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DOJ and FTC Issue Joint Statement Regarding COVID-19 and Antitrust Violations

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The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") recently issued a joint statement (the "COVID-19 Statement") regarding what constitutes lawful "procompetitive collaborations" between companies to address certain needs for consumers and businesses during the coronavirus pandemic. It also detailed what constitutes unlawful anticompetitive behavior related to essential and frontline workers and other vulnerable employees. The DOJ and FTC used this opportunity to send a clear warning to companies who may seek to take advantage of the current pandemic by entering into agreements to restrain competition and employee mobility or lower wages. Separately, for those companies who are actively working to assist essential workers, businesses and the country as a whole, the COVID-19 Statement provides guidance on engaging in lawful "procompetitive collaboration" to benefit essential workers and the economy amidst the coronavirus pandemic.

This most recent COVID-19 Statement follows the joint DOJ and FTC 2016 Antitrust Guidance for Human Resource Professionals (the "2016 Guidance"), which set the stage for targeted antitrust actions for anticompetitive behavior among competing employers. Specifically, the DOJ and FTC criminalized horizontal agreements between competitors not to hire or solicit each other's employees ("naked no poaching" agreements), which are unlawful restraints on trade in violation of antitrust laws. Similarly, agreements between competitors to fix wages or compensation within a certain range are also illegal under antitrust laws. These types of agreements unreasonably restrain competition, which has been described as the "foundation of a vibrant economy." They also harm employees who may be unlawfully prohibited from seeking "higher wages, better benefits or other terms of employment." The DOJ and FTC issued their 2016 Guidance after employers in the technology, fashion and healthcare industries entered into agreements with competitors to restrain the mobility and/or wages of their employees.

As it relates to "procompetitive collaboration" the 2016 Guidance clarified that "legitimate joint ventures" and agreements "reasonably related to a larger legitimate collaboration between employers" are not considered "per se illegal." However, companies may still be required to

establish that an agreement, engagement or joint venture does not violate antitrust laws. And, entities may engage in a review and advance guidance process with the DOJ ("business review letter") and FTC ("advisory opinion process") regarding proposed joint ventures and collaborations, though the review process generally takes several months.

Now, in the midst of the coronavirus crisis, the DOJ and FTC acknowledge that healthcare facilities and other businesses may need to work together to provide resources and services to assist patients, consumers and communities impacted by COVID-19. The COVID-19 Statement promises an "expedited antitrust procedure" to approve collaborations between businesses working to protect the health and safety of Americans during the COVID-19 pandemic. The DOJ and FTC "will aim to respond expeditiously to all COVID-19 related requests, and to resolve those addressing public health and safety within seven (7) calendar days of receiving all necessary information." The joint statement sets forth the process to request an expedited "DOJ business review letter related to COVID-19," while the FTC has set forth a similar process for parties to request an Advisory Opinion Letter.[1]

Going even further, the DOJ and FTC recognize that "some individuals and businesses may need to act immediately in addressing this ongoing pandemic" and provide the following examples of procompetitive collaborations that "would be consistent with the antitrust laws":

- Collaborations on research and development
- Sharing technical know-how to address COVID-19 related issues (as opposed to company-specific data about prices, wages, outputs or costs)
- Joint purchasing agreements among healthcare providers to increase efficiency of procurement of supplies and reduce transaction costs
- Lobbying activities, so long as they "comprise mere solicitation of governmental action with respect to the passage and enforcement of laws."
- Healthcare providers' development of practice parameters for patient management and clinical decision making

Despite its acknowledgement of the "extraordinary compassion" and "flexibility" on behalf of many companies at this time, the COVID-19 Statement also provides a stern warning to companies, staffing agencies and recruiters who take advantage of the current climate and "use it as an opportunity to subvert competition or prey on vulnerable Americans." The DOJ and FTC "stand ready" to aggressively pursue civil and criminal violations of the antitrust laws, including agreements to restrain competition, undermine employee mobility, lower wages, fix prices or wages, rig bids, or allocate markets.

Companies should take heed and avoid engaging in conduct that even appears to invite allegations of anticompetitive activity. Indeed, we anticipate a rise in antitrust actions and related litigation in the aftermath of the coronavirus crisis. Additionally, we should expect an increase in competition-related litigation generally as many employees are facing uncertainty in the wake of furloughs and layoffs coupled with non-compete agreements and other post-employment restrictions.

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