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# Recap of “DOJ-FTC Labor Antitrust Guidance 2.0: What’s New?” Webinar

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Over the past decade, antitrust regulators in the US have increased their scrutiny of labor market competition.<sup>1</sup> On January 16, 2025 – just days before the start of the second Trump administration – the Federal Trade Commission (FTC) and the Department of Justice (DOJ) jointly issued a new set of antitrust guidelines for the labor market titled “Antitrust Guidelines for Business Activities Affecting Workers” (the 2025 Guidelines).<sup>2</sup> These guidelines replaced the agencies’ “Antitrust Guidance for Human Resource Professionals” released in 2016 (the 2016 Guidelines)<sup>3</sup> and reflect an evolving landscape for labor market antitrust enforcement. While reaffirming some points from the 2016 Guidelines, the 2025 Guidelines expanded and clarified the agencies’ interpretation of how antitrust laws apply to labor markets in several ways, including:<sup>4</sup>

- Defining a “worker” to include independent contractors (e.g., gig workers)
- Explicitly stating that no-poach agreements in the franchise context may violate antitrust laws
- Increasing scrutiny of information sharing between competitors for workers, including information exchanges using third parties
- Introducing new areas of investigation of employment conditions, including false or misleading claims about potential earnings, training repayment agreements, and overly broad non-disclosure agreements

To discuss the implications of the updated guidelines, the ABA Antitrust Law Section's Distribution & Franchising Committee hosted a webinar titled "[DOJ-FTC Labor Antitrust Guidance 2.0: What's New?](#)" on May 7, 2025 moderated by Ms. Sima Namiri-Kalantari (Crowell & Moring), with panelists Brian Quinn (O'Melveny), Holly Ovington (WilmerHale), and Federico Mantovanelli (Analysis Group).<sup>5</sup> The discussion covered the evolution of labor antitrust enforcement over the past 15 years, the broadening scope of the 2025 Guidelines, and practical considerations for businesses operating in labor-intensive industries.

## I. Background: The Road to the 2025 Guidelines

Mr. Quinn opened the discussion by providing an overview of trends in labor market antitrust activity over the past fifteen years. He noted that the 2016 Guidelines serve as a clear demarcation in modern labor-market antitrust enforcement, as they represented the agencies' first clear indication of their intention to treat no-poach and wage-fixing agreements as per se illegal and criminally prosecutable.

According to Mr. Quinn, in the years leading up to the 2016 Guidelines, there were several prominent private class actions alleging no-poach agreements among high-tech firms in California.<sup>6</sup> Starting in 2020, the DOJ brought a series of criminal charges alleging no-poach and wage-fixing agreements, but most of these enforcement efforts did not end in convictions despite surviving motions to dismiss. Mr. Quinn cited *United States v. DaVita Inc. and Kenty Thiry*;<sup>7</sup> *United States v. Patel*;<sup>8</sup> and the aerospace engineers no-poach case (*Granata v. Pratt & Whitney*)<sup>9</sup> as examples of no-poach and wage-fixing cases where juries did not convict. Most recently, however, the DOJ did secure its first conviction in its wage-fixing criminal case in *United States v. Lopez*.<sup>10</sup>

Ms. Ovington added that, outside the courts, agency attention to competition in the labor market also intensified between 2016 and 2025. For example, in 2021, the DOJ and FTC jointly hosted a workshop on competition in labor markets, in which regulators from both agencies discussed the potential impact of non-compete clauses and other restrictive covenants on worker mobility and how such impact, if any, could be balanced against employers' interests in protecting confidential information and incentives to invest. Ms. Ovington also noted that, in 2024, the FTC issued a final rule effectively banning most forms of non-compete agreements. The rule was later struck down by a district court and is currently under appeal.<sup>11</sup>

Ms. Ovington further noted that new merger guidelines released in 2023 (the 2023 Merger Guidelines) included consideration of labor markets as well.<sup>12</sup> In particular, the 2023 Merger Guidelines explicitly state that buyer-side mergers can be evaluated using the same analytical tools applied to seller-side mergers. In the context of buyer-side mergers, firms can be viewed as purchasers of labor, and the potential impact of such mergers on labor markets should be assessed accordingly. She pointed to the FTC's challenge of the Kroger-Albertsons merger, which included allegations regarding the merger's potential impact on labor market competition.

Ms. Ovington then moved on to discuss the 2025 Guidelines and outlined several notable differences from the 2016 Guidelines. In particular, Ms. Ovington pointed to (i) the expanded definition of “workers” to include independent contractors; (ii) increased scrutiny of no-poach and wage-fixing agreements in the franchise context; (iii) the withdrawal of the 2016 “safe harbors” for sharing aggregated, historical, or third-party-mediated information among competitors; and (iv) the introduction of new areas of potential enforcement (e.g., false-earnings claims, non-solicit clauses, and training repayment agreements).

## **II. Expanded Definition of “Workers”**

The first difference between the 2025 and 2016 Guidelines that Ms. Ovington highlighted was the expansion of labor antitrust scrutiny beyond traditional employees to independent contractors. The 2025 Guidelines explicitly state that platform businesses are subject to antitrust laws “with respect to both their employees and independent contractors seeking work through their platform.”<sup>13</sup> Dr. Mantovanelli noted that this likely reflects, in part, the growth of technology platforms, the rise of gig work, and regulators’ concerns about whether there are adequate protections for independent contractors.

## **III. Scrutiny of Franchise No-Poach/No-Hire Agreements**

The second difference between the 2025 and 2016 Guidelines that Ms. Ovington highlighted was the inclusion of a separate section addressing no-poach/no-hire agreements in the franchise context. Dr. Mantovanelli noted that franchisees constitute a network of businesses with some level of independent decision making, but also share common business interests in operating within a cooperative network in which they share and invest in collective marketing efforts and benefit from the success of the overall franchise system.

Mr. Quinn noted that the expansion of labor antitrust scrutiny to franchises reflected the agencies’ increased skepticism toward any procompetitive justifications for no-poach/no-hire agreements. While the 2016 Guidelines distinguished between “naked” wage-fixing or no-poaching agreements among employers and such agreements that may be related to or “reasonably necessary to a larger legitimate collaboration between employers,”<sup>14</sup> agencies’ approach in recent years appears to reflect the view that no-poach/no-hire agreements may be intrinsically welfare reducing.

Mr. Quinn noted that scrutiny of no-poach/no-hire agreements at the state level followed a similar trend. For example, in January 2018, the Washington state attorney general “launched an initiative to eliminate no-poach clauses in franchise agreements nationwide.”<sup>15</sup>

When asked about the economics of no-poach/no-hire agreements, Dr. Mantovanelli explained that these clauses can have both anticompetitive and procompetitive impacts, and the effects of such clauses are highly context-dependent, with no one-size-fits-all answer. Although no-poach or no-hire agreements have the potential to reduce worker mobility, suppress wages, and hinder innovation, such agreements can also have procompetitive justifications, including in the franchise context, by encouraging investment in training and collaboration between businesses. For example, in the franchise context, no-poach agreements can prevent free-riding, where one franchisee may decide to focus on hiring trained workers from another franchisee rather than training its own workers. Such a dynamic could result in a hold-up problem, where each franchisee's incentives to make costly investments in training its workers are diminished. Ultimately, assessing the extent of these potential anticompetitive and procompetitive effects requires a rigorous analysis of market conditions and worker characteristics, including the scope of labor market competition; the extent of market power, if any; and variations in potential impact across workers of different skill levels, experience, and preferences.

Importantly, Dr. Mantovanelli noted that each alleged agreement needs to be evaluated carefully to understand the scope of any restrictions that it may place on the mobility of workers. For example, a no-poach agreement between Firm A and Firm B does not prevent workers from independently applying for or being hired into positions at the other firm, nor does it restrict workers from seeking jobs at Firm C.

## **IV. Information Sharing**

The third area of difference between the 2025 and 2016 Guidelines pertains to information sharing between competitors. Ms. Ovington explained that the 2016 Guidelines established general safe harbors for information sharing by generally allowing exchanges of historical, aggregated, and anonymized information through third parties. Ms. Ovington explained that the DOJ removed these safe harbors in 2023, and the 2025 Guidelines significantly raised the bar for safe information exchange. Ms. Ovington also noted that, while a simple exchange of information is not inherently anticompetitive, technological advancements in data processing may impact whether such information sharing raises potential antitrust concerns. She emphasized the need for updated antitrust compliance policies and training, especially for HR professionals.

Mr. Quinn added that it is lawful to share public wage data from government sources. In addition to government sources on wages, some states now require employers to disclose salary and benefits in job postings. Mr. Quinn stated that researching this publicly available information – especially when legally mandated – is a low-risk, legitimate strategy for understanding competitor compensation practices, as it does not involve any coordination with other labor market participants.

Mr. Quinn next addressed a question on the concern that sharing DEI metrics could raise questions about potential collusion allegations, citing FTC Chair Andrew Ferguson’s remarks on concerns regarding firms coordinating on hiring goals. He advised firms to train both HR and product teams to recognize when even informal conversations with labor market competitors could pose antitrust risks – especially when discussing specific hiring metrics. Mr. Quinn noted that the potential antitrust risk of sharing this information depends on the specificity of the metric in question.

Dr. Mantovanelli added that the 2025 Guidelines’ view on information sharing reflects, in part, the agencies’ growing concerns that, due to advances in AI and data processing, even aggregated historical data may reveal sensitive information and enable tacit collusion, particularly in concentrated markets. The 2025 Guidelines explicitly note modern methods of information gathering and exchanges as a potential cause for concern. Regulators are raising concerns that certain technological advancements in data processing tools and techniques (e.g., machine learning, AI) may lead to an improved ability to gather firm- specific information from even aggregated data. The extent of such risk depends on a variety of factors, including – but not limited to – the nature of the data, both in terms of content and granularity.

## **V. New Areas of Enforcement**

The last key difference between the 2016 and 2025 Guidelines that Ms. Ovington identified centers on new areas of potential agency enforcement, such as non-compete agreements and false earnings claims, neither of which were mentioned in the 2016 Guidelines.

Mr. Quinn explained that the 2025 Guidelines state that non-compete clauses in employment contracts that restrict workers from switching jobs or starting a competing business have the potential to harm competition and may be unlawful. The 2025 Guidelines specifically note that the FTC has “taken actions against non-competes when reviewing mergers,” including requiring “parties to cease using, enforcing, and/or entering into non-compete clauses.”<sup>16</sup>

Dr. Mantovanelli explained that evaluating the economic effects of non-compete agreements requires a nuanced, case-by-case analysis. While non-compete clauses have the potential to reduce worker mobility and wages and may act as barriers to entry for startups, reasonable non-compete clauses in employment contracts have legitimate procompetitive purposes, such as protecting trade secrets and incentivizing firms to invest in specialized training for employees. The net impact depends on case-specific factors like the agreement’s duration, geographic scope, and specific characteristics of the workers and employers involved.

## VI. Looking Ahead: What Comes Next?

The new 2025 Guidelines were issued in the waning hours of the Biden Administration, and it remains to be seen whether and how the Trump Administration will approach enforcement in labor markets.

Mr. Quinn noted that remarks by DOJ Assistant Attorney General for Antitrust Gail Slater and FTC Chair Ferguson indicate continued DOJ and FTC enforcement in this area, suggesting that the agencies' scrutiny of labor market competition may continue under the new administration.

Ms. Ovington noted the increasing public salience of antitrust policy, especially in labor markets. She encouraged practitioners to listen closely to enforcers' speeches, podcasts, and public statements, and remarked that, regardless of any potential policy shift at the federal level, state attorneys general are likely to continue to focus on labor antitrust issues.

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## Endnotes

1. See, e.g., "Recent Developments in Labor Market Antitrust Enforcement in the United States, Europe, Canada, and China," *Analysis Group*, January 6, 2025, available at [https://www.analysisgroup.com/globalassets/insights/publishing/2025\\_aba\\_article\\_recent\\_developments\\_in\\_labor\\_market.pdf](https://www.analysisgroup.com/globalassets/insights/publishing/2025_aba_article_recent_developments_in_labor_market.pdf).
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3. "Antitrust Guidance for Human Resource Professionals," *Department of Justice Antitrust Division and the Federal Trade Commission*, October 2016, available at <https://www.ftc.gov/legal-library/browse/antitrust-guidance-human-resource-professionals-department-justice-antitrust-division-federal-trade>.
4. See, e.g., "The DOJ and FTC Release New Guidance for Business Activities Affecting Workers," *Skadden*, January 29, 2025, available at <https://www.skadden.com/insights/publications/2025/01/the-doj-and-ftc-release-new-guidance-for-business-activities-affecting-workers>.
5. "DOJ/FTC Labor Antitrust Guidance 2.0: What's New?," *American Bar Association*, May 7, 2025, available at [https://www.americanbar.org/groups/antitrust\\_law/resources/on-demand/doj-ftc-labor-antitrust-guidance/](https://www.americanbar.org/groups/antitrust_law/resources/on-demand/doj-ftc-labor-antitrust-guidance/).
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8. "Court Ends Antitrust No-Poach Trial in U.S. v. Patel with Judgment of Acquittal," *Cleary Gottlieb*, May 1, 2023, available at <https://www.clearygottlieb.com/news-and-insights/publication-listing/court-ends-antitrust-no-poach-trial-in-us-v-patel-with-judgment-of-acquittal>.
9. "Aerospace Managers Acquitted in Labor-Related Antitrust Prosecution," *Reuters*, April 28, 2023, available at <https://www.reuters.com/legal/government/aerospace-engineers-acquitted-labor-related-antitrust-prosecution-2023-04-28/>.

10. "DOJ Secures Its First-Ever Conviction in a Criminal Antitrust Labor Market Trial," *The National Law Review*, April 29, 2025, available at <https://natlawreview.com/article/doj-secures-its-first-ever-conviction-criminal-antitrust-labor-market-trial>.
11. "FTC Announces Rule Banning Noncompetes," *Federal Trade Commission*, April 23, 2024, available at <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>; "White & Case Global Non-Compete Resource Center (NCRC)," *White & Case*, April 8, 2025, available at <https://www.whitecase.com/insight-tool/white-case-global-non-compete-resource-center-ncrc> ("On March 7, 2025, the FTC moved to stay its appeals to challenges against the Non-Compete Rule for 120 days, which the circuit courts granted. The FTC's motion cited the change in presidential administrations as well as FTC Chair Andrew Ferguson's public comments stating that the FTC may reconsider its defense of the Rule [...]").
12. "Merger Guidelines," *U.S. Department of Justice and the Federal Trade Commission*, December 18, 2023, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023\\_merger\\_guidelines\\_final\\_12.18.2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf).
13. 2025 Guidelines, p. 10.
14. "Antitrust Guidance for Human Resource Professionals," *Department of Justice Antitrust Division and the Federal Trade Commission*, October 2016, available at <https://www.ftc.gov/legal-library/browse/antitrust-guidance-human-resource-professionals-department-justice-antitrust-division-federal-trade>.
15. "Labor and Antitrust," *Washington State Office of the Attorney General*, accessed June 19, 2025, available at <https://www.atg.wa.gov/labor-and-antitrust>.
16. 2025 Guidelines, pp. 7-8.

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