2024

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THE RISE OF LABOR ISSUES AS AN ANTITRUST PRIORITY

Richard Dagen*

Maryanne Magnier**

INTRODUCTION

In the early days of his administration, President Biden promised that labor would take a prominent role in antitrust enforcement,¹ and there is no question that he has fulfilled that promise. An ongoing trend for 2024 and beyond will be increased antitrust enforcement in the labor market from both the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (collectively, “the Agencies”) as well as a growing number of Sherman Act claims by private plaintiffs. This rise in labor antitrust enforcement will doubtlessly affect transactional, labor, and corporate lawyers and businesspeople outside the antitrust sphere.

On July 19, 2023, the White House Competition Council announced new actions on the second anniversary of President Biden’s Executive Order on Competition.² The Council noted several new initiatives, findings, and updates, including a proposed rule by the FTC that would ban nearly all agreements not to compete between employers and employees (which is now in effect), the Treasury Department’s report finding that a lack of competition in labor markets lowers wages by roughly twenty percent, the partnership between the Department of Labor (“DOL”) and the DOJ to support worker mobility and more competitive labor markets, the FTC and the DOJ’s agreement to share information with the National Labor Relations Board, and the DOJ’s successful

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¹ Exec. Order No. 14,036, Promoting Competition in the American Economy, 86 Fed. Reg. 36987, 36988 (July 9, 2021) (“This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets . . . .”)


See id.
challenge to the Penguin Random House/Simon & Schuster book publisher merger to protect authors.\textsuperscript{3} Even more recently, the FTC filed a complaint challenging the proposed Kroger/Albertson’s supermarket merger, which in addition to traditional allegations relating to consolidation in supermarket services, also alleges that the transaction would reduce bargaining leverage for grocery store union employees.\textsuperscript{4} These developments represent the new front of antitrust enforcement. However, it must be noted that while these developments represent the new wave of labor cases, labor issues already have a history in the antitrust world, particularly in sports cases.\textsuperscript{5}

These shifting priorities have been accompanied by an increase in no-poach, no-hire, and noncompete cases brought by both the Agencies and private plaintiffs.\textsuperscript{6} This unprecedented focus on labor has significantly changed the landscape regarding mergers and acquisitions (“M&A”) activity. Notably, the Agencies finalized the 2023 Merger Guidelines on December 18, 2023.\textsuperscript{7} These guidelines include, for the first time, a section dedicated to understanding the impact of a proposed merger on labor.\textsuperscript{8} Relatedly, the FTC and the DOJ have also proposed changes to the premerger notification review process that would mandate additional information from companies, including more details on the merger’s impact on the labor market.\textsuperscript{9}

\begin{itemize}
  \item \textsuperscript{3} Id.
  \item \textsuperscript{6} Hittinger et al., supra note 5.
  \item \textsuperscript{7} U.S. DEP’T OF JUST. & PED. TRADE COMM’N, MERGER GUIDELINES 26-27 (2023) [hereinafter 2023 MERGER GUIDELINES], https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf.
  \item \textsuperscript{8} See id. at 26-27.
  \item \textsuperscript{9} See An Interview with Axinn Veltrop & Harkrider LLP Discussing Merger Control in the United States, LEXOLOGY (Dec. 1, 2023), https://www.lexology.com/library/detail.aspx?g=a8b48fc6-5856-4a53-847e-bf06d8a0ede.
I. MERGERS

Traditionally, merger antitrust analysis has focused primarily on product markets, such as the impact of a proposed transaction on the price and quality of products such as gasoline, groceries, pharmaceutical products, and semiconductors. However, analogous problems arise in labor markets, where companies may exercise market power as buyers of labor. Although this is a somewhat newer focus, antitrust laws and the Agencies’ enforcement power apply to all markets, for both traditional consumer products and labor alike.

Since President Biden’s election, the Agencies have increased their focus on a merger’s potential effects on labor markets. On June 27, 2023, the FTC and the DOJ proposed requirements regarding the premerger notification filing process under the Hart-Scott-Rodino (“HSR”) Act that would mandate the inclusion of additional information from companies relating to the merger’s impact on the labor market, regardless of whether the merged entity would be a significant employer. The amendments would require merging companies to disclose detailed information regarding employees, including a five-year history of citations from the Occupational Safety and Health Administration, the National Labor Relations Board, and the Department of Labor’s Wage and Hour Division and to report overlapping employee geographies.

An even more important development is the addition of a section dealing specifically with labor markets in the FTC’s and DOJ’s jointly released 2023 Merger Guidelines (“the Guidelines”). Guideline 10 is titled: “When a Merger Involves Competing Buyers, the Agencies Examine Whether it May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.” The Guidelines also note that Section 7 prohibits mergers that “may substantially lessen competition or tend to create a monopoly in any line of commerce and in any section of the country,” which is not limited solely to

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11 Id.
12 CONG. RSC. SERV., LSB10725, ANTITRUST ISSUES IN LABOR MARKETS 1 (2022) (“As a formal matter, the antitrust laws apply to all markets, for products and labor alike.”).
14 Id. at 42198.
15 See generally 2023 MERGER GUIDELINES, supra note 7, at 26-27 (requiring an examination of how a merger between competing buyers “may substantially lessen competition for workers, creators, suppliers, and service providers”).
16 Id. at 26.
competition among sellers. Guideline 10 explains that a merger between firms could substantially lessen competition for workers, which in turn could lower wages, slow wage growth, or worsen workers’ benefits or working conditions.

In a joint statement regarding the Proposed Merger Guidelines, Commissioner Bedoya, joined by Chair Khan and Commissioner Slaughter, expressly stated that the guidelines would recognize labor unions as “valuable sources of evidence” to help understand the industries.

The Guidelines contain some distinctions between labor and product market analysis in the requisite levels of anti-competitive behavior before the Agencies will intervene. For example, the Guidelines state, “the level of concentration at which competition concerns arise may be lower in labor markets than in product markets, given the unique features of certain labor markets.” The Guidelines also state that labor markets can be “relatively narrow” given the “switching costs,” which can arise from investments specific to a type of job or a particular geographic location. “For example, labor markets often exhibit high switching costs and search frictions due to the process of finding, applying, interviewing for, and acclimating to, a new job.” Of note, however, the Guidelines do not acknowledge that a labor geographic market could be narrower or broader than the product market. Further, as discussed below, the empirical literature primarily relied on by the FTC in their advocacy supports a higher concentration threshold, not

17 Id. (emphasis in original).
18 Id. at 26-27.
20 2023 MERGER GUIDELINES, supra note 7, at 27.
21 Id.
22 Id.
23 See id. at 48 (discussing how to define a geographic market for labor).
26 For example, a hospital merger might be local, while the demand for surgeons or nurses could be regional or national. See supra notes 22-25 and accompanying text.
a lower one. The Guidelines re-emphasize that a merger’s harm from decreased competition among buyers is not saved by increased competition among sellers. In other words, “a merger can substantially lessen competition in one or more buyer markets, seller markets, or both, and the Clayton Act protects competition in any one of them.”

On February 26, 2024, the FTC, along with nine attorneys general (representing Arizona, California, Washington, D.C., Illinois, Maryland, Nevada, New Mexico, Oregon, and Wyoming), challenged Kroger’s $24.6 billion acquisition of Albertsons in federal district court in Oregon. In addition to challenging the merger’s effect on supermarket services, the FTC also alleged anticompetitive harm in the market for grocery labor (excluding non-union employees). The geographic markets were defined by the areas covered by the local collective bargaining agreements (“CBAs”). Those local CBAs governed the local supermarkets for each of the chains. The FTC alleged the merger was presumptively anticompetitive and presumptively illegal because the post-merger market shares in numerous “local CBA areas” would exceed thirty percent with a change in HHI over one hundred points. However, the FTC then highlighted a large number of such areas where the combined share would be between sixty-five percent and one hundred percent. It is likely that the FTC will focus on the more concentrated areas if the case proceeds to trial. In addition to the Guidelines’ HHI presumption of illegality, the FTC cites instances where the unions played these large employers off one another to get better terms and conditions for union employees, concluding that the merger would reduce bargaining leverage for the United Food and Commercial Workers Union, which represents the two firms’ nearly 700,000 combined employees.

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28 2023 MERGER GUIDELINES, supra note 7, at 27 (“If the merger may substantially lessen competition or tend to create a monopoly in upstream markets, that loss of competition is not offset by purported benefits in a separate downstream product market.”).
29 Id. at 27.
31 Id. ¶ 63-64, In re Kroger Co. & Albertsons Cos., No. D-9428 (FTC Feb. 26, 2024).
32 Id. ¶ 65-67.
33 Id.
34 Id. ¶ 68. The HHI is a measure of industry concentration, and the formula involves adding up the square of each firm’s share. 2023 MERGER GUIDELINES, supra note 7, at 9.
35 Id.
nationwide. An FTC spokesperson confirmed that In re Kroger Co. represents the first legal challenge mounted by the FTC with an explicit labor focus.

Earlier, in February of 2022, the FTC voted unanimously to file, along with the state of Rhode Island, a complaint to enjoin the proposed merger of healthcare providers Lifespan Corporation and New England Health System. In the concurring statement issued by Chairman Khan and Commissioner Slaughter, the two Democrat Commissioners wrote that they would have also “supported an allegation that the effect of the proposed transaction may be to substantially lessen competition in a relevant labor market[].” In its decision, the Rhode Island Attorney General professed “concern[] that the Proposed Transaction is likely to substantially reduce competition in the labor market for nurses.” The decision found that the merged entity would “dominate the market for nurses, accounting for sixty-seven percent of full-time registered nurses employed by Rhode Island Hospitals.”

As part of its more intensive merger scrutiny, the FTC continues its efforts to restrict the use of Certificates of Public Advantage (“COPAs”). COPAs are creatures of state statutes that provide state regulatory oversight over healthcare systems’ mergers and collaborative agreements that protect them from antitrust

36 Id. ¶¶ 3, 70.
42 OFF. OF ATT’Y GENERAL, STATE OF RHODE ISLAND, FINAL DECISION RE: HOSPITAL CONVERSIONS ACT INITIAL APPLICATION OF RHODE ISLAND ACADEMIC HEALTH CARE SYSTEM, INC. 63 (2023), https://www.riag.ri.gov/media/2996/download.
43 Id.
scrutiny under the state action doctrine exemption. The objective of a COPA is to permit mergers that otherwise may not pass federal antitrust scrutiny because the merger benefits the public. In a rare unanimous decision, the FTC voted five to zero to issue a policy paper and fact sheet in August of 2022, which details research showing that COPAs are likely to be detrimental to patient costs, patient care, and, of import here, healthcare worker wages.

In October of 2022, the FTC submitted a comment to the New York State Department of Health opposing a request by SUNY Upstate Medical University and Crouse Health System to grant a COPA. An FTC press release regarding the comment included the observation that anticompetitive mergers permissible through COPAs frequently result in “lower wage growth for nurses, pharmacy workers, and certain other non-medical skilled workers.” The FTC filed a similar comment in connection with a COPA in Texas in 2020. However, Texas regulators ultimately used the COPA law to approve the merger between Hendrick Health Systems and Abilene Regional Medical Center.

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46 Fed. Trade Comm’n, supra note 44.

47 Fed. Trade Comm’n, supra note 45.


The FTC’s merger labor agenda has relied heavily on a study by economists Elena Prager and Matt Schmitt that found that hospital mergers with very large changes in concentration were associated with lower wage growth for certain healthcare workers. The study found that changes in the HHI in the neighborhood of 1,100 points or above might result in such effects, but importantly, the study also found no such effects for smaller changes in HHI. FTC advocacy has attempted to move this 1,100 threshold lower as part of its COPA advocacy, and the 2023 Merger Guidelines move the threshold lower still (reflected in the In re Kroger challenge). None of the labor thresholds have been court-tested. Nonetheless, going forward, it will be important for merging firms to keep in mind the effects a merger may have on the labor market and begin collecting data and information to explicitly demonstrate to the Agencies how the merged firm will not harm the labor market.

II. LITIGATION

A. No-Poach, No-Hire Cases, & Wage-Fixing

The DOJ and the FTC have expanded their focus to include no-poach and no-hire agreements and in turn have been filing more cases, both civilly and criminal ly. To clarify the terminology, no-poach and no-hire agreements are quite similar but are not interchangeable. “No-poach” provisions are more akin to non-solicitation agreements, which preclude recruiting, but not necessarily hiring. No-hire agreements go further—the participants cannot hire one another’s employees even if the potential employee applies unsolicited. It is not just the


52 Prager & Schmitt, supra note 27, at 18-19.
53 See id.
Agencies bringing these types of suits. In follow-on private suits, class action groups of employees have brought suits for treble damages.\textsuperscript{56} Courts have analyzed these cases under both a “per se”\textsuperscript{57} and a “rule of reason”\textsuperscript{58} analysis. A particularly notable development in the wage-fixing sphere is the DOJ charging these cases criminally for the first time, beginning in 2020.\textsuperscript{59} Collectively, these cases show that despite a lack of clear consensus on which antitrust legal standard applies to these cases, agencies and private plaintiffs are continuing to bring them. Therefore, business owners and corporate counsel should proceed with caution accordingly.

**B. Notable Civil Cases**

There are currently a handful of recent and ongoing civil and criminal cases worth analyzing. These cases include both Section 1 no-poach and no-hire conspiracy allegations and Section 2 single-firm cases.

1. **Section 1 Cases**

At the end of the Trump administration, in 2019, the United States filed a statement of interest in *In re Railway Industry Employee No-Poach Agreement Antitrust Litigation*, laying the groundwork for future enforcement.\textsuperscript{60} The plaintiffs in this case alleged the defendants agreed to “refrain from soliciting or hiring each other’s employees without the consent of the current employer,” i.e. agreements are concluded between competitors (i.e., employers) who agree not to hire (some of) each other’s employees, even if they applied of their own volition.”\textsuperscript{56}

\textsuperscript{56} Rochella Davis, *What About Class Actions?: Why the Per Se No-Poach Debate Matters in Class Actions*, CONCURRENCES COMPETITION L. REV., Nov. 2023, at 32 (“This is especially true in antitrust class actions because plaintiffs can recover treble damages amounting to three times the amount of damages they have proven under Section 4 of the Clayton Act.”).

\textsuperscript{57} Restraints analyzed under the per se rule are those that are typically seen as so inherently anticompetitive that they warrant condemnation without further inquiry into their effects on the market or any procompetitive effects. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S 150, 218 (1940) (“[P]rice-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”).

\textsuperscript{58} Established in *Standard Oil*, the “rule of reason” analysis establishes that a business practice is illegal if it unreasonably restricts trade. *See Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 98 (1911). Courts often find intent and motive relevant in predicting future consequences during a rule of reason analysis. *See Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69, 81 (citations omitted) (“Determining whether a restraint is undue for purposes of the Sherman Act ‘presumptively’ calls for what we have described as a ‘rule of reason analysis.’ That manner of analysis generally requires a court to ‘conduct a fact-specific assessment of market power and market structure’ to assess a challenged restraint’s ‘actual effect on competition.’”).

\textsuperscript{59} See infra Section II.A.

no-poach agreements. The government’s statement of interest stated, “[t]he United States has a particular interest in this case because it follows the enforcement action in United States v. Knorr-Bremse AG, . . . in which the United States challenged as per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1.”\textsuperscript{62} Knorr-Bremse resulted in a settlement agreement where rail equipment suppliers confirmed that each company had unilaterally withdrawn from all no-poach agreements and that they would not enforce any no-poach agreements with “any other employer relating to employees located or being hired to work in the United States.”\textsuperscript{63}

More recently, in Deslandes v. McDonald’s, the Seventh Circuit asserted a Section 1 antitrust challenge to a clause in McDonald’s franchise agreements barring its franchises from poaching employees from other franchisers.\textsuperscript{64} This was a unanimous opinion authored by Judge Frank Easterbrook, widely regarded as an important judge in the antitrust field. In McDonald’s, the Seventh Circuit held that the district court erred by rejecting the plaintiffs’ theory that the no-poach clause was per se unlawful at the motion-to-dismiss stage.\textsuperscript{65} The Seventh Circuit reversed the lower court decision and stated that the district court gave up on the per se standard too early, although it agreed the case failed under the rule of reason analysis.\textsuperscript{66} The Seventh Circuit agreed with the lower court decision that the complaint was deficient under the rule of reason because it did not allege that McDonald’s and its franchises collectively have power in the market for restaurant workers’ labor, and market power is essential to any claim under the rule of reason analysis.\textsuperscript{67} It was undisputed that within three miles of

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{61} In re Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d at 476.
  \item \textsuperscript{64} Deslandes v. McDonald’s USA, LLC, 81 F.4th 699, 705 (7th Cir. 2023), cert. denied, No. 23-562, 2024 WL 1143666 (U.S. 2024).
  \item \textsuperscript{65} Id. at 704.
  \item \textsuperscript{66} Id. at 703-05. In his discussion of the case, Judge Easterbrook explains the district court “thought that the anti-poach clause [was] justified as an ancillary restraint.” Id. at 703. Additionally, the district court “deemed the restraint ancillary because it appeared in franchise agreements—and each agreement expand[ed] the output of burgers and fries.” Id. However, Judge Easterbrook took issue with this approach because “it treat[ed] benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing).” Id. However, he noted taking such an approach “is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs, and Alston establishes otherwise.” Id. Additionally, Judge Easterbrook argues that “[a]nother problem with using the appearance of a clause in a contract that, on the whole, increases output, is that the clause may have nothing to do with the output.” Id. at 704. Ultimately, the Seventh Circuit concluded that the complaint raised complex questions that could not be answered by the plain language of the complaint. Id. at 705. Instead, they “require[d] careful economic analysis.” Id.
  \item \textsuperscript{67} Id. at 702.
\end{itemize}
\end{footnotesize}
the plaintiff’s home, there were between forty-two and fifty “quick-service restaurants as well as two McDonald’s franchises” and that “within ten miles of her home there [were] 517 quick-service restaurants.” Therefore, the district court’s conclusion that there was no alleged market power was not an abuse of discretion. However, Judge Easterbrook stated that “the district judge jettisoned the per se rule too early” since the complaint alleges a horizontal restraint, and market power is not essential to antitrust claims involving naked agreements among competitors.” In opposing certiorari, McDonald’s employees argued that there was no circuit split created by the lower court’s decision because the Seventh Circuit was the first appellate court “to have even considered how the ancillary restraints doctrine applies to a no-hire agreement between a franchisor and its franchisees.”

Around the same time, a district court in Louisville, Kentucky considered a class action no-poach suit against Papa John’s and ultimately denied the approval of a $5 million payout to Papa John’s employees, stating that it was not “not entirely obvious” the no-poach agreements harmed franchise employees. In the complaint, restaurant employees alleged that the restaurants’ franchise agreement provisions barred franchisors from soliciting the employees of other franchises of the same chain, which depressed wages, benefits, and promotions. The parties disagreed on whether the contractual provisions should be subject to a per se or rule of reason analysis. In his order, the district judge stated that “the parties haven’t yet explained the common proof that would predominate assuming the per se rule applies,” and that although it was clear that the “restraints made advancing up the ranks at Papa John’s more difficult,” the plaintiffs offered “no theory why a worker wouldn’t simply switch to a different restaurant.” The judge also noted that “the lawyers should clarify their

68 Id. at 703.
69 See id. at 703 (“This is not a situation in which a court can treat employment for a single enterprise as a market all of its own.”).
70 Id. at 703. “Each franchise operator promised not to hire any person employed by a different franchise, or by McDonald’s itself, until six months after the last date that person had worked for McDonald’s or another franchise. A related clause barred one franchise from soliciting another’s employee.” Id. at 702.
71 Brief of Respondents in Opposition to Petition for Writ of Certiorari at 2, Deslandes v. McDonald’s USA, LLC, 81 F.4th 699, 705 (7th Cir. 2023), cert. denied, No. 23-562, 2024 WL 1143666 (U.S. 2024).
75 Id. at *6.
76 Id. at *6.
theory,” as to why the geographic market to be analyzed was a nationwide market of all Papa John’s employees, rather than “all fast-food employers in a smaller geographic area.” An important takeaway from this case is that counsel must be clear going forward as to the scope of the geographic market in question, and why or why not it should be narrowed based on presumed loyalty to a particular brand.

Also in 2023, the Southern District of New York considered a no-poach class action where Saks Fifth Avenue and several other high-end designers were accused of conspiring to stifle employee mobility and to keep luxury-worker pay artificially low. The judge determined that the action was barred by the statute of limitations. However, the court also stated that while the plaintiffs’ allegations indicate that Saks pays its luxury retail employees less than the defendants, this fact alone “does not indicate that Saks can control [luxury retail employees’] salaries market-wide.” Accordingly, the judge also ruled that the plaintiffs alleged insufficient facts to support a direct adverse effect on competition and failed to show that Defendants held market power in the relevant market. Therefore, the defendants thus failed to allege an indirect “adverse effect on competition as a whole in the relevant market.”

2. Section 2 Cases

In January 2024, a federal district court in the Ninth Circuit denied Ultimate Fighting Championship’s (“UFC”) motion for summary judgment on claims alleging the company suppressed fighter wages by up to $1.6 billion. In denying the motion, the court found there was a genuine dispute about whether UFC used its market power to suppress wages, even if other measures of output went up. This case illustrates that an increase in hiring and workers’ salaries is not enough to defeat Section 2 claims at summary judgment.

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77 Id. at *5.
79 Id. at 195.
80 Id. at 210.
81 Id. (quoting Spinelli v. Nat’l Football League, 903 F.3d 185, 212 (2018)).
82 Giordano, 654 F. Supp 3d at 210 (quoting Spinelli v. Nat’l Football League, 903 F.3d 185, 212 (2018)).
84 Le v. Zuffa, LLC, No. 2:15-cv-01045-RFB-BNW, 2024 WL 195994, at *5 (D. Nev. Jan. 18, 2024). The court thus rejected UFC’s argument that summary judgment was merited because it was undisputed that the company “increased the raw numbers for bouts, hiring, promotions, and compensation during the class period.” Id. (“That prices and outputs steadily increased is not dispositive.”).
C. Criminal Cases

In October of 2016, the DOJ stated that it intended to criminally prosecute no-poach agreements, since “these types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.”\(^{85}\) Several criminal no-poach cases have been brought forth since.\(^{86}\) The DOJ has included various arrangements, such as agreements not to solicit, recruit, cold call, hire, or hire without prior approval, under the umbrella of no-poach.\(^{87}\)

The DOJ’s 2022 lawsuit against Denver-based dialysis firm DaVita Inc. and its former CEO was the first time a company and top executive were charged criminally for a no-poach provision under the Sherman Act.\(^{88}\) However, a jury acquitted DaVita and the CEO on all charges.\(^{89}\) Still, the DOJ was undeterred. In 2021, the DOJ charged the owner and operator of Surgical Care Affiliates, a provider of outpatient medical care centers, with allegedly conspiring with other health providers to not solicit each other’s senior-level employees.\(^{90}\) In November of 2023, the Division voluntarily dismissed the indictment without prejudice.\(^{91}\) However, this did not end the DOJ’s attempts to charge these types of cases criminally, and the DOJ has since brought several more criminal cases involving effects on labor markets.\(^{92}\)

Indeed, the DOJ’s Antitrust Division has not yet had significant success obtaining convictions in these criminal cases, losing three jury trials in a row including DaVita.\(^{93}\) The DOJ did obtain a guilty plea from a Vegas nurse staffing company stemming from allegations that it conspired with a competitor not to

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\(^{85}\) U.S. DEP’T OF JUST. & FED. TRADE COMM’N, supra note 54, at 4.

\(^{86}\) See id. at 3-4; Robert Anello, Are DOJ’s No-Poach Prosecutions Getting Poached?, FORBES (May 10, 2023, 2:19 PM), https://www.forbes.com/sites/insider/2023/05/10/are-doj-s-no-poach-prosecutions-getting-poached/.

\(^{87}\) See U.S. DEP’T OF JUST. & FED. TRADE COMM’N, supra note 54, at 4.


hire each other’s nurses.\textsuperscript{94} Notably, a manager who was charged with participating in the scheme subsequently entered into a pretrial diversion agreement to resolve the charges against him, which imposed no jail time.\textsuperscript{95} Although the extent to which the DOJ will continue to prosecute these types of cases criminally is unclear, what is clear is that the Agencies’ antitrust scrutiny of labor markets is not going anywhere anytime soon.

\textbf{D. Noncompete Agreements}

The DOJ and the FTC have also increased their focus on prohibiting noncompete agreements. Noncompete agreements, or “noncompetes,” are contractual terms between employees and employers that prevent the employee from working for a competitor, or starting a competing business, for a stated period after the employment ends.\textsuperscript{96} These are typically constrained to a limited geographic area, and typically are not agreements between competing employers, but are vertical agreements between employers and employees.\textsuperscript{97} The theory of harm used to justify regulating non-competes is that these are unreasonable restraints that adversely affect wages and mobility.\textsuperscript{98}

On April 23, 2024, the FTC issued a final rule to ban noncompetes nationwide.\textsuperscript{99} According to the FTC’s press release, the rule could increase more than 8,500 new startups a year, increase earnings for the average worker by $524 per year, and “lower healthcare costs by up to $194 billion over the next decade.”\textsuperscript{100} Under the new rule, existing noncompetes for the vast majority of workers will no longer be enforceable after the rule’s effective date.\textsuperscript{101} While existing noncompetes for senior executives will be allowed to remain in force, employers “are banned from entering into or attempting to enforce any new

\begin{itemize}
\item \textsuperscript{94} Plea Agreement, United States v. VDA OC, LLC, No. 2:21-cr-00098 (D. Nev. 2022).
\item \textsuperscript{95} Cooper Spinelli & Eric Akira Tate, \textit{No-Poach Case Alert: DOJ’s No-Poach Strategy Dealt Another Blow as Court tosses Case Before It Reaches Jury}, JD SUPRA (May 12, 2023), https://www.n.com/legalnews/no-poach-case-alert-doj-s-no-poach-3641250/.
\item \textsuperscript{97} See id. A vertical agreement is a term used in competition law to denote agreements between firms at different levels of a supply chain. See Eric Posner & Sarah Roberts, \textit{No-Poach Antitrust Litigation in the United States}, CONCURRENCES COMPETITION REV., Nov. 2023, at 10.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} Id.
\end{itemize}
noncompetes,” even if those agreements involve senior executives.\textsuperscript{102} “The final rule defines senior executives as workers earning more than $151,164 annually and who are in policy-making positions.”\textsuperscript{103}

This rule was initially proposed in January of 2023.\textsuperscript{104} The FTC notice of proposed rulemaking stated that California, the tech capital, had banned noncompetes and had flourished.\textsuperscript{105} A main change from the proposed rule is that the FTC “eliminated a provision in the proposed rule that would have required employers to legally modify existing noncompetes by formally rescinding them.”\textsuperscript{106} Under the final rule, employers are only required to provide notice to workers bound to an existing noncompete explaining that the noncompete agreement will not be enforced against them in the future.\textsuperscript{107} “The aim of this is to streamline compliance.”\textsuperscript{108} However, it is worth noting that the rule will continue to face opposition in the courts. On April 24, 2024, the day the rule was filed, the Chamber of Commerce and several other business groups sued the Federal Trade Commission in a federal district court in Texas.\textsuperscript{109} Further lawsuits are expected.

One notable aspect of this rule is that it does not require either an agreement between competitors or market power by the employer.\textsuperscript{110} Thus, even a local barbershop acting alone would be precluded from using non-competes in their employment contracts.\textsuperscript{111} The public comments showed mixed reviews from small business owners.\textsuperscript{112} Some businesses wanted greater protection from a drain on their resources created by hiring and training workers who then leave for larger businesses that can afford to pay higher wages, and others believe that noncompete agreements damper entrepreneurship and prevent them from hiring the best talent.\textsuperscript{113}

\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{106} Fed. Trade Comm’n, supra note 99.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{110} Fed. Trade Comm’n, supra note 103 (“The FTC is seeking public comment on the proposed rule, which is based on a preliminary finding that noncompetes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act.”).
\textsuperscript{111} See id.
\textsuperscript{112} See id.
\textsuperscript{113} Id.
In addition to the rule, the FTC continues its efforts against noncompete restrictions through other means. On January 4, 2023, the FTC announced that for the first time, it sued to halt noncompete restrictions using its authority under Section 5 of the FTC Act, filing separate suits against three companies and two individuals (Prudential, Ardagh, O-I Glass). The FTC alleges that these companies and individuals illegally imposed noncompete restrictions on workers in a variety of positions ranging from low-wage security guards to engineers. This, in turn, barred the employees from seeking or receiving work from another employer or operating a competing business after they left the companies.

Even before publishing the proposed rule to prohibit non-competes, the FTC had already demonstrated animosity towards noncompetes. Prohibitions on noncompetes have been included within orders and consent decrees throughout the Biden Administration. For example, when the FTC challenged 7-Eleven’s acquisition of Marathon Petroleum Corporation’s Speedway subsidiary, the FTC’s consent order prohibited 7-Eleven from enforcing any noncompete provisions as to any franchisees or employees working at or doing business with the divested assets. Similarly, in the Decision and Order for the proposed acquisition of DaVita Inc. by Total Renal Care, the FTC required the removal of any noncompete provisions of employment “or other contracts . . . that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Divestiture Clinic Employee who receives an offer of employment from the Acquirer.” These types of

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115 See id.


prohibitions in proposed orders in connection with proposed transactions may become more prominent.

CONCLUSION

In summary, the antitrust world is witnessing a substantial rise in enforcement in the labor market, stemming at least in part from the Biden administration’s pronouncements. This trend will likely continue, particularly in the healthcare sector. The Biden pronouncements proposed HSR Amendments, the 2023 Merger Guidelines, state legislation, the Agencies’ litigation priorities, and ongoing private actions all show that labor has taken a prominent role in the antitrust world.

Merging firms should be prepared to provide substantial information on their labor practices and be prepared for scrutiny in the labor market. Companies should be aware of developing case law on non-compete, no-poach, and no-hire agreements as well as unilateral conduct implicating that conduct. Greater activity for labor markets will likely remain ongoing for the Agencies for the foreseeable future.