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FTC and DOJ Alert for Pandemic Anticompetitive Conduct

Recently, the Federal Trade Commission's Bureau of Competition and the Justice Department's Antitrust Division jointly announced that they are on high alert for potential antitrust violations and will aggressively enforce antitrust laws against those who seek to exploit the current pandemic to engage in anticompetitive conduct.

Responding to the pandemic has created opportunities for companies and organizations to come together and provide concerted support and help during these unprecedented times. While the agencies acknowledge that many types of collaborative activities designed to improve the health and safety response to the pandemic would be consistent with the antitrust laws, they caution companies to share technical know-how, rather than company specific data about prices, wages, outputs, or costs.

In particular, the FTC and DOJ stand ready to pursue violations, including agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists to use their market power to engage in exclusionary conduct. Specifically, the agencies are on alert for employers, staffing companies, and recruiters, among others, who might engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked.

A few tips to keep in mind when navigating collaborative efforts in this unprecedented time include:

- Stay focused on the objectives of the information sharing and don't let discussions wander to areas of enhanced antitrust risk. Be mindful that direct exchanges of current or forward-looking competitively sensitive data presents very high risk.
- Avoid "no-poach" hiring agreements, and agreements to fix compensation, increases and/or employee benefits. Moreover, avoid direct exchanges or discussions about non-public wage levels, employment terms and conditions, and costs.
- As to employees, be mindful that "competitors" are not limited to direct competitors but can include other companies that provide different products and services, but who compete for common employees.
- Avoid potential anticompetitive conduct such as restrictions on the business hours and restrictions on output.
- Even absent an actual agreement to restrict competition, companies may still face enforcement actions if they invite others to collude.

More information relating to the FTC and DOJ press releases can be found at the following links:

- March 24, 2020 statement: <https://www.ftc.gov/public-statements/2020/03/joint-ftc-doj-antitrust-statement-regarding-covid-19>
- April 13, 2020 statement: https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement?utm_source=govdelivery