

DOJ and FTC Virtual Workshop: Agencies Discuss Whole-of-Government Approach and New Solutions to Address Competition Issues in Labor Markets

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On December 6 and 7, 2021, the Department of Justice Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) hosted a virtual workshop to discuss competition issues in labor markets and plans to execute President Biden’s Executive Order to address competition issues in our modern economy. The workshop, along with enforcement actions already underway, reinforces that this is a priority area for the Administration; marketplace participants are well-advised to review their policies and compliance programs accordingly.

In their opening remarks, DOJ Assistant Attorney General Jonathan Kanter and FTC Chair Lina Khan emphasized that the workshop came at a pivotal moment, as recent patterns of conduct and declining levels of competition have caused competitive harm to workers, resulting in the need for conversations as to how antitrust policies and laws can protect workers. In the first public remarks since his Senate confirmation, AAG Kanter noted that antitrust enforcers must develop new applied tools to address competition issues in the modern economy. Chair Khan echoed the need to ensure for the agencies’ tools for evaluating competitive conduct to keep pace with the realities of the modern economy. Both Kanter and Khan noted that these new approaches were necessary for upholding the responsibilities of the agencies as directed by President Biden’s [Executive Order](#), which included in its call to action 72 initiatives that will focus on promoting and protecting healthy competition.

One of the proposed new approaches was the reconsideration of the DOJ and FTC’s Horizontal Merger Guidelines to include methods of evaluating the effects of merger on competition in the labor markets. Throughout the workshop, many panelists noted that the current Merger Guidelines and the merger review process do not adequately address competitive effects to the labor markets. Panelists provided several examples of transactions that were not blocked by the agencies under the traditional antitrust analysis but still presented competitive harm in the labor markets, noting for example hospital mergers that resulted in competitive harm to the market for healthcare professionals’ employment services. This point was also emphasized in the Tuesday afternoon keynote by Tim Wu,

Special Assistant to the President for Technology and Competition Policy, who noted that reconsideration of the merger guidelines was directly in line with the considerations in President Biden's Executive Order.

AAG Kanter and Chairwoman Khan also represented that their agencies would be committing to the Executive Order's interagency, "whole-of-government" approach towards addressing competition issues. The heads of DOJ Antitrust and the FTC promised much higher collaboration between their agencies and other sister agencies over the next few years. This approach was explored in depth during Tuesday's "Building a 'Whole-of-Government' Competition Policy" panel, in which leadership from the Office of Information and Regulatory Affairs ("OIRA"), the Department of Treasury, the Department of Labor ("DOL"), and the Council of Economic Advisors discussed how their respective agencies identify competition issues in the labor markets and proposed methods for interagency collaboration to address those issues:

- **Ben Harris, Assistant Secretary for Economic Policy at the Department of the Treasury**, discussed the trend of wage stagnation for workers at the lower end of the work scale, and highlighted the series of initiatives within the President's Executive Order that aim to make sure wages are more transparent in certain sectors such as curtailing the use of non-compete clauses and studying the impact of limited labor market competition. Mr. Harris noted that the Treasury has been tasked with three specific white papers that are expected to be released in 2022.
- **Heather Boushey, Member at the Council of Economic Advisors**, discussed labor competition from her perspective as an economist, noting that monopsonies and labor market concentration give employers the outsized power to set wages. She also noted that labor market friction and information asymmetry to be significant factors for workers evaluating the cost of switching to a new job or signing a non-compete agreement. Ms. Boushey identified the merger review process to be a critical policy lever in mitigating the labor market consequences of firm concentration, praising the DOJ's recent lawsuit to prevent a monopsony resulting from Penguin Random House's acquisition of Simon & Schuster. Our client alert discussing that action can be found [here](#).
- **Sharon Block, Associate Administrator at OIRA**, discussed the role of her agency in developing guidance to help agencies identify the types of appropriate regulatory interventions and serving as a clearinghouse for proposed regulations. She noted that OIRA can serve as an intermediary for dialogue at many levels to connect staffers between agencies and help agencies develop new tools for stakeholder engagement, as directed by the Executive Order.
- **Raj Nayak, Assistant Secretary for Policy at the Department of Labor**, noted that the DOL has already been a leader in interagency work, pointing to several laws the DOL enforces relating to wage and hour violations, violations of health and safety standards, and violations of anti-discrimination law, and noting that those violations can inform the significance of concentration levels when evaluating mergers market effects. In discussing tools available to the DOL for addressing these issues, Mr. Nayak noted that enforcement of worker protections are the agency's biggest tool, particularly where workers are unable to engage in class actions to challenge anticompetitive behavior; for example, the DOL's Occupational Safety and Health Administration ("OSHA") is charged with enforcing the Criminal Antitrust Anti-Retaliation Act, which offers protection for antitrust whistleblowers who come forward and report antitrust violations from retaliation by their employer, and is working

closely with DOJ to cross-train staff to understand each other's respective authorities.

Throughout the workshop, panelists also discussed several other competition issues and methods for agencies to address those issues going forward:

- Labor monopsonies: Panelists referenced monopsonies and the many ways they may appear in the labor market, as well as the current and future harms associated. Panelists pointed to universities as an example of an employer exercising monopsonistic power even in the absence of a high degree of market concentration, noting that market concentration can be a red herring at times because it can obscure harms that may appear in places where there is an accumulation of market power but not concentration. The same panel also featured a discussion of Senator Klobuchar's "Competition and Antitrust Law Enforcement Act", which proposes to explicitly add monopsony to the antitrust laws and limits the need to focus on arguing the market definition, unless the argument is relying on market share.
- Contractual restraints on worker mobility: Panelists discussed a number of clauses that may cause harm to workers including non-compete, nondisclosure, non-solicitation and training repayment agreements. The discussion included current evidence on non-compete agreements and their impact on the labor force with regards to worker mobility, wages, and entrepreneurship. There was also discussion as to the procompetitive aspects of non-compete and non-disclosure agreements, which focused on the benefit of protecting the knowledge, proprietary information, inventions and innovation of employers. With regard to proposed solutions, panelists discussed the merits of adopting state-by-state or federal standards to regulate a wide scope of restrictive agreements. The Executive Order specially encouraged the FTC to exercise its statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of such provisions. There has been no rulemaking on this topic yet, with Republican Commissioners Christine S. Wilson and Noah Phillips questioning whether the FTC's rulemaking authority extends to competition issues, and would likely oppose the idea of using rulemaking instead of the traditional case-by-case approach to enforcing the law. However, with a third Democratic Commissioner expected to be confirmed in early 2022, a proposed rule could come from the agency in the near future, and it is reasonable that the FTC will use the public comments from the workshop to develop its factual record supporting the issuance of a proposed rule to limit or prohibit the use of such contractual restraints.
- Collective bargaining for gig economy workers: Panelists discussed the anticompetitive effects that result from the misclassification of workers, including the denial of the right for collective bargaining. Jennifer Abruzzo, General Counsel at the National Labor Relations Board, discussed the difficulties that independent contractors have when it comes to unionizing. Abruzzo noted that the NLRB does not have jurisdiction over independent contractors and that those who engage in collective action to improve their circumstances are at risk of being prosecuted under antitrust laws. In response, many panelists echoed their support for Chair Khan's proposal for Congress to extend the antitrust labor exemption to cover certain gig economy employees, noting that properly classified independent contractors should get the benefit of the labor exemption.

The discussions throughout the two-day workshop emphasized that competitive issues in labor markets will be a key focus of this administration. The DOJ, FTC, and other agencies outlined their

intent to execute the interagency, “whole-of-government” approach as envisioned by President Biden’s Executive Order to identify and develop new approaches for addressing competitive issues in labor markets. Going forward, we can expect to see action in response to the Executive Order including: a reconsideration of the agencies’ Merger Guidelines to require greater scrutiny for the effects of mergers on labor markets; increased cooperation and involvement by agencies that have previously not been as active in antitrust enforcement; FTC rulemaking on the use of contractual restraints such as non-compete agreements; and legislative change to the antitrust laws to address monopsonies and collective bargaining for gig economy workers.

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