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Antitrust Enforcement in Labor Markets: Merger Analysis at a Time of Agency Transition

For at least the last three presidential administrations, antitrust agencies have analyzed potential adverse effects of mergers and conduct on workers as well as consumers. That scrutiny—and the policy discussion about labor antitrust more generally—increased significantly during the Biden administration, [as officials promised early in their term that labor would be at the forefront of their agenda](#), and they followed through with both policy and enforcement actions. The Department of Justice (“DOJ”) aggressively prosecuted businesses under antitrust laws to challenge no-poach and wage-fixing agreements and the Federal Trade Commission (“FTC”) adopted a non-compete rule. The Antitrust Agencies jointly issued revised Merger Guidelines that called out potential labor harms, and the FTC followed with a [first-of-its-kind claim](#) that a merger would lessen competition in the market for “unionized labor.” Finally, in the midst of that challenge, the Antitrust Agencies entered into [a quadrilateral Memorandum of Understanding with Labor Agencies](#) to “enhance antitrust review of labor issues in merger investigations.”

After new Republican FTC Commissioners were confirmed in 2024, many believed that, for the FTC at least, the emphasis on labor could subside—after all, immediately after they joined the Commission, the two Commissioners dissented from the vote finalizing the FTC’s Non-Compete Rule. Then, while the rest of the Biden Administration continued its “whole of government” effort to highlight attentiveness to worker concerns, the FTC quietly withdrew from the quadrilateral agreement in late September 2024 and simultaneously, a broader effort to forge a bi-partisan consensus on an FTC rulemaking on merger filing requirements garnered bipartisan support only after the final proposed rules dropped an earlier proposal to require labor market data submissions as part of the merger filings.

While this internal horse-trading could provide some insight into how the Trump antitrust leadership may approach the question of where labor fits into antitrust analysis, that does not mean that labor issues will cease to be of interest in the next administration. Indeed, there are already signs the Trump administration, with its strong populist tailwinds, will appear attentive to labor issues. In one of its first moves, Trump selected Lori Chavez-DeRemer as labor secretary—a move supported by Teamsters president Sean O'Brien—showing at least some support for organized labor, yet another example of how Trump cannot be classified as a traditional conservative. In antitrust, we saw in the prior Trump administration that [antitrust leaders expressed interest](#) in evaluating competition in labor markets, a deviation from the mainstream conservative focus on consumer harm and efficiency. Although the Republican FTC Commissioners drew the line on labor reporting requirements in the HSR Final Rulemaking, their rationale may be as much about their views on regulatory burdens in general as opposed to antipathy for investigating labor impact during merger review. Thus, while it seems unlikely that attention to labor considerations will reach the crescendo it has under FTC Chair Lina Khan and AAG Jonathan Kanter, labor markets will likely continue to play a role in merger analysis, something merging parties should anticipate and be prepared to address in the review process.

The Biden Administration's Legacy on Antitrust Enforcement in Labor Markets

Building on prior administrations' efforts to apply antitrust to labor markets, the Biden Administration was vocal and active in finding novel enforcement, rulemaking, and policy vehicles to apply the antitrust laws to labor markets.

- The Biden Administration continued a practice started in late 2020 by the Trump DOJ of bringing criminal complaints against company executives alleging criminal antitrust violations in certain no-poach agreements and wage-fixing agreements, although thus far there have been no convictions—and several acquittals—on such claims.
- On January 5, 2023, the FTC [promulgated](#) a Notice of Proposed Rulemaking (NPRM) banning the use of virtually all employee non-compete agreements. On April 24, 2024, a divided FTC voted 3-2 on party lines to [issue](#) the Final Rule on Non-Competes adopting substantially the same proposal. Less than three months after issuing the Final Rule on Non-Competes, a federal court [paused](#) the implementation of the rule.
- Agencies within the Biden Administration entered into Memoranda of Understanding (MOUs) to formalize their commitment to coordinating on labor antitrust issues. Separately, the Biden Administration announced MOUs between [DOJ and DOL](#) on March 10, 2022, [FTC and NLRB](#) in July 19, 2022, [DOJ and NLRB](#) on July 26, 2022, and [DOL and FTC](#) in August 30, 2023. The purpose and scope of these agreements is to [“strengthen the Agencies’ partnership through greater coordination in information sharing, coordinated investigations and enforcement activity, training, education, and outreach.”](#)

As it pertains to mergers, the Biden Administration's [December 2023 revision of the Merger Guidelines](#) devoted an entire guideline to “mergers between competing buyers” of labor (e.g. employers) that included its framework to address the potential of mergers to affect workers and labor markets.

The Labor Antitrust Merger Memorandum of Understanding

On August 28, 2024, the DOJ Antitrust Division and the FTC (the “Antitrust Agencies”) entered into [a Memorandum of Understanding](#) with the National Labor Relations Board (“NLRB”) and Department of Labor (“DOL”) (together the “Labor Agencies”) formalizing a commitment by the Labor Agencies to support the Antitrust Agencies’ review of mergers (the “Labor Antitrust Merger MOU”).

The Labor Antitrust Merger MOU established a Labor Information Sharing Protocol that committed the Labor Agencies to “promptly meet with the respective Antitrust Agencies upon request” to “provide technical assistance,” and “additional information and data, as appropriate.” The Labor Information Sharing Protocol committed the Labor Agencies to provide information similar to that called for in the Hart-Scott-Rodino (HSR) Rules proposed in December 2023, suggesting that the Antitrust Agencies would have used the shared information to ascertain the labor impacts of a transaction. Specifically, the Labor Antitrust Merger MOU contemplates:

- Outreach to worker stakeholders and organizations during the early investigation phase;
- Requiring merging parties to produce documents and data related to labor markets;
- Analyzing data published by DOL including “worker and employer statistical data” and “information on labor standards enforcement” to inform merger investigations; and
- Analyzing enforcement actions and cases involving the merging parties or others in contemplated labor markets

The Appendix to the Labor Antitrust Merger MOU identified the DOL data that the Antitrust Agencies would use in their investigations, including the relevant occupations, wages, employment figures, employers, worker skills, knowledge and ability, job openings, industries, and job losses and gains data. The Labor Antitrust Merger MOU Appendix specifically described how certain publicly available DOL data may be used to examine labor markets:

- To examine employment, the Antitrust Agencies may turn to the [QCEW](#) (monthly data for industries by county), [SAE](#) (numbers of employees in industry by state/MSA), and [OEWS](#) (annual estimates of hourly wages by industry, by six-digit SOC code at MSA level) data;
- To examine wages and earnings the Antitrust Agencies may turn to [OEWS](#) (annual estimates of hourly wages by industry, by six-digit SOC code at MSA level) or [SAE](#) (earnings in industry by state/MSA) data;
- To examine worker knowledge, skills and qualifications, the Antitrust Agencies may turn to [O*NET](#) (education, experience, and training needed for jobs by job zone and SOC code) data;
- To examine the number of employers, the Antitrust Agencies may turn to [QCEW](#) (monthly data for industries by county) data;
- To examine firings, quits, and other worker separations, the Antitrust Agencies may turn to [JOLTS](#) (monthly national data of hiring, firing, quits, and other worker separations by NAICS code and state data at the total nonfarm employment level) data; and
- To examine hours worked, the Antitrust Agencies may turn to [SAE](#) (numbers of employees in industry by state/MSA and NAICS code) data.

Second, the Labor Antitrust Merger MOU memorialized the Labor Agencies’ agreement to provide training to the Antitrust Agencies. The DOL will provide training to staff broadly on issues “under their jurisdiction.” The NLRB will provide training “on the duty to bargain in good faith, successor bargaining obligations, and unfair labor practices, among other topics.”

Third, the Labor Antitrust Merger MOU memorializes the Antitrust Agencies' and the Labor Agencies' commitment to meet bi-annually to discuss the implementation and coordination of the MOU.

Withdrawal of FTC Support

On September 27, 2024, the FTC notified the other agencies that it was withdrawing from the Labor Antitrust Merger MOU. When it did, [the FTC only stated](#) that it would “continue to closely scrutinize all issues related to mergers, including potential impacts on labor, in accordance with its merger guidelines.” But it did not offer any explanation of why it was withdrawing, which was made all the more curious by the fact that DOJ and the Labor Agencies did not withdraw, and that the other MOUs signed between the Labor and Antitrust agencies remained in effect.

Elimination of Proposed Labor Market Filing Requirements in Final HSR Rulemaking

Shortly after the FTC withdrew from the Labor Antitrust Merger MOU, the FTC, with concurrence from the DOJ, issued [proposed Final Rulemaking on HSR Filings](#). While the new rules revise the HSR premerger notification requirements to impose more time, cost, and burden to parties with reportable transactions, they are more modest and a significant departure from the originally proposed rules in June 2023, particularly as they pertain to labor information. As originally contemplated, the proposed HSR rules would have required merging parties to submit (1) employee occupation classifications, (2) “geographic market information” for “overlapping” employees based on ERS commuting zones, and (3) “worker and workplace safety information” based upon previous workplace or worker penalties or findings issued against the filing parties in the last five years.

The June 2023 proposed rules received over 700 public comments, many of which expressed concerns about the burden the proposed rules would place on filing parties and disutility of the additional information to staff's review. When the final rules were issued, several areas were pared back, perhaps the most burdensome of which were the requirement that parties submit detailed employee information, by DOL classification and geographic location, as well as worker safety information. [The Democratic majority lamented](#) that the excluded labor provisions “would have aided the agencies' assessment of whether the proposed deal would risk threatening competition in labor markets,” but that other information “will enable the agencies to identify whether a proposed deal risks undermining competition for workers.”

It appears that the elimination of the labor provisions in the Final HSR Rulemaking and the withdrawal from the Labor Antitrust MOU were part of a deal required to secure the votes of the Republican Commissioners. In [her concurring statement](#), Commissioner Holyoak explained that she viewed the labor information requirements as particularly problematic, challenging “worker and workplace safety information” as providing “no measurable benefit” to the FTC in determining whether a proposed merger would violate the antitrust laws. She also criticized SOC codes as overbroad and “not tethered to” traditional antitrust market definition analysis, and noted that ERS commuting zones were based on “24-year-old data” that “fail[s] to reflect current market realities.” As for the Labor Antitrust MOU, Commissioner Holyoak was “equally pleased that the Chair rescinded [it].” [Commissioner Ferguson](#) called the elimination of these labor information requirements “the most important climbdown” from the proposed rules,” since they would have imposed a “major burden,” had “methodological problems,” and in his view represented a “clear abuse of Congress's mandate that the Commission require only information ‘necessary and appropriate’ to identify transactions that ‘violate the antitrust laws.’”

But the Republican Commissioners notably did not dispute that competition for workers could be impacted by mergers. Commissioner Holyoak called it “theoretically possible,” and Commissioner Ferguson “[did] not disagree that the antitrust laws apply to labor markets.” Where they differed from the majority was in their view of the magnitude of the issue compared to the costs of submitting the called-for labor information. Commissioner Ferguson said that labor impact had been part of merger investigations “for years,” and Commissioner Holyoak also pointed out that despite this, the Commission had never challenged a merger on labor theory except as a “tagalong” claim. Commissioner Ferguson did take issue with Commissioner Bedoya’s claim that “research suggests that mergers, specifically, help companies keep wages low,” dismissing it as based only on “a couple papers and a book.” That, in his view, was “nowhere near enough . . . to justify massive regulatory burdens” like the proposal that extensive labor market information be provided as part of every company’s HSR filing.

What to take away?

While some might interpret recent FTC actions as a sign that labor effects will no longer be scrutinized by antitrust authorities in the next Trump administration, that decrease seems unlikely as the first no-poach cases were brought during the first Trump administration, and Trump officials have touted their interest in protecting workers from anticompetitive behavior. Further, unless and until the 2023 Merger Guidelines are rescinded, they will continue to provide policy support for labor theories in merger cases. And at least for the time being, the DOJ is still a party to the Labor Antitrust Merger MOU with the Labor Agencies.

It is also likely incorrect to conclude that opposition by the Republican Commissioners to labor aspects of the proposed HSR rulemaking signals they do not believe the issue is worth investigating in appropriate cases. Their concerns were clearly with the burden that the labor information requirement would have placed on all merging parties, not with the concept that workers could be harmed by a merger. With its populist, working class messaging, it seems likely that the effort to find mergers that affect labor markets will persist during the next Trump administration. Merging parties should therefore prepare for the possibility that they could receive requests for labor-related information. Comprehensive antitrust counseling should thus account for the risk of delay due to the potential impact of mergers on workers, and anticipate potential requests for information regarding, and analysis of, those issues, including analysis based on relevant DOL data and applicable NLRB decisions.

“Congress passed the antitrust laws to ensure that all Americans benefit from free and fair competition. When businesses vigorously compete for workers, workers enjoy better wages and working conditions as well as greater opportunity and freedom. By deepening partnerships with the National Labor Relations Board, the Department of Labor, and the Justice Department’s Antitrust Division, the FTC will keep building on our whole-of-government efforts to ensure that all Americans can get a fair shot in our economy, free from unlawful coercion.”—Chair Khan, August 28, 2024.

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