April 22, 2020

Federal Antitrust Authorities Issue Warning Against Employer Collusion to Disadvantage Essential Service Workers

On April 13, 2020, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, the agencies) issued their Joint Antitrust Statement Regarding COVID-19 and Competition In Labor Markets (Joint Statement), which included a warning to employers that the agencies will not tolerate anticompetitive behavior that suppresses wages for or otherwise harms "essential service providers on the front lines of addressing the [COVID-19 health care] crisis." These essential service providers include, but are not limited to, doctors, nurses and first responders, as well as employees at grocery stores, pharmacies and warehouses.

The information provided in the Joint Statement is consistent with the agencies' October 2016 statement Antitrust Guidance for HR Professionals, which advised companies about the potential antitrust implications of agreements between firms that compete in the market for employee services. In particular, those guidelines stressed that agreements between competing firms not to poach one another's employees or to fix or stabilize wages or benefits for those employees constitute per se violations of the antitrust laws. The agencies reserved the right to prosecute such conduct as criminal antitrust violations (with all the attendant consequences, including criminal fines for companies and potential imprisonment for individual bad actors). Moreover, the agencies strongly discouraged competitors from sharing competitively sensitive information regarding employment terms and conditions, because such exchanges can facilitate implicit illegal agreements between competitors. (Employers may be able to share some dated information in the context of a trade association or industry group in order to gain insight into broad industry trends, but only if appropriate precautions are taken to ensure that the information is sufficiently aggregated and that enough participants are involved so recipients of the data cannot identify competitively sensitive information about particular competitors. Often this requires the engagement of a third party to gather, aggregate and disseminate the relevant information.)

Notably, in the past the DOJ has brought complaints against competing employers in the health care industry for

conspiring to suppress wages for their employees. For example, in 1994, the DOJ brought a civil enforcement action against eight Utah hospitals, a professional association and a trade association comprised of the defendant hospitals for exchanging nonpublic prospective and current wage information about their registered nurse employees during conference calls and trade association meetings. According to the DOJ, these information exchanges facilitated unlawful agreements between the competing hospital defendants, and helped the hospitals keep the salaries of registered nurses artificially low. The defendants ultimately agreed to a consent judgment that ordered them to refrain from similar information exchanges and agreements and to maintain robust antitrust compliance programs.

In another civil action filed in 2007, the DOJ sued a trade association that operated a registry that contracted staffing agencies to provide temporary nurses for member hospitals. The trade association and member hospitals agreed to use the registry to implement a uniform rate schedule that agencies could charge hospitals for temporary nurses. While the DOJ did not allege a per se violation of the antitrust laws, its complaint focused on the trade association's market power in the market for "purchasing" nurses' services and the effect it had on compensation for nurses under a rule of reason analysis (where a decision-maker weighs procompetitive benefits against anticompetitive harms). The defendants eventually agreed to a consent judgment that prohibited the use of the registry for setting uniform rates of compensation and other competitively sensitive contract terms. In addition, the affected nurses brought a separate class-action lawsuit against the defendants in which they alleged the trade association and member hospitals suppressed their wages and caused them severe economic harm. The settlements from that private lawsuit eventually totaled around $24 million.

As noted in the Joint Statement, in light of the current coronavirus pandemic, the agencies are particularly monitoring employers, staffing companies and recruiters that may engage in anticompetitive behavior that hurts essential employees during the pandemic. While the DOJ previously has threatened to wield its authority to criminally prosecute employers who enter into price-fixing and no-poach agreements, it has not yet done so. However, to the extent the DOJ ever wanted to bring such charges, now might be a prime opportunity to do so. It is difficult to imagine a more sympathetic group of victims than those who put themselves in harm's way during a global health emergency only to have their employers enter into unlawful agreements to suppress their compensation and benefits.

The antitrust laws are nuanced and complex and their application to particular circumstances is a fact-sensitive inquiry. If you have questions about how information exchanges or agreements between employers could implicate the antitrust laws, you should consult with counsel.

As the number of cases around the world grows, Faegre Drinker's Coronavirus Resource Center is available to help you understand and assess the legal, regulatory and commercial implications of COVID-19.

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