

GIBSON DUNN



Antitrust & Competition Update

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Departing Biden FTC and DOJ Announce Expansive and Unprecedented Guidelines for Conduct in Labor Markets

Guidance for Employers Navigating the New Guidelines.

Overview

On January 16, 2025, the U.S. Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) jointly issued [Antitrust Guidelines for Business Activities Affecting Workers](#) (2025 Guidelines or Guidelines) that reflect a marked departure from prior practice and applicable precedent alike.^[1] The 2025 Guidelines, which replace the [2016 Antitrust Guidance for Human Resource Professionals](#) (2016 Guidelines),^[2] are a targeted effort to reframe the law on the intersection between antitrust laws and workers.^[3]

The 2025 Guidelines are significantly more expansive than the 2016 Guidelines. Like the DOJ and FTC enforcement activity and statement of interest filings in recent years, they reflect a proscriptive, rather than descriptive, approach to antitrust law and labor markets. They repeal long-established safe harbors for conducting aggregated, anonymized market surveys about wages and benefits, adopt a restrictive view of non-competes like the one put forth by the FTC in its currently stayed Non-Compete Rule, and otherwise seek to do through guidance what the administration was unable to accomplish in rulemaking.^[4] The new Guidelines reflect not just an aggressive stance toward labor market enforcement, but a final attempt to cause a sea change in

well-established business practices. The fate of these 2025 Guidelines and its effect on DOJ and FTC enforcement activities will be a decision for the new Trump Administration and the courts.

While in force, however, they attempt to—and do—create uncertainty for employers.

Information Sharing

The 2025 Guidelines retract the so-called “safe harbor” guidance from the 2016 Guidelines, which advised that labor-market information could be shared if it (1) was managed through a neutral third party; (2) was limited to relatively old data; (3) was comprised of aggregated data; and (4) contained enough data sources that information could not be attributed to any specific competitor.^[5] Instead, the 2025 Guidelines emphasize that sharing through third-parties and algorithms may be unlawful even when companies do not strictly adhere to third-party recommendations^[6]—as DOJ has recently argued in private litigation.^[7] The Guidelines also caution that information-sharing agreements may be unlawful even if participants retain discretion on compensation or are sharing as part of a legitimate business transaction, such as a joint venture or other collaborative activity.^[8]

Further, the 2025 Guidelines assert that information exchanges may provide evidence of the existence of a wage-fixing conspiracy, which could be a *per se* violation of the antitrust laws with criminal implications.^[9]

Although the 2025 Guidelines memorialize the DOJ’s and FTC’s desire to take an aggressive approach to the sharing of information with competitors “about terms and conditions of employment,” such as wage information, they fail to offer concrete, actionable guidance to replace the prior information-sharing safe harbors contained in the 2016 Guidelines.^[10] Instead, the 2025 Guidelines simply conclude that the sharing of competitively sensitive employee/employment-related information may constitute an antitrust violation if the information exchange has, or is likely to have, an anticompetitive effect (even if that effect was not intended).^[11] For this reason, if you are interested in wage-related benchmarking, you should consult with counsel to adopt best practices and understand potential risk.

Independent Contractors

The 2025 Guidelines also emphasize that antitrust laws apply to agreements impacting independent contractors and to “platform businesses” that use technology platforms “to match workers who provide labor with consumers seeking their services.”^[12] In particular, the 2025 Guidelines note that agreements between competing platforms to “fix the compensation of independent contractors offering their services via the platforms” could constitute a *per se* criminal antitrust violation.^[13]

Non-Compete Agreements

Under the 2025 Guidelines, “[n]on-compete clauses that restrict workers from switching jobs or starting a competing business,” such as those often contained in employment agreements, “can violate the antitrust laws.”^[14] This guideline aligns with the FTC’s Non-Compete Rule.^[15] That Rule is currently unenforceable nationwide because a team led by Gibson Dunn attorneys

persuaded a federal district court to set it aside.^[16] You can read more about Gibson Dunn's work obtaining that result [here](#) and [here](#). The FTC appealed the decision to the U.S. Court of Appeals for the Fifth Circuit, filing its opening brief on January 2, 2025.^[17]

The Guidelines also state that the Agencies will continue to “investigate and take action against non-competes and other restraints on worker mobility that limit competition,” and the FTC will retain the authority to address non-compete clauses through case-by-case enforcement actions, including in the context of merger review.^[18]

Attacks on Standard Deal and Employment Terms

The 2025 Guidelines explain that any employment terms that “impede worker mobility or otherwise undermine competition” may violate antitrust laws.^[19] The “restrictive conditions” identified by the Guidelines include:^[20]

- **Non-solicitation employment terms** that prohibit a worker from soliciting the clients or customers of their former employer, depending on the facts and circumstances. Notably, the Guidelines also assert agreements that prohibit two or more entities from hiring or soliciting one another's workers can be *per se* unlawful, condemning even arrangements “to request permission from the other company before trying to hire an employee”^[21] “regardless of whether it actually harms workers.”^[22]
- **Non-disclosure agreements** that are “drafted so broadly as to prohibit disclosure of any information that is ‘usable in’ or ‘relates to’ and industry.”^[23]
- **Training repayment agreement provisions** that require a person to repay costs of training when they leave their employer.
- **Exit fees and liquidated damages provisions** that require a worker to pay a penalty for leaving their employer.

False Earnings Claims

According to the 2025 Guidelines, “[t]he Agencies also may investigate and take action against business that make false or misleading claims about potential” wages that workers may earn.^[24] Although the Agencies’ position applies to all businesses, it appears to be largely focused on workers in the gig economy. In the Agencies’ view, “[w]hen workers are lured to [] businesses by false earnings promises, honest businesses are less able to fairly compete for those workers.”^[25]

Criminal Enforcement

The 2025 Guidelines indicate that criminal investigation and prosecution of wage-fixing and no-poach agreements continue to be one of DOJ’s antitrust enforcement priorities.^[26] Like the 2016 Guidelines, which first announced that naked no-poach and wage-fixing agreements would be investigated and prosecuted as potentially criminal antitrust violations,^[27] the 2025 Guidelines confirm the Agencies’ broad view of conduct that may create criminal risk.^[28]

Like the 2016, Guidelines, the 2025 Guidelines prohibit wage fixing agreements. That includes asserting agreement to “align, stabilize, or other coordinate [] wages” can constitute a criminal violation, even if there is no agreement on a specific wage.[\[29\]](#)

The 2025 Guidelines reiterate that no-poach agreements can give rise to criminal risk.[\[30\]](#) And, as noted above, the Guidelines assert such agreements may be criminal even when they do not harm workers.[\[31\]](#)

Takeaways

The 2025 Guidelines articulate an expansive view of labor-market conduct that may violate the antitrust laws and signal an aggressive enforcement agenda. It remains to be seen, however, how much these Guidelines accurately signal future enforcement priorities for the new administration. Andrew Ferguson, a current FTC Commissioner and President Trump’s nominee to become FTC Chair, issued a strong dissent noting that “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.”[\[32\]](#) The 2025 Guidelines also assert positions that remain either contrary to long-standing precedent, untested in court, or demonstrably unsuccessful in recent enforcement actions. DOJ, for example, has suffered a series of trial losses and dismissals in no-poach cases over the last four years without a single trial verdict in its favor, yet these Guidelines expand—rather than retract—the scope of agreements that may have antitrust implications. Whether the 2025 Guidelines will result in successful enforcement actions, and whether the incoming administration will allow the new Guidelines to remain in place, will be an open question. In fact, the 2025 Guidelines may be withdrawn by the FTC by a majority vote without a notice and comment period. DOJ would need to separately withdraw the Guidelines to nullify them for purposes of DOJ as well.

It would be a mistake, however, to dismiss the 2025 Guidelines wholesale. The prior Trump administration pursued an aggressive labor market enforcement agenda, including bringing several criminal prosecutions for wage fixing and no-poach agreements, and the incoming FTC Chair Ferguson has said that “[t]he Commission is wise to focus its resources on protecting competition in labor markets.”[\[33\]](#)

The Guidelines emphasize that these labor-related issues also are subject to state AG enforcement and/or may signal further enforcement from state AGs on these issues. In addition, the Guidelines may embolden the private plaintiffs’ bar to test new theories of civil antitrust liability, leading to an uptick in civil private litigation.[\[34\]](#)

Given the breadth of the 2025 Guidelines when compared to the 2016 Guidelines—and continued activity by state AGs and private plaintiffs in this area—employers should carefully consider the Agencies’ new guidance and how it may apply to their current business activities and increased scrutiny thereof. The Guidelines may embolden government and plaintiffs to test new theories of liability. Companies should assess and audit their hiring, employment, and compensation policies and practices, including their use of benchmarking in these areas. Companies looking to include restraints on employee mobility in M&A or other deal transactions,

to engage in benchmarking, or to otherwise continue various labor-facing practices also are wise to seek counsel during this period of uncertainty.

The following Gibson Dunn lawyers prepared this client alert: Rachel Brass, Caeli Higney, Melanie Katsur, Julian Kleinbrodt, Kristen Limarzi, Cynthia Richman, Jeremy Robison, and Katherine Warren Martin.

Gibson Dunn lawyers have extensive experience with the issues addressed above and stand ready to work with you to minimize risks associated with the 2025 Guidelines. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of the firm's Antitrust and Competition, Labor and Employment, or Mergers and Acquisitions practice groups.

[1] Antitrust Guidelines for Business Activities Affecting Workers (2025) ("2025 Guidelines" or "Guidelines"), available at <https://www.ftc.gov/legal-library/browse/ftc-doj-antitrust-guidelines-business-activities-affecting-workers> (FTC Website) and <https://www.justice.gov/atr/media/1384596/dl?inline> (DOJ Website).

[2] Antitrust Guidance for Human Resource Professionals (2016) ("2016 Guidelines"), available at <https://www.justice.gov/atr/file/903511/dl?inline>.

[3] See DOJ Press Release: Justice Department and Federal Trade Commission Issue Antitrust Guidelines on Business Practices that Impact Workers (Jan. 16, 2025), available at <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-issue-antitrust-guidelines-business>.

[4] Gibson Dunn Client Alert: [Gibson Dunn Secures Nationwide Relief from Federal Trade Commission's Non-Compete Rule](#) (Aug. 20, 2024).

[5] 2016 Guidelines at 5.

[6] 2025 Guidelines at 6.

[7] See, e.g., *Duffy v. Yardi Sys., Inc.*, 2024 WL 4980771, at *5 (W.D. Wash. Dec. 4, 2024); See DOJ Press Release: Justice Department Sues Six Large Landlords for Algorithmic Pricing Scheme that Harms Millions of American Renters (Jan. 7, 2025), available at <https://www.justice.gov/opa/pr/justice-department-sues-six-large-landlords-algorithmic-pricing-scheme-harms-millions>.

[8] 2025 Guidelines at 7.

[9] *Id.* at 6.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 10.

[13] *Id.*

[14] *Id.* at 7.

[15] Gibson Dunn Client Alert: [FTC Issues Final Rule Barring Employee Non-Compete Agreements](#) (April 24, 2024).

[16] *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024).

[17] *Ryan LLC v. FTC*, No. 24-10951 (5th Cir. Jan. 2, 2025), ECF No. 41 (FTC's opening brief). It is uncertain, however, whether the incoming administration will pursue this appeal.

[18] 2025 Guidelines at 7-8.

[19] *Id.* at 9.

[20] *Id.*

[21] *Id.* at 4.

[22] *Id.* at 6.

[23] *Id.* at 9.

[24] *Id.* at 11.

[25] *Id.*

[26] *Id.* at 4.

[27] 2016 Guidelines at 4.

[28] 2025 Guidelines at 4.

[29] *Id.*

[30] *Id.* "In this context, the term 'no-poach' agreement refers to the types of market-allocation agreements that affect employees' attempts to get other jobs, such as an agreement between two competitors not to try to hire or solicit each other's employees, or an agreement to request permission from the other company before trying to hire an employee. These no-poach agreements are different than, for example, agreements between an employer and its workers that prevent the workers from soliciting clients or vendors at a future employer or for a future competing business." *Id.* n.11.

[31] *Id.* at 5-6.

[32] https://www.ftc.gov/system/files/ftc_gov/pdf/at-guidelines-for-business-activities-affecting-workers-ferguson-holyoak-dissent.pdf

[33] https://www.ftc.gov/system/files/ftc_gov/pdf/guardian-ferguson-dissenting-statement-final.pdf

[34] The Guidelines also seek to promote more reporting of potential violations, reflecting the Agencies' efforts in recent years to facilitate online reporting. See 2025 Guidelines at 12. Similarly, in an effort to promote reporting of potential antitrust violations, on January 14, 2025, DOJ and the Department of Labor, Occupational Safety and Health Administration jointly issued a statement "affirm[ing] that corporate non-disclosure agreements (NDAs) that deter individuals from reporting antitrust crimes undermine the goals of whistleblower protection laws. . . ." See <https://www.justice.gov/opa/pr/justice-department-and-osha-issue-statement-non-disclosure-agreements-deter-reporting>. In addition, the statement cautions that "using NDAs to obstruct or impede an investigation may also constitute separate federal criminal violations." *Id.*

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