

COVID-19 NEWS OF INTEREST

DOJ and FTC Announce Enforcement Against Pandemic Collusion in U.S. Labor Markets

April 15, 2020

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On April 13, 2020, the Department of Justice's Antitrust Division ("DOJ") and the Federal Trade Commission's Bureau of Competition ("FTC," and with the DOJ, the "Agencies") released a joint statement (the "Joint Statement") announcing that they are closely monitoring employer collusion that harms workers on the frontlines of the coronavirus ("COVID-19") pandemic.¹

Protected workers include doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential-service providers.² The Agencies will enforce the antitrust laws against those who seek to exploit the pandemic to harm such workers and otherwise engage in anticompetitive activity.³

The Joint Statement comes at a time when hospitals are cutting pay and furloughing workers to ease the financial hardship from declining revenue, in part from the ban on elective surgeries and procedures.⁴ The Agencies confirmed

¹ *Joint Antitrust Statement Regarding COVID-19 And Competition In Labor Markets*, DOJ and FTC (Apr. 13, 2020), [here](#) [hereinafter *Joint Press Release*].

² *Joint Press Release* at 1.

³ *Joint Press Release* at 1; *Justice Department and Federal Trade Commission Jointly Issue Statement on COVID-19 and Competition in U.S. Labor Markets*, DOJ (Apr. 13, 2020), [here](#) [hereinafter *DOJ Press Release*].

⁴ Shane Harris, Justin Sondel, and Gregory S. Schneider, *Cash-starved hospitals and doctor groups cut staff amid pandemic*, WASHINGTON POST (Apr. 9, 2020), [here](#).

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that they are on alert for employers, staffing companies, and recruiters that might engage in collusion or other anticompetitive conduct that harms workers.⁵

Such conduct includes agreements to suppress or eliminate competition with respect to compensation, benefits, hours worked, and other terms of employment. It also includes collusion in the hiring, soliciting, recruiting, or retention of workers and the unlawful exchange of competitively sensitive employee information, including salary, wages, benefits, and compensation data.⁶

Those who enter into unlawful, naked wage-fixing and no-poach agreements may be criminally prosecuted by the DOJ, and those inviting collusion may be subject to civil enforcement by the FTC, even if no collusive agreement is reached.⁷ Those involved in the hiring, recruiting, retention, or placement of such workers should be aware that anticompetitive conduct runs the risk of civil and/or criminal liability, as the Agencies have made clear in previously issued guidance.⁸

The Agencies acknowledged that the COVID-19 pandemic may necessitate unparalleled cooperation among federal, state, local and tribal governments, private businesses, and individuals to protect the health and safety of Americans.⁹ We have previously reported that the DOJ and FTC are offering expedited review of pandemic-related collaborations to facilitate innovation and productivity.¹⁰

We have also observed, however, that the Agencies have been silent on collaborations *to mitigate the severe economic damage resulting from the pandemic shutdown*.¹¹ Such collaborations may facilitate, through non-collusive means, cost savings that are crucial to the survival of businesses during the pandemic shutdown and its aftermath. Given the absence of guidance by the Agencies on condition-mitigating collaborations, and their continued warnings against unlawful agreements, structuring such cost-saving arrangements properly is especially important.

⁵ Joint Press Release at 1; DOJ Press Release at 1.

⁶ Joint Press Release at 1; DOJ Press Release at 1.

⁷ Joint Press Release at 1; Federal Trade Commission and Justice Department Issue Joint Statement Announcing They are on Alert for Collusion in U.S. Labor Markets, FTC (Apr. 13, 2020), [here](#). [hereinafter *FTC Press Release*].

⁸ DOJ Press Release at 1; see also Wesley R. Powell and Timothy G. Fleming, “FTC and DOJ Issue Joint Guidance to Human Resource Professionals,” WILLKIE.COM (Nov. 17, 2016), [here](#).

⁹ Joint Press Release at 1; FTC Press Release at 1.

¹⁰ William H. Rooney and Michelle A. Polizzano, “Competition Authorities Expedite Consideration of Competitor Collaborations Due to the COVID-19 Pandemic,” WILLKIE.COM (Mar. 25, 2020), [here](#); see also William H. Rooney, Wesley R. Powell and Timothy G. Fleming, “Antitrust and Condition-Mitigating COVID-19 Collaborations,” WILLKIE.COM (Apr. 6, 2020), [here](#).

¹¹ William H. Rooney, Wesley R. Powell and Timothy G. Fleming, “Antitrust and Condition-Mitigating COVID-19 Collaborations,” WILLKIE.COM (Apr. 6, 2020), [here](#).

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The Antitrust Practice Group is pleased to assist with your competition questions, both specific to the pandemic and in the ordinary course of business. Please contact the authors or other members of the Antitrust Practice Group, listed below:

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