

To the surprise of many, antitrust enforcement in the second Trump administration has been particularly aggressive. This has included continuing the cases filed during the Biden Administration and targeting new conduct as potentially anticompetitive.

President Donald Trump announced his administration's key antitrust objective is to "help ensure that our competition laws are enforced, both vigorously and fairly, with clear rules that facilitate, rather than stifle, the ingenuity of our greatest companies."¹ For his part, Federal Trade Commission (FTC) Chair Andrew Ferguson echoed the call for tough enforcement, stating "one of the most important things that the FTC will do under my watch is focusing very intently on attacking anti-competitive conduct that hurts America's workers. I think that is part and parcel of what President Trump was elected to do, and the FTC under President Trump is going to do it."² Gail Slater, the assistant attorney general at the Department of Justice, Antitrust Division (DOJ), amplified President Trump's sentiments by announcing the division's plans to pursue an increased number of antitrust enforcement actions.³

Inevitably, continued aggressive pursuit of antitrust violations will bring more and more companies into the crosshairs. This makes it a critical time for companies across the economy to ensure that they are properly insulated against antitrust problems. Over the last few months, the DOJ and FTC have issued a series of compliance guidelines to deter anticompetitive practices that should be taken seriously – in addition to deterring potential violations, the DOJ has said that a company's antitrust compliance program can lead to reduced penalties even where violations occur if that program meets the government's announced expectations. Because the costs of a violation can be severe, it is critical that companies stay ahead of the curve when it comes to antitrust compliance.

On November 14, 2024, the agencies released the "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations," (the "November 2024 Guidelines"), which instruct companies on the development, implementation and/or revision of antitrust compliance policies. Then, on January 16, 2025, the agencies issued the "Antitrust Guidelines for Business Activities Affecting Workers" (the "January 2025 Guidelines"), which reflect the agencies' growing efforts to increase clarity and transparency regarding the identification and evaluation of business practices and events that affect labor markets and competitive pricing. Although FTC Chair Andrew Ferguson dissented to the timing of the January 2025 Guidelines, both the November 2024 Guidelines and January 2025 Guidelines align with the Trump Administration's plans to aggressively pursue antitrust violations.⁴

Key Themes from the November 2024 Guidelines

The November 2024 Guidelines provide a nine-point framework for companies looking to develop, implement and/or revise their antitrust compliance policies. When evaluating a company's antitrust compliance policy, the agencies will consider the effectiveness of the company and policy's: (1) design; (2) culture of compliance; (3) resource allocation; (4) risk assessment techniques; (5) compliance training and communication; (6) monitoring and auditing techniques; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.⁵ The November 2024 Guidelines underscore the importance of establishing strong deterrence protocols to avoid criminal prosecutions, as these policies will be used when drafting sentencing recommendations.⁶

1 See @realDonaldTrump, Truth Social (Dec. 4, 2024, at 12:21 PM), <https://truthsocial.com/@realDonaldTrump/posts/113595703893773894> (announcing the second Trump administration's vision for antitrust enforcement).

2 See Eric Revell, *New FTC chair Andrew Ferguson previews Trump admin's plans for the agency*, Fox Business (Feb. 20, 2025, 10:26 AM), <https://www.foxbusiness.com/politics/new-ftc-chair-andrew-ferguson-previews-trump-admins-plans-agency>.

3 See Statement of Gail Slater, Nomination Hearing (Feb. 12, 2025), available at <https://www.judiciary.senate.gov/committee-activity/hearings/02/12/2025/nominations>.

4 See Commissioner Andrew N. Ferguson and Commissioner Melissa Holyoak, dissenting, Regarding the Antitrust Guidelines for Business Activities Affecting Workers, Matter No. P251202.

5 See Dep't of Just., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, 4—5 (2024), available at <https://www.justice.gov/atr/media/1376686/dl>.

6 See Dep't of Just., 17, <https://www.justice.gov/atr/media/1376686/dl> (last visited Apr. 23, 2025).

In particular, companies should consider their technology footprint and evidence preservation methodology in advance of a potential investigation. The agencies demand business leaders draft specific rules regarding the preservation of ephemeral messaging and other non-company methods of communication, including refraining from auto-deletion functions or the use of certain applications altogether, as the agencies have repeatedly stated that ephemeral messages are documents.⁷

Risk assessment techniques could pose particularly difficult challenges to companies looking to adopt and integrate new technologies and strategies. In an October 2024 amicus brief, the DOJ asserted that algorithmic revenue management software is likely to invite increased scrutiny as evidence of a price-fixing conspiracy.⁸ The agencies plan to initiate enforcement actions against the use of these tools regardless of whether they require human oversight, or their recommendations are adopted.

Key Themes from the January 2025 Guidelines

The January 2025 Guidelines address five key issues affecting labor market competition: (1) no-poach agreements; (2) wage-fixing agreements; (3) the sharing of competitively sensitive information; (4) non-compete clauses in employment contracts; and (5) employment conditions that create enforcement risk.⁹ Although the agencies expressly list certain types of employment-related agreements, companies should note that the agencies will review the substance of these agreements without regard for form. Moreover, the agencies will focus on whether the businesses compete in the same labor market, regardless of whether they compete as sellers of the same products or services.

- **No-poach Agreements.** The January 2025 Guidelines expressly apply to no-poach agreements entered between business competitors, as well as between franchisors and franchisees. The agencies may also evaluate indirect no-poach agreements made through an intermediary.¹⁰ When reviewing no-poach agreements between business competitors, the agencies will scrutinize restrictions of one company's ability to hire a competitor-company's workers, or a franchisee's ability to hire a franchisor's previously-trained employees to determine if such restrictions violate the antitrust laws.

- **Wage-fixing Agreements.** The January 2025 Guidelines target wage-fixing agreements entered between businesses that concern workers' salaries, bonuses, benefits and other terms of compensation. The agencies indicated that they plan to pursue written and oral agreements, indirect agreements made through third parties and informal understandings.

In *United States v. Eduardo Lopez*, the DOJ secured its first wage-fixing trial verdict against a Nevada home health agency company accused of fixing the wages of hundreds of Nevada nurses for three years.¹¹ Following the trial, Assistant Attorney General Slater stated: "the verdict highlights what should be a clear message with antitrust crimes: the agreement is the crime. The Antitrust Division will zealously prosecute those who seek to unjustly profit off their employees."¹²

- **Sharing Competitively Sensitive Information.** The agencies will also scrutinize companies that share competitively sensitive information about terms and conditions of employment directly and indirectly using third-party information exchanges, intermediary algorithms and other software. The use of third-party data aggregators collecting wage or benefits data should be reviewed by counsel in advance, and companies should document source information to avoid allegations of obtaining it improperly.
- **Non-compete Clauses in Employment Agreements and Catch-all Enforcement Provisions.** Though the FTC's rule banning most non-compete agreements is currently stayed, Chair Ferguson shared that the FTC would utilize a labor task force to bring enforcement actions against companies found to unreasonably use non-compete agreements on a case-by-case basis. Non-competes may also violate state laws banning unfair methods of competition. The January 2025 Guidelines also provide for antitrust scrutiny of any other restrictive agreement or human resource practice that may obstruct an employee's job mobility (e.g., non-disclosure agreements, training repayment provisions and non-solicitation agreements).
- **Application to Independent Contractors.** Although antitrust regulations traditionally applied to businesses and employees, the January 2025 Guidelines specifically broaden the scope of enforcement to include independent contractors. These guidelines formally categorize gig workers as independent contractors in the antitrust regulation scheme.¹³

⁷ See Fed. Trade Comm'n., *Slack, Google Chats, and other Collaborative Messaging Platforms Have Always Been and Will Continue to be Subject to Document Requests* (Jan. 26, 2024), available at <https://www.ftc.gov/enforcement/competition-matters/2024/01/slack-google-chats-other-collaborative-messaging-platforms-have-always-been-will-continue-be-subject>.

⁸ See *Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants, Gibson v. Cendyn Group, LLC*, Case No. 24-3576 (9th Cir. Oct. 24, 2024) (arguing that the use and widespread adoption of third-party algorithmic revenue management software can be used to prove conspiracy and intent to agreement despite a lack of action and constitute a *per se* violation of the Sherman Act).

⁹ See Dep't of Just. & Fed. Trade Comm'n., *Antitrust Guidelines for Business Activities Affecting Workers* (Jan. 2025), available at https://www.ftc.gov/system/files/ftc_gov/pdf/p251201antitrustguidelinesbusinessactivitiesaffectingworkers2025.pdf.

¹⁰ See Dep't of Just. & Fed. Trade Comm'n., 5, https://www.ftc.gov/system/files/ftc_gov/pdf/p251201antitrustguidelinesbusinessactivitiesaffectingworkers2025.pdf (last visited on Apr. 23, 2025).

¹¹ See Verdict, *U.S. v. Lopez*, No. 23-cr-00055 (D. Nev. Apr. 15, 2025), ECF No. 662; see also Dep't. of Just., Press Release, U.S. Department of Justice, *Jury Convicts Home Health Agency Executive of Fixing Wages and Fraudulently Concealing Criminal Investigation* (Apr. 14, 2025), available at <https://www.justice.gov/opa/pr/jury-convicts-home-health-agency-executive-fixing-wages-and-fraudulently-concealing-criminal>.

¹² *Id.*

¹³ See Dep't of Just. & Fed. Trade Comm'n., https://www.ftc.gov/system/files/ftc_gov/pdf/p251201antitrustguidelinesbusinessactivitiesaffectingworkers2025.pdf (last visited Apr. 20, 2025).

Developing an Antitrust Compliance Framework

Antitrust compliance is a key component of a company's legal compliance policy. The updated guidance reflects the Trump Administration's intent to "vigorously enforce the antitrust laws and reject the bias accepted in previous Republican administrations toward underenforcement."¹⁴ In light of these changes, existing policies may potentially be outdated and need a refresh. Companies should consult with their outside counsel to identify, assess and correct business practices that leave them exposed to potential criminal or civil liability.

Contacts

Michael Wise

Partner and US Antitrust and Competition Practice
Group Leader, Washington DC
T +1 202 457 5239
E michael.wise@squirepb.com

Mary Walser

Of Counsel, Washington DC
T +1 202 457 5249
E mary.walser@squirepb.com

Briana Whitmore

Associate, Washington DC
T +1 202 457 5548
E briana.whitmore@squirepb.com

¹⁴ See *Time Change: Hearing Continuing a Bipartisan Path Forward for Antitrust Enforcement and Reform Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, 118th Cong. (2024).