

Opportunity Economy: Risks in Antitrust Enforcement

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- The Biden administration's recent executive order takes a hard line on limits to employment mobility, such as non-compete agreements.
- No-poach agreements—companies agreeing not to recruit each other's employees—and wage-fixing are a particular target of the federal focus on antitrust.
- Companies should take a number of proactive steps, including reviewing employment contracts, reviewing M&A due diligence guidelines, establishing an antitrust compliance program, and ensuring HR professionals are informed about antitrust risks.

*While the COVID-19 pandemic remains a public health and economic concern, companies are adapting and adjusting, finding new and better ways to do business moving forward. Womble Bond Dickinson is taking a comprehensive look at this new Opportunity Economy from a wide range of viewpoints. For example, Womble Bond Dickinson attorneys **David Hamilton** and **Sarah Motley Stone** examined a renewed federal focus on antitrust enforcement and the challenges this presents to companies operating in the Opportunity Economy. They recently spoke to Womble Bond Dickinson attorney **Mark Henriques** on an episode of the "In-house Roundhouse" podcast, and the article below is based on that conversation.*

While the COVID-19 pandemic remains the biggest X-factor in how businesses plan for the near future, other important factors remain in play and should be considered by business leaders as they position their operations to move forward.

One of these factors is a renewed federal emphasis on antitrust enforcement. The Biden administration has made economic competition and wage suppression points of emphasis. Given that virtually any routine business activity potentially can involve antitrust issues, company leaders and their legal counsel need to be aware of how antitrust law is changing and how they can best avoid running afoul of federal regulators.

Executive Order Sets the Tone

President Biden issued a wide-ranging executive order on July 9 with the intent of limiting the power of large corporations. The order includes 72 initiatives across a dozen federal agencies and nearly every economic sector is impacted.

Hamilton said the executive order puts into action goals Biden set forth during the 2020 campaign. His election also resulted in three significant executive appointments:

1. [Tim Wu to the National Economic Council](#). Wu, an economics professor at Columbia University, has been an outspoken critic of Big Tech. He served as the primary author of the administration's executive order on competition.
2. [Lina Khan as Chair of the Federal Trade Commission](#). Like Wu, Khan is a favorite in progressive circles who favors bold action in curbing the power of large companies.
3. [Jonathan Kanter to lead the DOJ's Antitrust Division](#). Kanter is seen as a hawk on antitrust enforcement, and in private practice, he has represented plaintiffs in high-profile antitrust litigation against large tech companies.

"These three appointments very much reflect that there is a battle for the soul of antitrust law," Hamilton said. "The Biden administration and these appointees in particular view existing antitrust law as inadequate and antiquated."

The executive order does not have the effect of law, but Hamilton called it "a flag in the ground." He expects the Biden administration to seek legislative action to add teeth to the executive order. Potential targets could include no-poach agreements, wage-fixing and price-fixing. Targeted industries include tech, pharma, and health care, and manufacturing.

Employment Mobility in the Enforcement Spotlight

The Biden administration is taking a particularly dim view of agreements that impede employee mobility, such as non-compete agreements. Non-compete agreements, which are made between an employer and employee, are coming under scrutiny. In addition, the Department of Justice continues its enforcement of no-poach or wage-fixing agreements—made between two employers.

"It's one thing for an employer & employee to enter an agreement at the start of employment. It's another thing, in terms of competition, for two employers to agree (to restrict employment or wages)," Stone said. She said such alleged agreements have been litigated in the healthcare sector as well as in the fast-food industry, where some franchise agreements called for franchisees to avoid recruiting employees from a franchisee of the same restaurant.

In a poll on LinkedIn, more than 50 percent of respondents said enforcement of no-poach agreements is their top antitrust concern.

"No-poach agreements are where the DOJ really gets involved – and it has for some time," Stone said. "Generally speaking, non-competes have been a matter of state law for so long. When you start looking at no-poach agreements, they are the ones that go a step beyond that and there has been increased scrutiny on those in recent years, both civil actions and criminal investigations."

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In October 2016, the FTC and DOJ published a document titled "[Antitrust Guidance for Human Resource Professionals](#)." In this document, federal officials drew a bright red line against no-poach agreements, stating such agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct." The FTC and DOJ announced they would criminally prosecute companies and executives that engage in such practices, even unofficial, off-the-record no-poach collaboration. Also, the Biden administration is considering, through the FTC and DOJ, revising these guidelines.

Hamilton said the risks to employers have moved beyond the hypothetical. In December 2020, the DOJ brought its first criminal action related to wage-fixing, targeting a staffing agency accused of coming to an agreement to suppress the wages of independent contractors it employs. He noted that civil actions, particularly class actions, typically follow DOJ criminal indictments.

Stone said such class action suits can be brought by customers of the industry, if they believe anti-competitive practices impact prices paid, or by employees themselves who believe wages were improperly suppressed. One recent example of the former is the [pending Health First lawsuit](#), brought by patients of the system who alleged, in part, that the healthcare system requires physicians to refer patients only to Health First hospitals and specialists to maintain admitting privileges.

Managing Antitrust Risks in the Opportunity Economy

So federal agencies clearly are making antitrust enforcement a priority. How should companies respond to help ensure they are in compliance?

"If it wasn't already, it becomes necessary during a merger or acquisition to step up due diligence regarding employee agreements," Hamilton said. A thorough review of all employee contracts should be a company's first step, with particular attention paid to addressing possible no-poach agreements.

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DAVID HAMILTON

Hamilton also said every organization, regardless of size, should have an antitrust compliance program documented and in use. Such a formal program not only helps identify and eliminate risks, he said, but it demonstrates to regulators that the company is serious about complying with the law.

"All companies are big enough to at least identify this as a risk. For companies involved in a merger, acquisition or other transaction, it creates an exposure," Hamilton said.

Stone said, "Even if you are a mid-sized company and aren't looking at M&A activity, just check in with your HR professionals. They're on the ground with hiring and compensation practices. Understand where they get their information, what their resources are, and that they know what the

antitrust risks are. Even informal conversation (between HR professionals at competing companies) can create antitrust risk.”

In-house counsel also should familiarize themselves with the [DOJ Antitrust Division's Corporate Leniency Program](#). Under the program, “corporations and individuals who report their cartel activity and cooperate in the Division's investigation of the cartel reported can avoid criminal conviction, fines, and prison sentences if they meet the requirements of the program.”

Hamilton said that while US law obviously is the focus for most companies, businesses engaged in cross-border transactions and trade need to be aware of the applicable laws in other jurisdictions.

“The law is more vigorous in places like the EU than it is in the US,” he said. “Companies have to take into account all the regulatory agencies they have to deal with.”

Moving forward, Hamilton and Stone say they expect the Biden administration to increase the pressure on ensuring competition and antitrust compliance. In fact, the administration wants the FTC and DOJ to see if some already completed mergers could be undone under antitrust law. Even if such an extreme scenario doesn't take place, Hamilton and Stone believe there will be an increase in federal investigations and enforcement actions, particularly in targeted sectors such as tech and healthcare. Then, if experience holds, the class actions follow.

“Hold onto your hats—we're going to see a lot of activity in this area,” Stone said.

Womble Bond Dickinson In-house Roundhouse · Antitrust Regulation And The Labor Market

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National Law Review, Volume XI, Number 238

Source URL:<https://natlawreview.com/article/opportunity-economy-risks-antitrust-enforcement>