Election Unlikely To Overhaul Antitrust Enforcers' Labor Focus

By **Jared Nagley and Joy Siu** (October 22, 2024)

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Given the Biden administration's emphasis on antitrust enforcement over the past four years, there has been understandable speculation leading up to November's presidential election about how the next administration could affect the approaches to enforcement taken by the Federal Trade Commission and the U.S. Department of Justice's Antitrust Division.

Although the outcome of the election could potentially alter the course of enforcement in certain areas of the economy, the agencies' scrutiny of labor markets is likely to remain largely unaffected — with one notable exception.

Monopsony power will continue to be a focus in merger investigations and challenges.

The agencies have consistently evaluated whether proposed mergers were likely to give the merging firms monopsony, or buyer power, in any labor markets when considering the legality of a potential transaction under Section 7 of the Clayton Act. For example, the FTC's model second request has long had a specification asking for documents evidencing any changes in the target company's operations that will affect employees.[1]

In 2019, during the Trump administration, the DOJ initiated a broad examination of competitive conditions in labor markets, including how merger enforcement should account for labor monopsony considerations.[2]

This examination led in part to the 2023 revised merger guidelines, in which the agencies stated that they will consider whether a merger may result in dominance in any labor markets by giving the merged firm power to cut or freeze wages, slow wage growth, increase leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit.[3]

Former Assistant Attorney General Makan Delrahim emphasized that enforcers had challenged transactions even where competitive harm "is localized in an upstream labor market, not just a downstream product market."[4]

And in recent years, the agencies have sued to block additional deals specifically based on concerns about potential affects on labor markets. For example, in 2022, the DOJ filed a complaint to enjoin Penguin Random House LLC's acquisition of competing book publisher Simon & Schuster Inc., based on concerns that the transaction would give the merged firm too much leverage over authors.[5]

This year, the FTC and multiple state attorneys general have sued to block The Kroger Co.'s proposed $24.6 billion acquisition of Albertsons Cos. Inc., partly on grounds that it could harm competition in markets for unionized grocery store workers.[6]

All signs indicate that monopsony power in labor markets will continue to be a focus of

enforcement.[7]

Agreements affecting worker mobility will continue to be a priority, but agencies may focus on civil challenges and leave criminal prosecution to states.

There has also been bipartisan support for curbing the use of agreements that restrict employee mobility and artificially limit their wages, specifically, no-poaching, nonsolicitation and wage-fixing agreements, in which employers agree with each other to curtail their hiring practices with regard to each other's workforces or fix salaries.

In 2016, the agencies jointly released antitrust guidance for human resource professionals, and announced for the first time that the DOJ intended to proceed criminally against naked wage-fixing and no-poaching agreements.[8] A year into Donald Trump's presidency, Delrahim highlighted that the DOJ was making good on that promise, noting that a handful of criminal cases were in the works.[9]

A few months later, the DOJ entered into settlements with two rail equipment suppliers, Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp., which were accused of entering into an agreement not to solicit, recruit, hire without prior approval or otherwise compete with one another for employees.[10]

The settlement prohibited the employers from entering into similar arrangements going forward. Leading into the 2020 election, and stemming from concerns during the COVID-19 pandemic, the FTC and the DOJ issued a joint statement warning that they were on alert for collusion in U.S. labor markets — particularly with regard to essential service providers, such as doctors, nurses, first responders, and pharmacy, grocery store, and warehouse employees.[11]

Over the past four years, under the Biden administration, the agencies have further expanded their efforts to address potential competitive harms in labor markets caused by these restrictive covenants.

Although the DOJ has not secured a favorable verdict in any of the criminal trials it has brought, it has had some successes. It has obtained guilty pleas from defendants and established that naked no-poaching and wage-fixing agreements are illegal per se under the Sherman Act.[12]

And despite the DOJ's trial losses, Assistant Attorney General Jonathan Kanter emphasized during a discussion at the Brookings Institute in late 2023 that "protecting workers from criminal behavior that harms their ability to get better wages, to realize upward mobility in their lives by getting access to better jobs, better training, and opportunities to provide for their families is fundamental and foundational to the work we do as antitrust enforcers."[13]

Given the DOJ's track record, it is possible that the agencies will revert to bringing wage-fixing and no-poaching claims as civil cases, especially given the DOJ's past success using this tactic during the Trump administration.[14] But even if the agencies change their strategy going forward, their past efforts to bring criminal cases have inspired state attorneys general to do the same.

For example, California Assistant Attorney General Paula Blizzard announced in March 2024 that the AG's office was planning to reinvigorate criminal antitrust enforcement of the Cartwright Act, specifically to target the use of no-poaching and noncompete provisions in employment contracts.[15]

A Republican administration will likely take a more restrained approach to Section 5 enforcement and rulemaking on noncompete agreements.

As we have seen, regardless of the outcome of the presidential election in November, the agencies are likely to continue to be aggressive in enforcing the antitrust laws to prevent harms in labor markets. However, one aspect of labor market enforcement that is likely to be affected by the outcome of the election relates to noncompete agreements.

While the agencies did consider the impact of noncompete agreements on labor markets during the Trump administration, this issue did not receive the attention it has more recently.[16] And while Republican commissioners have criticized employers use of noncompete agreements in specific instances, they have been wary of condemning such conduct under Section 5 of the FTC Act.

For instance, in January 2023, the FTC entered into settlements with three companies to resolve claims that these employers violated Section 5 of the FTC Act by entering into unfair and anticompetitive noncompete agreements.

Dissenting in one of the matters, In the Matter of Prudential Security, former commissioner Christine Wilson explained that while she did not "endorse or condone" Prudential Security's noncompete clause — which prohibited employees from accepting employment with a competing business for two years, and included a liquidated damages provision requiring employees to pay Prudential $100,000 for violations — she disagreed "with the new Section 5 Policy Statement" that "condemn[s] conduct summarily as an unfair method of competition based on little more than the assignment of adjectives."[17]

Given that Republican commissioners have been much more circumspect about the reach of Section 5, it is unlikely that the FTC under a Republican administration would be active in scrutinizing noncompete agreements relying on that authority.

Republicans have also objected to the FTC's attempt to regulate noncompete agreements through the use of its rulemaking authority. On April 23, the FTC voted 3-2 along party lines to issue a final rule banning employers from imposing noncompete clauses against their workers in almost all situations, subject to extremely narrow exceptions for senior executives and in the sale of a business.

Commissioners Andrew Ferguson and Melissa Holyoak dissented, explaining that "[w]hatever the Final Rule's wisdom as a matter of public policy, it is unlawful. ... It categorically prohibits a business practice that has been lawful for centuries," based on "a few words in a 110-year-old statute" that "the Commission has never used to regulate noncompete agreements until the day before this rulemaking began."[18]

In July, the U.S. District Court for the Northern District of Texas agreed, in Ryan LLC v. FTC, holding the final rule unlawful and enjoining the FTC's enforcement of it.[19] In response to the loss, the FTC immediately highlighted its authority to challenge specific noncompete provisions through individual enforcement actions under Section 5 of the FTC Act, which the Ryan court did not disturb, and on Oct. 18, the FTC filed a notice of appeal to the U.S. Court of Appeals for the Fifth Circuit, seeking review of the district court's order and judgment in Ryan.

The outcome of the election would likely affect the FTC's approach to the appeal. We would not expect that the FTC under a Republican administration would continue to attempt to

address noncompetes or other labor market issues through rulemaking.

Regardless of the outcome of this presidential election, given federal and state enforcers' continued focus on labor markets, companies should keep labor issues at the top of mind when considering transactions, and in the ordinary course of business when considering the use of noncompete provisions and other restrictive covenants in their agreements.

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[1] Compare 2015 Model Second Request with 2024 Model Second Request.

[2] Events: Public Workshop on Competition in Labor Markets, U.S. Dep't of Justice, https://www.justice.gov/atr/event/public-workshop-competition-labor-markets; see also Assistant Attorney General Makan Delrahim Remarks at the Public Workshop on Competition in Labor Markets, U.S. Dep't of Justice (Sept. 23, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition.

[3] U.S. Dep't of Justice & FTC Merger Guidelines 27 (Dec. 18, 2023).

[4] Transcript of Proceedings, Public Workshop on Competition in Labor Markets, U.S. Dep't of Justice (Sept. 23, 2019), https://www.justice.gov/atr/page/file/1209071/dl?inline.

[5] Matthew Perlman, Court Blocks Penguin's $2.2B Simon & Schuster Deal, Law360 (Oct. 31, 2022), https://www.law360.com/articles/1537250/court-blocks-penguin-s-2-2b-simon-schuster-deal.

[6] Press Release, FTC, FTC Challenges Kroger's Acquisition of Albertsons (Feb. 26, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons.

[7] While enforcement will remain a priority regardless of administration, it bears noting that Republican commissioners have rejected attempts to increase information requests regarding labor as part of premerger filing requirements under the Hart-Scott-Rodino Act, and seem skeptical that a merger can be challenged solely on a labor market theory of harm. For example, in a concurring statement regarding the FTC's recent overhaul of Hart-Scott-Rodino Act filing rules, Commissioner Holyoak underscored that it was critical to her vote to approve the final rule that the FTC dropped several proposed information requests, including requests regarding employee classifications, geographic market information based on commuting zones, and worker and workplace safety. Concurring Statement of Commissioner Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, FTC File No. P239300 (Oct. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-hsr-rule-statement.pdf. Holyoak explained that "To be sure, a merger may theoretically create anticompetitive effects in a relevant labor market" by "eliminat[ing] a critical employment option for

workers" but such requests would "generally [be] unhelpful for determining whether an acquisition violates the antitrust laws" because "[t]he agencies have never brought a standalone labor challenge to an acquisition." Id. 7-8.

[8] Federal Trade Comm'n and U.S. Dep't of Justice, Antitrust Guidance for Human Resources Professionals 3-4 (Oct. 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

[9] Matthew Perlman, Delrahim Says Criminal No-Poach Cases Are in the Works, Law360 (Jan. 19, 2018), https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works.

[10] Press Release, Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (April 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[11] Press Release, FTC, Federal Trade Commission and Justice Department Issue Joint Statement Announcing They are on Alert for Collusion in U.S. Labor Markets (April 13, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement-announcing-they-are-alert.

[12] Ann O'Brien, Leo Caseria, & Joy Siu, Labor Collusion Loss Will Shape DOJ's Case Strategy, Law360 (May 9, 2023), https://www.law360.com/articles/1605100/labor-collusion-loss-will-shape-doj-s-case-strategy.

[13] A Conversation with FTC Chair Lina Khan and DOJ Assistant Attorney General Jonathan Kanter on Antitrust Enforcement, The Brookings Institution (Oct. 5, 2023), https://www.skadden.com/-/media/files/publications/2024/03/insights-special-edition/stated-in-a-brookings-institution-panel-discussion-in-october-2023.pdf?rev=059f7b6d0d144c0088a339db98db3791&hash=81988E50D00347BBC68C352842A3088A.

[14] Press Release, Dep't. of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (April 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[15] Dylan Ballard & Lillian Sun, Expert Analysis: Preparing For Possible Calif. Criminal Antitrust Enforcement, Law360 (March 29, 2024), https://www.law360.com/real-estate-authority/articles/1819132/preparing-for-possible-calif-criminal-antitrust-enforcement.

[16] Public Workshop on Competition in Labor Markets, Department of Justice, https://www.justice.gov/atr/event/public-workshop-competition-labor-markets; see also Assistant Attorney General Makan Delrahim Delivers Remarks at the Public Workshop on Competition in Labor Markets, Department of Justice (Sept. 23, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition.

[17] Dissenting Statement of Commissioner Christine S. Wilson, In the Matter of Prudential Security, FTC File No. 211-0026 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/wilson_dissenting_statement_-

_prudential_security_-_final_-_1-3-23.pdf (footnotes omitted).

[18] Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, In the Matter of the Non-Compete Clause Rule (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf.

[19] John Carroll, Jonathan Clark et al., Final Word on Final Rule? Texas District Court Eviscerates FTC's Non-Compete Ban, Sheppard Mullin (Aug. 21, 2024), https://www.antitrustlawblog.com/2024/08/articles/ftc/final-word-on-final-rule-texas-district-court-eviscerates-ftcs-non-compete-ban/.