

THE GIG IS UP: UNDERSTANDING THE IMPLICATIONS OF THE DOJ AND THE FTC'S GUIDANCE ON THE LABOR MARKET

On January 16, 2025, the DOJ and the FTC released the Antitrust Guidelines for Business Activities Affecting Workers (**Antitrust Worker Guidelines**),¹ replacing the 2016 Antitrust Guidelines for Human Resource Professionals.² Although the Antitrust Worker Guidelines do not alter existing law or legal precedent, they are a last effort by the Biden administration to use antitrust to protect labor markets and to codify in a single document the various ways different agreements affecting workers "may" raise antitrust risks. The Antitrust Worker Guidelines align with the FTC's Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability (**Enforcement Policy Statement**) published two days earlier, which clarifies that independent contractors, including gig workers, are exempt from antitrust liability when engaging in union activities related to compensation and working conditions.³ In the Enforcement Policy Statement, the FTC pledged not to bring enforcement actions against independent contractors who collaborate to seek improved labor conditions. Unlike the 2016 Antitrust Guidelines, which received bipartisan approval, the Antitrust Worker Guidelines were passed along party lines at the FTC with a vote of 3-2, raising concerns about their future as dissenting Commissioner Andrew Ferguson, was nominated to become FTC Chair and Republicans are set to take the majority at the FTC.

¹ U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Business Activities Affecting Workers* (Jan. 16, 2025), available at https://www.ftc.gov/system/files/ftc_gov/pdf/p251201antitrustguidelinesbusinessactivitiesaffectingworkers2025.pdf.

² U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), available at <https://www.justice.gov/atr/file/903511/dl?inline>.

³ Fed. Trade Comm'n, *Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability* (Jan. 14, 2025), available at https://www.ftc.gov/system/files/ftc_gov/pdf/p251201laborexemptionpolicystatement.pdf.

KEY TAKEAWAYS

First, regarding the Antitrust Worker Guidelines, the dissent from Commissioner Ferguson suggests that the FTC may be inclined to withdraw support with a Republican majority. Gail Slater, whom President Trump nominated to lead the DOJ Antitrust Division, has yet to weigh in on the decision to publish the Antitrust Worker Guidelines so close to an administration change or on the actual guidelines themselves. This could lead to a scenario where, at least until there is a majority of Republican FTC Commissioners, there is guidance that is supported by one antitrust agency and not the other, which is not unprecedented. In September 2021, the FTC withdrew its support of the Vertical Merger Guidelines, while the DOJ issued a statement on the same day stating that the guidelines would "remain in place," leading to differing stances by the agencies. As a result, this divergence created ambiguity for parties and courts on how to analyze vertical mergers; one court even acknowledged that there was "uncertainty in the state of the law" during that time, but proceeded to apply traditional antitrust analysis regarding vertical mergers to determine whether that merger would harm competition.

Second, as the agencies are expanding the scope of what may be unlawful when it comes to labor, it is unknown if courts will accept some of these novel theories. For example, it is reasonable to expect that courts may be skeptical about whether it is unlawful for parties to use a third-party benchmarking service. The RealPage case will hopefully provide important guideposts as to the bounds of the use of algorithms in making business decisions from an antitrust perspective. Nonetheless, businesses should be careful when sharing human resource information that may be competitively sensitive with third parties that will aggregate or share that information with others, regardless of whether those third parties are using algorithms or artificial intelligence (AI). It is always safest to provide data that is sufficiently historical. Care should also be taken when relying on third parties to make pricing, employee salary, and other competitive business decisions, especially when the third party is relied upon by competitors and the data or outputs are real-time or future-looking rather than historical.

Third, employers should continue to evaluate the use of non-competes on a case-by-case basis and ensure that they are reasonably tailored in scope and duration and necessary for the level of employee. Employers should also ensure that their employment terms comport with state laws, as there is currently a patchwork of U.S. state laws prohibiting various forms of employee non-competes.

Finally, these actions wrap up a busy month for the FTC with Lisa Khan leaving her position as FTC Chair. As noted in a separate dissent by Commissioner Melissa Holyoak on January 16,⁴ since January 1, the FTC "has voted on more than thirty matters, including seven proposed settlements, five federal court or administrative complaints, three notices or advance notices of proposed rulemaking, one final rule, eight final administrative consent orders, three reports for ongoing 6(b) studies, two enforcement policy or guidance statements, one potential 6(b) study, and several administrative matters." Through this dissent, she warned that these actions "will have long-lasting consequences for the incoming

⁴ Fed. Trade Comm'n, *Dissenting Statement of Commissioner Melissa Holyoak Regarding Closed Commission Meeting Held on January 16, 2025* (Jan. 16, 2025), available at https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-statement-re-january-16-closed-commission-meeting.pdf.

administration, diverting already scarce Commission resources to defend misguided policy objectives and novel legal theories . . . [and] [m]ore important, to the extent underlying investigations were rushed or are incomplete, they may place the agency in precarious positions in litigation and risk futility of the scarce resources that have, and will be, devoted to these matters." Despite Commissioner Holyoak's critique, the full impact of Lina Khan's final month as Chair remains to be seen.

ANTITRUST GUIDELINES FOR BUSINESS ACTIVITIES AFFECTING WORKERS

Applying the antitrust laws to labor markets has been a consistent practice for years, regardless of the administration. But the FTC, under outgoing Chair Lina Khan, leaned into labor issues as evidenced by the amount of emphasis labor was given in the Albertsons-Kroger challenge, its attempt to ban employer-employee non-competes, and bringing standalone no-hire and non-compete cases. Therefore, even if the Antitrust Worker Guidelines themselves may not have a future, there are some important insights to be found within their pages.

Sharing competitively sensitive information with third parties to help advise on business decisions regarding employee wages and benefits, including the use of AI, may face antitrust risk, even when the recommendation is ultimately ignored.

The Antitrust Worker Guidelines underscore the agencies' growing concern about the use of algorithms in business decision-making, particularly concerning the labor market. Providing competitively sensitive information through an algorithm, or via a third party's tool or product, may be unlawful, according to the Antitrust Worker Guidelines. The use of third-party software or algorithms to generate recommendations for wages, benefits, or other employment terms, either at a specific level or within a range, may also pose antitrust risks in the eyes of the agencies. Even if companies retain the ability to disregard the recommendation, the initial agreement to use shared information, calculations, or algorithms could be deemed unlawful. Although the Antitrust Worker Guidelines read as if they were taken directly out of the DOJ's complaint against RealPage, in which RealPage offered algorithmic pricing and other rental term recommendations to its clients, the agencies make clear similar concerns can arise in the context of employee information.

Non-compete clauses remain under scrutiny on a case-by-case basis.

The agencies remain focused on non-compete clauses that restrict workers from changing jobs or competing with their former employers, albeit with more measured language. The Antitrust Worker Guidelines recognize that the FTC's rule banning most non-compete clauses in employee contracts was blocked by a court in the Northern District of Texas in August 2024, partly due to insufficient evidence supporting such a sweeping prohibition. Undeterred, the Antitrust Worker Guidelines indicate that the agencies will continue to scrutinize these provisions on a case-by-case basis and that the agencies will generally approach the use of non-competes with skepticism for specific categories of workers.

Agreements between businesses to fix independent contractors' compensation may violate antitrust law.

The agencies interpret the antitrust laws, specific to labor, to reach independent contractors. Most notably, the agencies believe that an agreement between two or more competing platforms to set the compensation of independent contractors offering their services through their platforms may represent a *per se* violation of antitrust laws, leading to potential criminal liability.

ENFORCEMENT POLICY STATEMENT ON EXEMPTION OF PROTECTED LABOR ACTIVITY BY WORKERS FROM ANTITRUST LIABILITY

Two days earlier, on January 14, the FTC published the Enforcement Policy Statement. It clarifies that all workers who engage in collective action to seek better compensation and job conditions will not be subject to antitrust liability, including independent contractors. Under the FTC's reasoning, interpreting antitrust law to categorically exclude independent contractors would incentivize businesses to misclassify workers as independent contractors as opposed to employees. This mischaracterization would result in independent contractors being unable to coordinate on improved conditions and pay, a protection that is afforded to employees. The FTC's definition makes no distinction between different types of workers under antitrust law, detouring from how courts have traditionally classified workers under other areas of law. This Enforcement Policy Statement suggests that a potential government enforcement action may have been coming absent an administration change but may still lead to challenges brought by private plaintiffs.

DISSENTING STATEMENTS OF THE REPUBLICAN COMMISSIONERS

In the announcement of both the Antitrust Worker Guidelines and the Enforcement Policy Statement, Republican Commissioners Ferguson and Holyoak dissented. In the dissent of the Antitrust Worker Guidelines, Commissioner Ferguson penned, "The antitrust laws protect employees from unlawful restraints of the labor markets, and guidance reflecting the Commission's enforcement position on these issues promotes important transparency and predictability to market participants. But the lame-duck Biden-Harris FTC should not replace existing guidance mere days before they hand over the baton. That is not 'running through the tape.' Rather, the Biden-Harris FTC announcing its views on how to comply with the antitrust laws in the future is a senseless waste of Commission resources."⁵ Similarly, in the announcement of the Enforcement Policy Statement, which was also passed along party lines 3-2 with the Republican Commissioners voting against it, Commissioner Ferguson noted in his dissent, "[T]his is not the time for the Biden-Harris Commission to announce policy changes, let alone declare how the agency will exercise prosecutorial discretion going forward. Indeed, it is senseless for the Biden-Harris Commission to announce, on its way out the door,

⁵ Fed. Trade Comm'n, *Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Antitrust Guidelines for Business Activities Affecting Workers* (Jan. 16, 2025), available at https://www.ftc.gov/system/files/ftc_gov/pdf/at-guidelines-for-business-activities-affecting-workers-ferguson-holyoak-dissent.pdf.

its plans for the future. It has no future."⁶ These statements may suggest that Commissioner Ferguson will seek to repeal both documents as FTC Chair. Such withdrawals may result in a lack of clear guidance on labor at the FTC.

⁶ Fed. Trade Comm'n, *Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability* (Jan. 14, 2025), available at https://www.ftc.gov/system/files/ftc_gov/pdf/labor-exemption-policy-statement-ferguson-dissent.pdf.

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