreements are between a franchisor and a franchisee (vertical agreements), or among the franchisees of the same franchisor (horizontal agreement among franchisees);[14]
- exchanges of competitively sensitive information – such as with respect to compensation, other terms or conditions of employment – among or with companies that compete for workers, including when done through a third party, other intermediary, or through a third party using a common algorithm to share such information (directly or indirectly);[15]
- unilateral use or collective adoption by one or more employers of restrictive, exclusionary or predatory employment agreements, such as: non-compete agreements, non-solicitation

[10] Department of Justice, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023); Federal Trade Commission, Federal Trade Commission Withdraws Health Care Enforcement Policy Statements (Jul. 14, 2023). The Biden Administration has not released revised guidance on application of the antitrust laws to health care.

[11] It seems clear that some of these alleged violations are considered, by a majority of the current Commission, to be unfair methods of competition, even if they are not violations of the Sherman Act.

[12] 2025 Guidelines at 4-5.

[13] Id.

[14] Id. at 5-6.

[15] Id. at 6-7.

agreements, overly broad nondisclosure agreements,[16] training repayment provisions, and exit fee or liquidated damages provisions;[17] and,

- false earnings claims, because "when workers are lured to ... businesses by false earnings promises, honest businesses are less able to fairly compete for those workers."[18]

The Trump Administration is Unlikely to Adopt the Guidelines in their Entirety

The broader concerns in the 2025 Guidelines reflect, in part, the enforcement actions initiated in the first Trump administration and the outgoing Biden administration, but the incoming Trump administration will likely adopt less aggressive positions than the Guidelines do, in at least five ways.

First, the incoming Trump Administration is likely to recognize that some information-sharing efforts may have procompetitive justifications and procompetitive effects, even where associated with wages and other terms of compensation. Such instances are likely to be limited to historical, aggregated data shared among market participants that, collectively, are not a significant percentage of market participants. This is consistent with historical practice, but because the previous safe-harbor guidance was not, at the time, based on empirical economic analysis, revived guidance on information-sharing efforts may be less helpful than past guidance, and may be more restrictive. But, it is likely some guidance on information sharing, and some form of safe-harbor, will be adopted by the incoming administration.

Second, the incoming Trump administration is less likely to consider *unilaterally adopted* restrictions on an employee's future employment as an antitrust issue. The 2025 Guidelines do not require a showing of market power in a relevant antitrust labor market to condemn allegedly exclusionary, restrictive or predatory employer-employee post-employment agreements; in part the Commission avoided such a showing by alleging such agreements were an unfair method of competition, which,

---

[16] Earlier this week, the Antitrust Division and Occupational Safety and Health Administration reminded the public that non-disclosure agreements that deter individuals from reporting antitrust crimes "undermine the goals of whistleblower protection laws, including the Criminal Antitrust Anti-Retaliation Act of 2019 ("CAARA"). CAARA prohibits employers from discharging or otherwise retaliating against an employee or worker for (i) reporting potential criminal antitrust violations and related crimes to their employer or the federal government or (ii) assisting a federal government investigation or proceeding. See Department of Justice, Justice Department and OSHA Issue Statement on Non-Disclosure Agreements that Deter Reporting of Antitrust Crimes (Jan. 14, 2025).

[17] Id. at 7-10.

[18] Id. at 11. False earnings claims are generally challenged as deception under the FTC Act, not an unfair method of competition. However, the Commission has recently alleged that such claims are an unfair method of competition. See Count IV, Complaint, FTC v. GrubHub, No. 1:24-CV-12923 (N.D. Ill. Dec. 17, 2024). Commissioners Ferguson and Holyoak dissented from this count in the complaint. See Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part, In the Matter of Grubhub, Inc. (Dec. 17, 2024); Press Release, FTC, Illinois Attorney General Take Action Against Grubhub for Harming Diners, Workers and Small Businesses (Dec 17, 2024) (noting dissents of Ferguson and Holyoak as to Count IV.).

it argued, did not require a showing of market power or a showing of actual anticompetitive effects. The incoming FTC leadership is unlikely to adopt this position. In some instances, the FTC may allege certain such restrictions are an unfair act or deceptive practice, but the application of such laws to all employer-employee restrictions is not clear. Historically, the FTC has not often attempted to police such restrictions using its consumer protection authority. However, the *collective adoption* of common restrictions, or agreements not to compete for employees, will continue to be viewed as inconsistent with the antitrust laws and will not generally require a showing of market power or anticompetitive effects.

Third, the incoming Trump Administration is likely to be more cognizant of the intellectual property concerns of employers, and unlikely to find bargained-for restrictions on future employment an overly broad effort to protect the confidentiality of intellectual property rights. In short, the Biden Administration's belief that nondisclosure agreements are a substitute for non-compete agreements is likely to be abandoned by the Trump Administration.

Fourth, the incoming Trump Administration is unlikely to consider false earnings claims as a predicate for a violation of the competition laws.[19] The FTC is likely to continue to allege false earnings claims as deceptive, or violations of the Business Opportunity Rule,[20] or, in the future, as inconsistent with rules that may be adopted with respect to earnings claims.[21]

Finally, the incoming Trump Administration is unlikely to continue efforts to adopt a ban on post-employment non-compete agreements (and their equivalents) as an unfair method of competition.[22] The FTC's ban has been "set aside" by one district court, while another found it unsupported by the rule-making record; both are on appeal.[23] While the Commission may continue the litigation, it seems likely that it will move to rescind or restrict the scope of the non-compete rule through a revised rulemaking if the appellate courts find that the Commission has competition rule-making authority.

Although the Commission may continue to allege that certain non-compete agreements act as a restraint on competition, or an unfair method of competition, Republican FTC Commissioners have been skeptical of the strength of past matters because the Commission has not credibly or at all

[19] See the discussion at note 18.

[20] 16 C.F.R. §437.4.

[21] The FTC has recently proposed changes to the Business Opportunity Rule and proposed a new rule with respect to earnings claims. See FTC Proposes Rule Changes and New Rule to Deter Deceptive Earnings Claims by Multilevel Marketers and Money-Making Opportunity Sellers (Jan. 13, 2025).

[22] See Bilal Sayyed and Peter Bariso, FTC Adopts Broad Ban on the Use of Non-Compete Clauses in Employment Agreements (Apr. 24, 2024).

[23] See Bilal Sayyed, FTC's Rule Banning Non-Compete Agreements is "Set-Aside" Nationwide in District Court Ruling, But Two District Courts Find FTC Likely Has Authority to Issue Rules Prohibiting Unfair Methods of Competition (Quorum Newsletter, Sept. 2024); Bilal Sayyed, FTC Appeals Recent Losses in Non-Compete Rule Litigation (Quorum Newsletter, Oct. 2024).

alleged market power or other facts sufficient to show harm to competition. It is unlikely such cases will be pursued as aggressively in the Trump Administration.[24]

* * *

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Bilal Sayyed +1 202 862 2417 bilal.sayyed@cwt.com

[24] There is substantial state legislative activity concerning employer-employee post-employment restrictions; the leadership of both antitrust agencies are likely to continue to weigh in on the benefits or limitations of state legislation. Both Republican FTC Commissioners have expressed concern about the over-broad use of non-compete agreements (and their equivalents) and have indicated support for properly pled complaints alleging facts showing a harm to competition and for properly tailored legislation. See, e.g., Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, In the Matter of the Non-Compete Clause Rule (Jun. 28, 2024); Oral Statement of Commissioner Holyoak, In the Matter of the Non-Compete Clause Rule (Apr. 24, 2024).