Antitrust Guidelines for Business Activities Affecting Workers

U.S. Department of Justice and the Federal Trade Commission

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Overview[1]

These Guidelines explain how the U.S. Department of Justice's Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") (collectively, the "Agencies") assess whether business practices affecting workers violate the antitrust laws. The Agencies enforce the nation's antitrust laws, which include the Sherman Act, Clayton Act, and Federal Trade Commission Act. These laws provide "a central safeguard for the Nation's free market structures" by promoting open and fair competition.[2]

The antitrust laws protect competition for labor, just as they protect competition for goods and services that companies provide.[3] They protect the freedom of working people to choose the best job for them and their families. Just as vibrant competition for goods and services benefits consumers, competition among employers benefits workers through better wages, benefits, and other terms and conditions for working people. Business practices may violate the antitrust laws when they harm the competitive process, especially if they deprive labor markets of independent centers of decisionmaking[4] or they create or abuse employers' monopsony power.[5] By interfering with free and fair competition for workers, such practices can lead to fewer job opportunities, lower wages, and worse working conditions.[6] Similarly, businesses should be free to hire the right person for a job. Vibrant, open markets to recruit and retain workers create market opportunities that are conducive to new business formation, innovation, and productivity. Conversely, when companies act in ways that harm competition for workers, that behavior might lead to fewer job opportunities for workers, lower wages, and worse job quality. That is why the antitrust laws prohibit certain practices that harm competition for workers.

How to Use These Guidelines: These Guidelines are intended to promote clarity and transparency for the public about how the Agencies identify and assess business practices affecting workers that may violate the antitrust laws.[7] The following sections explain how the Agencies approach

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[1] This document replaces the Antitrust Guidance for Human Resource Professionals (2016). It should not be construed as legal advice, and it has no force or effect of law. It is not intended to create any substantive or procedural rights enforceable at law by any party. Nothing in this statement should be construed as mandating a particular outcome in any specific case, and nothing in this statement limits the discretion of any U.S. government agency to take any action, or not to take action, with respect to matters under its jurisdiction.

[2] *N. Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015).

[3] *See generally Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69 (2021); *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948); *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359 (1926).

[4] *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010) ("[C]oncerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." (internal quotation marks and citations omitted)).

[5] *Alston*, 594 U.S. at 90 (concluding that the NCAA used its monopsony power to impose restraints that "can (and in fact do) harm competition" for student-athletes' labor).

[6] *See Alston*, 594 U.S. at 110 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.").

[7] The 2023 Merger Guidelines provide guidance to the public about how agencies consider the effects of business transactions such as mergers and acquisitions on workers. *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *Merger Guidelines* (2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

particular antitrust issues affecting labor. Sections 1–5 discuss specific types of agreements or business practices that may violate the antitrust laws. Certain agreements and other activities may give rise to criminal liability. Other types of agreements may be subject to civil liability rather than criminal prosecution. Section 6 explains that the antitrust laws apply to relationships between businesses and independent contractors. For example, an agreement between businesses to fix the compensation that each pays to independent contractors may violate the antitrust laws, just as an agreement between businesses to fix the wages each pays to workers may violate the antitrust laws. Section 7 explains that false claims about workers' potential earnings may violate federal laws against unfair, deceptive, or abusive practices. Section 8 provides information about reporting potential antitrust violations to the Agencies.

As discussed further in Sections 1–5, the Agencies may investigate certain types of agreements or business practices as potential violations of the antitrust laws. Examples of such agreements include:

1. **Agreements between companies not to recruit, solicit, or hire workers, or to fix wages or terms of employment, may violate the antitrust laws and may expose companies and executives to criminal liability.** Where appropriate, DOJ exercises its authority to bring felony criminal charges against companies and individuals who participate in these conspiracies.

2. **Agreements in the franchise context not to poach, hire, or solicit employees of the franchisor or franchisees may violate the antitrust laws.** No-poach and similar agreements are subject to antitrust scrutiny even if they are between a franchisor and a franchisee or, for example, among the franchisees of the same franchisor.

3. **Exchanging competitively sensitive information with companies that compete for workers may violate the antitrust laws.** This includes exchanges of information about compensation or other terms or conditions of employment, and other exchanges of information that harm competition for workers. Exchanging such information with competitors may be illegal even if companies use a third party or intermediary—including a third party using an algorithm—to share such information.

4. **Employment agreements that restrict workers' freedom to leave their job may violate the antitrust laws.** These include non-compete provisions that prevent workers from leaving their job to join a competing or potentially competing employer; that prevent workers from leaving their job to start a new business; or that require workers to pay a penalty upon leaving their job.

5. **Other restrictive, exclusionary, or predatory employment conditions that harm competition may violate the antitrust laws.** These include overly broad non-disclosure agreements, training repayment agreement provisions, non-solicitation agreements, and exit fee or liquidated damages provisions.

This list is not exhaustive. Listed activities may or may not be an antitrust violation. The Agencies encourage anyone with information about these activities or other potential antitrust violations to report them to the Agencies. See Section 8 below for further information.

General Principles for Analyzing Agreements that Impact Workers: In many of these circumstances, the Agencies will focus on whether there is an agreement between businesses that harms competition for workers. An agreement need not be explicit or written down in order to violate the antitrust laws. Agreements—sometimes called conspiracies, gentleman's agreements, handshake agreements, or shared or mutual understandings—that violate the antitrust laws can be formal or

informal; express or implicit; and need not be written down or talked about at all. Such agreements are illegal even if they are never carried out. In assessing whether businesses have entered into an illegal agreement, the Agencies consider direct and circumstantial evidence. For example, they may consider whether a business has discussed with another company wages or other potential terms of employment; engaged in parallel behavior that demonstrates a shared understanding; invited another company to participate in a plan to restrict competition for workers followed by action consistent with that plan; or used a common intermediary to obtain competitively sensitive information.

If the Agencies identify an agreement between companies relating to workers, they assess its impact on competition and the competitive process. Some types of agreements are illegal regardless of their effects. In other cases, the Agencies perform a deeper analysis, examining the impact of the agreement on workers by impairing the competitive process, suppressing competition, or the actual or likely effects of the conduct in the affected labor market.[8]

The Agencies also focus on whether the participants in a potential agreement compete for workers. Businesses can compete to hire or retain workers even if they make different products or offer different services. Accordingly, when assessing agreements that affect workers, the Agencies will focus on whether the businesses compete in the same labor markets even if they do not compete as sellers of products or services.

Companies can be labor market competitors even if they have some other collaborative or cooperative relationship, such as a joint venture that produces a good or provides a service. Companies can also be competitors in a labor market even if they are not competitors in downstream markets to produce a good or service. For example, airplane manufacturers and their part suppliers may both hire from the same market for engineers.

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[8] *United States v. Am. Airlines Grp. Inc.*, 121 F.4th 209, 220 (1st Cir. 2024).

1. Some types of agreements, including wage-fixing and no-poach agreements, may violate the antitrust laws and can lead to criminal charges

Businesses that compete with each other for workers may be committing an antitrust crime if they enter into an agreement not to recruit, solicit, or hire workers or to fix wages or terms of employment. Even if criminal charges are not pursued, these agreements may also be subject to civil liability.[9] Such agreements can violate the antitrust laws whether they are informal or formal, written or unwritten, or spoken or unspoken.[10]

Examples include:

- agreements between businesses, or between individuals at different businesses, about workers' salaries or other terms of compensation, such as bonuses, benefits, or other terms of employment, either at a specific level or within a range (sometimes called "wage-fixing agreements"); and
- agreements between businesses, or between individuals at different businesses, not to hire, solicit, and/or otherwise compete for current, former, or potential workers (sometimes called "no-poach" agreements, which may also be referred to as "no-hire" or "no-solicit"[11] or "market allocation" agreements).

The Agencies focus on the substance of a wage-fixing or no-poach agreement regardless of its precise form. If companies agree to align, stabilize, or otherwise coordinate the wages they set, including by agreeing to a range, ceiling, or benchmark for calculating wages, it does not matter if they do not agree on a specific wage.[12] Similarly, if a company agrees to restrict its ability to hire another

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[9] *See United States v. Lucasfilm Ltd.*, No. 10-02220 RBW (D.D.C. June 3, 2011); *United States v. Adobe Sys., Inc.*, No. 1:10-CV-01629-RBW (D.D.C. Mar. 17, 2011); *United States v. eBay, Inc.*, No. 12-CV-05869-EJD-PSG (N.D. Cal. 2014); *In re: Guardian Service Industries, Inc.*, No. 241 0082 (F.T.C. Dec. 4, 2024).

[10] *See United States v. Jindal*, No. 4:20-CR-00358, 2021 WL 5578687, at *4–5 (E.D. Tex. Nov. 29, 2021); *United States v. DaVita Inc.*, No. 1:21-CR-00229-RBJ, 2022 WL 266759, at *9 (D. Colo. Jan. 28, 2022); *United States v. Manahe,* No. 2:22-CR-00013-JAW, 2022 WL 3161781, at *6 (D. Me. Aug. 8, 2022).

[11] 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. Non-solicitation agreements are discussed below.

[12] *See Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 348 (1982) (holding, in a civil case, that an agreement among doctors fixing maximum rates that the doctors could receive for their services was a per se violation of the antitrust laws); *Plymouth Dealers' Ass'n of No. Cal. v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) (holding, in a civil case, that an agreement to fix the starting point for prices is a per se violation of the antitrust laws); Plea Agreement, *United States v. Topkins*, No. CR-15-201 (N.D. Cal. Apr. 30, 2015) (defendant pled guilty to price-fixing conspiracy implemented through conspirators' joint use of specific pricing algorithms), available at https://www.justice.gov/atr/case-document/file/628891/dl; Press Release, U.S. Dep't of Just., *Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution* (Apr. 6, 2015), https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace.

company's workers, it does not matter if the agreement does not completely prohibit hiring the other company's workers. For example, an agreement not to "cold call" workers is considered a no-solicit agreement regardless of whether the firms are allowed to hire the workers who applied for a position without first being solicited.[13]

When formed between competing or potentially competing employers, these types of agreements—whether entered into directly or through an intermediary[14]—are illegal even if they did not result in actual harm such as lower wages.[15] Nor does it matter if the agreement does not include specific pay rates. For example, an agreement to set a starting point for compensation may be a form of wage fixing under the law.[16]

The DOJ may criminally investigate and, where appropriate, bring felony charges against the participants in these agreements, including both individuals and companies.

The Criminal Antitrust Anti-Retaliation Act (CAARA) provides whistleblower protections for employees, contractors, subcontractors, and agents who report antitrust crimes, including no-poach and wage-fixing agreements.[17]

2. Franchise no-poach agreements may violate the antitrust laws

No-poach clauses in franchise agreements are also subject to antitrust scrutiny. Often, franchisors compete with franchisees for workers.[18] Franchisors sometimes enter into agreements with franchisees in which the franchisor and franchisee agree not to compete for workers. Such an agreement can be *per*

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[13] *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (in private civil damages case following Department of Justice consent decree, holding that plaintiffs plausibly alleged that five no-cold-call agreements were per se violations of the antitrust laws); *In re Animation Workers Antitrust Litigation*, 123 F. Supp. 3d 1175, 1213 (N.D. Cal. 2015) (in private civil damages case following Department of Justice consent decree, holding that plaintiffs had plausibly alleged that anti-solicitation agreements were per se violations of the antitrust laws); Final Judgment, *United States v. Ass'n of Fam. Prac. Residency Dirs.*, No. 95-0575-CV-W-2 (W.D. Mo. Aug. 15, 1996) (entering consent decree in a civil case to resolve allegations that defendants established policies prohibiting the use of certain practices for recruiting medical residents, which restrained price and other forms of competition), available at https://www.justice.gov/atr/case-document/file/628591/dl.

[14] *See* Final Judgment, *United States v. Ariz. Hosp. and Healthcare Ass'n*, No. CV07-1030-PHX (D. Ariz. Sept. 12, 2007), available at https://www.justice.gov/atr/case-document/file/487106/dl (entering consent decree to resolve allegations that association of hospitals violated the antitrust laws by setting a uniform bill rate schedule that member hospitals would pay for temporary and per diem nurses).

[15] Such agreements may require a fuller analysis of their effects, however, when the restraint is subordinate and collateral to a broader business collaboration, such as a joint venture, and is reasonably necessary to achieve the procompetitive potential of that collaboration. *See Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021)*; see also, e.g., In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345–46 (3d Cir. 2010)*; Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986)*; United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898).

[16] *See Plymouth Dealers' Ass'n*, 279 F.2d at 132–34 (holding that an agreement between car dealers to fix list prices was price fixing, although the dealers often used the list price as a starting point).

[17] *See* 15 U.S.C. § 7a-3.

[18] *See, e.g.*, *Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247, 1250 (11th Cir. 2022) (noting that Burger King "compete[s] . . . for employees" against "its separate and independent franchise restaurants").

se illegal under the antitrust laws.[19] In other words, the agreement itself may be illegal regardless of whether it actually harms workers.

Similarly, a franchisor may violate the antitrust laws by organizing or enforcing a no-poach agreement among franchisees that compete for workers.[20] Agreements among franchisees, either written or unwritten, not to poach, hire, or solicit each other's workers may violate other federal and state laws.[21]

3. Sharing competitively sensitive information—including wage information—with competitors may violate antitrust laws

Sharing competitively sensitive information with competitors about terms and conditions of employment may violate the antitrust laws.[22] Exchanging competitively sensitive compensation or other employment information with a competitor may be unlawful when the information exchange has, or is likely to have, an anticompetitive effect, whether or not that effect was intended.[23] An information exchange may be explicit or it may be implied from the conduct of parties who share competitively sensitive information (for example, information about compensation, benefits, or the terms of an employment contract). In addition, information exchanges may indicate the existence of a wage-fixing conspiracy.

Providing competitively sensitive information through an algorithm or through a third party's tool or product may also be unlawful. For example, the DOJ obtained a court-ordered settlement with a group of poultry processing companies and a data consulting company to resolve allegations that they (i) directly exchanged competitively sensitive information about current and future wages and benefits for plant workers; and (ii) did so through a third-party firm that facilitated the exchange of competitively sensitive compensation information.[24]

Information exchanges facilitated by or through a third party (including through an algorithm or other software) that are used to generate wage or other benefit recommendations can be unlawful even if the exchange does not require businesses to strictly adhere to those recommendations.[25] An agreement

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[19] *See, e.g.*, *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 705 (7th Cir. 2023).

[20] *See United States v. Apple Inc.*, 791 F.3d 290, 325 (2d Cir. 2015).

[21] *See, e.g.*, Wash. Rev. Code Ann. § 49.62.060 ("No franchisor may restrict, restrain, or prohibit in any way a franchisee from soliciting or hiring any worker of a franchisee of the same franchisor."); Minn. Stat. Ann. § 181.99.

[22] *See Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 410–12 (1921).

[23] *See* Final Judgment, *United States v. Utah Soc. for Healthcare Hum. Res. Admin.*, Civ. A. No. 94-C-282G (D. Utah Sep. 12, 1994), available at https://www.justice.gov/atr/case-document/file/628496/dl (entering consent decree to resolve allegations that a society of HR professionals conspired to exchange nonpublic prospective and current wage information about registered nurses, which enabled hospitals to keep nurses' wages artificially low).

[24] Final Judgment, *United States v. Cargill Meat Solutions Corp.*, No. 1:22-CV-01821 (D. Md. June 5, 2023), available at https://www.justice.gov/d9/2023-11/418169.pdf; *see also Jien v. Perdue Farms, Inc.*, No. 1:19-CV-2521-SAG, 2020 WL 5544183 (D. Md. Sept. 16, 2020).

[25] *See Duffy v. Yardi Sys., Inc.*, No. 2:23-CV-01391-RSL, 2024 WL 4980771, at *5 (W.D. Wash. Dec. 4, 2024).

to use shared wage recommendations, lists, calculations, or algorithms can also still be unlawful even where co-conspirators retain some discretion or cheat on the agreement.

Companies can sometimes work together as part of a transaction or collaboration (like a joint venture) in ways that are not illegal. Even if companies are parties to a legitimate transaction or are otherwise involved in a joint venture or other collaborative activity, an agreement between the companies to share information about wages or other terms of employment, including company data regarding worker compensation, may violate the antitrust laws.

4. Non-compete clauses can violate antitrust and other laws

Non-compete clauses that restrict workers from switching jobs or starting a competing business can violate the antitrust laws.[26] By preventing workers from leaving jobs to pursue better employment opportunities, non-competes decrease competition for workers. Non-competes may also harm competition by preventing other businesses from obtaining enough workers to enter a market or prevent potential competitors from forming, thereby blocking competitors from competing effectively with the original employer.

The Agencies may investigate and take action against non-competes and other restraints on worker mobility that limit competition. For example, in 2020, the DOJ entered into a deferred prosecution agreement in which a medical oncology practice admitted to conspiring to allocate chemotherapy and radiation treatments for cancer patients.[27] To remediate the harm and increase competition in the treatment of cancer patients going forward, the criminal resolution required the defendant to waive and not enforce non-compete provisions in contracts with its current or former employees who open or join an oncology practice in the region.

In 2021, the FTC pursed several enforcement actions charging the use of non-competes as unfair methods of competition under Section 5 of the Federal Trade Commission Act. These actions resulted in orders requiring the firms to eliminate non-competes for thousands of workers.[28] The FTC has also

[26] *See, e.g.*, *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (holding that several tobacco companies violated both Section 1 and Section 2 of the Sherman Act because of the collective effect of six of the companies' practices, one of which was the "constantly recurring" use of non-compete clauses); *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977) ("[E]mployee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act."); Decision and Order, *In re Ardagh Group S.A., et al.*, No. C-4785 (F.T.C. Feb. 21, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110182-c4785-ardagh-decision-and-order.pdf; Decision, *In re: O-I Glass, Inc.*, No. C-4786 (F.T.C. Feb. 21, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110182_c4786-o-i-glass-inc-decision-and-order.pdf; Decision, *In re: Prudential Security, Inc.*, No. C-4787 (F.T.C. Feb. 23, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/c47872210026prudentialsecurityfinalconsent.pdf; Decision and Order, *In re Anchor Glass Container Corp.*, No. C-4793 (F.T.C May 18, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/211_0182_c4793_anchor_glass_final_order_with_appendices.pdf.

[27] Deferred Prosecution Agreement, *United States v. Fla. Cancer Specialists & Rsch. Inst., LLC*, No. 2:20-cr-00078-TPB-MRM (M.D. Fla. Apr. 30, 2020), available at https://www.justice.gov/atr/case-document/file/1281681/dl; Press Release, U.S. Dep't of Just., *Leading Cancer Treatment Center Admits to Antitrust Crime and Agrees to Pay $100 Million Criminal Penalty* (Apr. 30, 2020), https://www.justice.gov/opa/pr/leading-cancer-treatment-center-admits-antitrust-crime-and-agrees-pay-100-million-criminal.

[28] Decision and Order, *In re Ardagh Group S.A., et al.*, No. C-4785 (F.T.C. Feb. 21, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110182-c4785-ardagh-decision-and-order.pdf; Decision, *In re: O-I Glass, Inc.*, No. C-4786 (F.T.C. Feb. 21, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110182_c4786-o-i-glass-inc-

taken action against non-competes when reviewing mergers. In multiple final orders settling charges that certain mergers violated federal antitrust laws, the FTC has required the parties to cease using, enforcing, and/or entering into non-compete clauses.[29]

In April 2024, the FTC issued a final rule banning most non-compete agreements, including provisions that function as non-competes.[30] That rule was scheduled to take effect on September 4, 2024. However, on August 20, 2024, the District Court for the Northern District of Texas issued an order setting aside the rule.[31] The order is currently on appeal.[32] The latest information regarding the status of the non-compete final rule is available at ftc.gov/noncompetes. Regardless, the FTC retains the legal authority to address non-competes through case-by-case enforcement actions under the FTC Act, as it has done in the past.

Non-competes may also violate other federal laws, such as the National Labor Relations Act[33] and the Packers and Stockyards Act.[34] Non-competes can also violate state laws, including laws banning unfair methods of competition and unfair or deceptive practices, as well as statutes banning or restricting some or all non-competes.[35]

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decision-and-order.pdf; Decision, *In re: Prudential Security, Inc.*, No. C-4787 (F.T.C. Feb. 23, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/c47872210026prudentialsecurityfinalconsent.pdf; Decision and Order, *In re Anchor Glass Container Corp.*, No. C-4793 (F.T.C May 18, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/211_0182_c4793_anchor_glass_final_order_with_appendices.pdf.

[29] Decision and Order, *In the Matter of Zimmer Holdings, Inc.*, No. C-4534 (F.T.C. Aug. 11, 2015), available at https://www.ftc.gov/system/files/documents/cases/150820zimmerdo.pdf; Press Release, Fed. Trade Comm'n*, FTC Approves Final Order Requiring Divestitures of Hundreds of Retail Gas and Diesel Fuel Stations Owned by 7-Eleven, Inc.* (Nov. 10, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-approves-final-order-requiring-divestitures-hundreds-retail-gas-diesel-fuel-stations-owned-7; Decision and Order at 12–14, *In the Matter of Davita Inc. and Total Renal Care, Inc.*, No. C-4752 (F.T.C. Jan. 10, 2022), available at https://www.ftc.gov/system/files/documents/cases/211_0056_c4752_davita_utah_health_order.pdf; Press Release, Fed. Trade Comm'n*, FTC Approves Final Order Restoring Competitive Markets for Gasoline and Diesel in Michigan and Ohio* (Aug. 9, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-approves-final-order-restoring-competitive-markets-gasoline-diesel-michigan-ohio.

[30] Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024).

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

[32] *See* Notice of Appeal, Ryan LLC et al. v. FTC, No. 3:24-CV-00986-E (N.D. Tex. Oct. 18, 2024), available at https://www.uschamber.com/assets/documents/FTC-Notice-of-Appeal-Ryan-LLC-v.-FTC-Fifth-Circuit.pdf.

[33]*See* Nat'l Lab. Rels. Bd., *Filing an Unfair Labor Practice Charge with the National Labor Relations Board* (2024), https://www.nlrb.gov/sites/default/files/attachments/pages/node-184/info-for-workers-subject-to-noncompetes-or-stay-or-pay-provisions.pdf.

[34] Final Judgment, *United States v. Koch Foods Inc.*, No. 1:23-CV-15813 (N.D. Ill. Feb. 12, 2024), available at https://www.justice.gov/atr/media/1377131/dl; Press Release, U.S. Dep't of Just., *Justice Department Files Lawsuit and Proposed Consent Decree to Prohibit Koch Foods from Imposing Unfair and Anticompetitive Termination Penalties in Contracts with Chicken Growers* (Nov. 9, 2023), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decree-prohibit-koch-foods-imposing.

[35] For example, non-competes have been void in California and North Dakota for over a century. *See* Cal. Bus. & Prof. Code § 16600 *et seq.*; N.D. Cent. Code § 9-08-06.

5. Other restrictive, exclusionary, or predatory employment conditions can also be unlawful

The Agencies may also investigate and take action against other restrictive agreements that impede worker mobility or otherwise undermine competition.

The following examples illustrate how restrictive conditions could potentially violate the antitrust laws or other federal or state laws.

- **Non-disclosure agreements** can violate the antitrust laws when they span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job. For example, a non-disclosure agreement drafted so broadly as to prohibit disclosure of any information that is "usable in" or "relates to" an industry may be unlawful.[36] Non-disclosure agreements can also violate federal law when they are worded so broadly as to suggest that workers who report potential violations of law to state or federal law enforcement or regulators, or who cooperate with a government investigation, could face lawsuits and adverse employment consequences.[37]
- **Training repayment agreement provisions** are requirements that a person repay any training costs if they leave their employer. Depending on the facts and circumstances, these provisions can be anticompetitive, such as if they function to prevent a worker from working for another firm or starting a business.[38]
- **Non-solicitation agreements** that prohibit a worker from soliciting former clients or customers of the employer similarly can, depending on the facts and circumstances, be anticompetitive, such as if they are so broad that they function to prevent a worker from seeking or accepting another job or starting a business.
- **Exit fee and liquidated damages provisions** require workers to pay a financial penalty for leaving their employer. Depending on the facts and circumstances, these provisions can be anticompetitive,[39] such as if they prevent workers from working for another firm or starting a business.

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[36] *See Brown v. TGS Mgmt.*, 57 Cal. App. 5th 303, 316–19 (2020).

[37] *See, e.g.*, *EEOC v. Astra USA*, 94 F.3d 738, 744–45 (1st Cir. 1996); *FTC v. AMG Services, Inc.*, No. 2:12-CV-00536-GMN-VCF, 2013 WL 12320929, at *4 (D. Nev. Aug. 20, 2013); *Sparks v. Seltzer*, No. 05-CV-1061 (NG) (KAM), 2006 WL 2358157, at *4 (E.D.N.Y. Aug. 14, 2006); *EEOC v. Int'l Profit Assocs.*, No. 01 C 4427 (N.D. Ill. Apr. 23, 2003) (unpublished); *Hoffman v. Sbarro, Inc.*, No. 97 CIV. 4484(SS), 1997 WL 736703, at *1 (S.D.N.Y. Nov. 26, 1997).

[38] *See* Statement of Interest of the United States of America at 20, *Mizell v. Univ. of Pittsburgh Med. Ctr.*, No. 1:24-CV-00016-SPB (W.D. Penn. Sept. 30, 2024), ECF No. 50 [hereinafter *Mizell* Statement of Interest], available at https://www.justice.gov/atr/media/1371576/dl.

[39] *See* Final Judgment, *United States v. Koch Foods Inc.*, No. 1:23-CV-15813 (N.D. Ill. Feb. 12, 2024), available at https://www.justice.gov/atr/media/1377131/dl (consent decree resolving allegations that termination payment provisions in poultry grower contracts violated Section 1 of the Sherman Act and Section 202(a) of the Packers and Stockyards Act in which the defendant poultry processor agreed to repay all termination payments it had received from farmers and to refrain from including termination payment obligations in future poultry grower contracts).

These types of restrictions can harm labor market competition by preventing workers from seeking better, higher-paying jobs. When firms hold monopsony power in a labor market, they may exploit their bargaining power to impose restrictive, exclusionary, or predatory employment terms that deprive workers of fair competitive pay and of the ability to bargain for better working conditions.[40] These restrictions can also harm competition for goods and services by raising entry barriers for new businesses, and by depriving existing businesses of the opportunity to hire the talent necessary to compete. Such provisions raise many of the same antitrust concerns as non-competes, and the Agencies may investigate if there are indications that such a restrictive condition on workers is harming competition.

Other federal agencies have their own authorities to address unfair methods of competition, including practices that undermine labor market competition.[41] Many of these agencies have enforced against restraints on worker mobility.[42] State law also sets limits on training repayment requirements and NDA restrictions.[43]

6. The antitrust laws apply to agreements that businesses reach with independent contractors

The antitrust laws prohibit anticompetitive conduct directed at workers, which includes both employees and independent contractors. Many businesses hire workers as independent contractors rather than as employees. Independent contractors typically are hired to perform discrete jobs, are not under the direct supervision of the firm, and often use their own tools.[44] With the growth of technology platforms such as smartphone apps, some firms use independent contractors rather than employees to match workers who provide labor with consumers seeking their services.

The antitrust laws also apply to these kinds of platform businesses, with respect to both their employees and independent contractors seeking work through their platform. For example, an agreement between two or more competing platforms to fix the compensation of independent contractors offering their services via the platforms may constitute the type of *per se* violation of the antitrust laws that the exposes the platforms to criminal liability.

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[40] *See Mizell* Statement of Interest at 1.

[41] *See*, *e.g.*, 7 U.S.C. § 192 (U.S. Department of Agriculture's Section 202 authority under the Packers and Stockyards Act); 29 U.S.C. §§ 157, 158 (National Labor Relation Board's Section 7 and 8(a)(1) authorities under the National Labor Relations Act); 49 U.S.C. § 41712 (U.S. Department of Transportation's authority under the Federal Aviation Act).

[42] *See, e.g.*, Consumer Fin. Prot. Bureau Office for Consumer Populations, Issue Spotlight: Consumer Risks Posed by Employer-Driven Debt (July 20, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report; Nat'l Lab. Rels. Bd., *Region 9-Cincinnati Secures Settlement Requiring Juvly Aesthetics to Rescind Unlawful Non-Compete and Training Repayment Agreement Provisions (TRAPs) and Pay Over $25,000 to Employees* (Feb. 6, 2024), https://www.nlrb.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-secures-settlement-requiring-juvly; *Su v. Advanced Care Staffing, LLC*, 23-CV-2119 (E.D.N.Y. March 20, 2023) (suing to enjoin enforcement of a training repayment agreement as a violation of the Fair Labor Standards Act).

[43] *See*, *e.g.*, Colo. Rev. Stat. § 8-2-113(3)(a)-(b).

[44] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1639 (Jan. 10, 2024) (codified at 29 C.F.R. 780).

7. False earnings claims can violate the law

The Agencies may investigate and take action against businesses that make false or misleading claims about potential earnings that workers (including both employees and independent contractors) may realize. For example, the FTC has taken action against an online retailer,[45] a ride-sharing company,[46] a customer service gig work platform,[47] and a food delivery company[48] for allegedly falsely advertising that workers would earn substantially more in compensation and/or tips than they did in reality. When workers are lured to these businesses by false earnings promises, honest businesses are less able to fairly compete for those workers.

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[45] Complaint, Fed. Trade Comm'n, *In the Matter of Amazon.com, Inc. and Amazon Logistics, Inc.*, No. 1923123 (Feb. 2021), available at https://www.ftc.gov/system/files/documents/cases/amazon_flex_complaint.pdf.

[46] Complaint, *FTC v. Uber Technologies, Inc.*, No. 3:17-CV-00261 (N.D. Cal. Jan. 19, 2017), available at https://www.ftc.gov/system/files/documents/cases/1523082ubercmplt.pdf.

[47] Complaint, *FTC v. Arise Virtual Solutions, Inc.*, No. 0:24-CV-61152 (S.D. Fla. July 2, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/arise_complaint.pdf.

[48] Complaint, *FTC v. Grubhub Inc.*, No. 1:24-CV-12923 (N.D. Ill. Dec. 17, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2024-12-17-GrubhubComplaint.pdf.

8. Report violations

The Department of Justice's Antitrust Division and the Federal Trade Commission encourage anyone who notices any of the above activities or other suspicious behavior and believes that there has been an antitrust violation to report it to either or both offices.

Contact the Antitrust Division's Complaint Center	**Contact the FTC's Bureau of Competition Complaint Intake**
Online complaint portal: https://www.justice.gov/atr/webform/submit-your-antitrust-report-online	Online complaint portal: https://www.ftc.gov/enforcement/report-antitrust-violation
Phone: 202-307-2040; 888-647-3258	
Mail: Complaint Center, U.S. Department of Justice, Antitrust Division 950 Pennsylvania Avenue NW Room 3322 Washington, DC 20530	Mail: Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission 600 Pennsylvania Avenue NW Washington, DC 20580

The Antitrust Division and the FTC encourage anyone seeking to submit a complaint to provide the following types of information with your complaint:

- What are the names of companies, individuals, or organizations that are involved?
- How have these companies, individuals, or organizations potentially violated federal antitrust laws?
- What examples can you give of the conduct that you believe may violate the antitrust laws?
- Who is affected by this conduct?
- How do you believe competition may have been harmed?
- How did you learn about the situation?