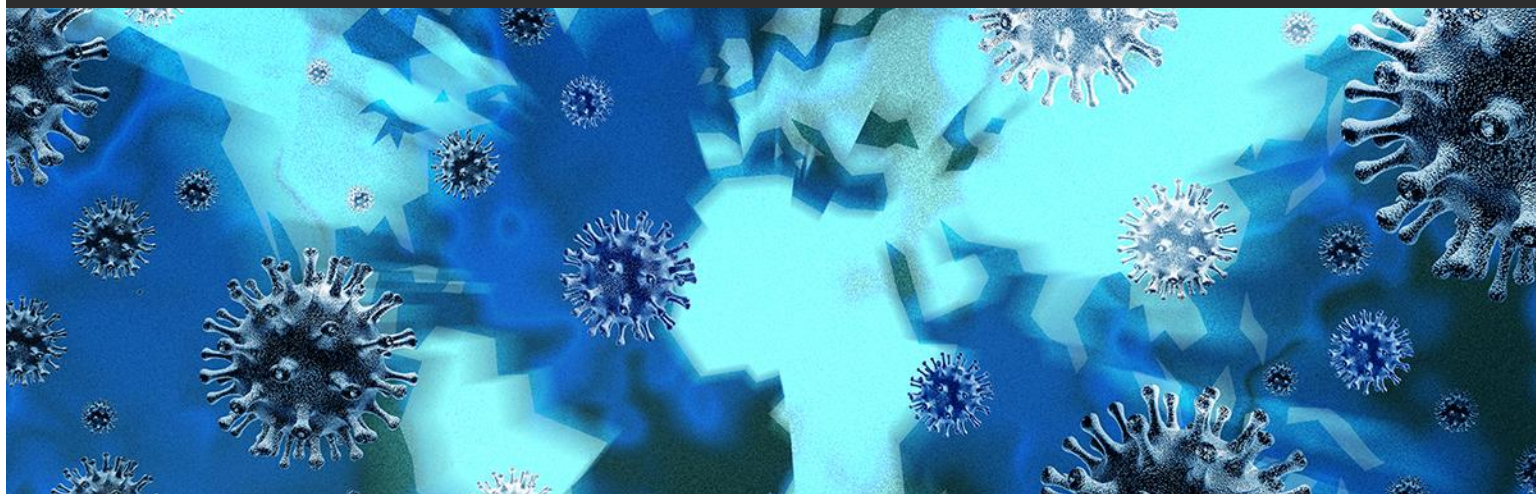


**Alert | Health Emergency Preparedness Task Force:  
Coronavirus Disease 2019**



May 2020

## **DOJ and FTC Issue Joint Antitrust Statements for Businesses and Workers in Response to COVID-19 Pandemic**

In April, the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission released a [Joint Statement](#), warning they are “on alert” and will scrutinize employers – especially employers of front-line and essential workers such as doctors, nurses, grocery store employees, pharmacists, and warehouse workers – who engage in collusive or anticompetitive labor practices that take advantage of regulations relaxed to help the fight against COVID-19. The Agencies are actively on the lookout for employers, staffing companies, and recruiters who allegedly attempt to suppress or fix wages, refrain from competitive hiring or enter no-poach agreements, or share competitively sensitive employment information.

The April Joint Statement follows a [March Joint Statement](#) that discussed application of the antitrust laws to individuals and businesses that may need to act immediately and collaboratively in addressing the ongoing pandemic. The March Joint Statement discussed the types of pro-competitive collaborations that would allow companies to engage in health and safety responses to the pandemic, and also “would be consistent with the antitrust laws.”

The two Joint Statements have been issued at a time when many companies find themselves in new territory. A significant number of businesses are experiencing workforce interruptions due to public health orders, in addition to significant supply and demand changes related to their products and services.

Some companies are responding to changed circumstances by shifting production or services to new areas critically needed to respond to COVID-19. The March Joint Statement acknowledges that joint efforts, limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath, may be a necessary response to the exigent circumstances. Otherwise, certain products or services may not be available to Americans. The Agencies, however, will not condone agreements put in place merely to raise prices, lower wages, decrease output, or reduce quality. Nor will the Agencies allow monopolists to use their market power to engage in exclusionary conduct.

To allow companies to act quickly, the March Joint Statement set forth examples of procompetitive activities that are designed to improve the health and safety response to COVID-19 and which would generally be deemed consistent with antitrust laws. Examples of such procompetitive activities include:

1. collaboration on research and development;
2. sharing technical know-how (as distinct from company-specific data about prices, wages, outputs, or costs);
3. development of suggested practice parameters, such as patient management standards to assist with clinical decision-making;
4. joint purchasing arrangements among health care providers, such as those designed to increase the efficiency of procurement and to reduce transaction costs; and
5. private lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19, “insofar as those activities comprise[] mere solicitation of governmental action with respect to the passage and enforcement of laws.”

The March Joint Statement warns that COVID-19-related antitrust violations will be scrutinized and prosecuted: “While many individuals and businesses have and will demonstrate extraordinary compassion and flexibility in responding to COVID-19, others may use it as an opportunity to subvert competition or prey on vulnerable Americans.”

The April Joint Statement builds on this concept, affirming “the Agencies will protect competition for workers on the frontlines of the United States COVID-19 response efforts by enforcing antitrust laws against those who seek to exploit the pandemic.” The Agencies are actively monitoring the labor market – and seek tips from concerned citizens – to identify instances of collusion and other anticompetitive conduct that harms workers, such as agreements to suppress or eliminate competition regarding “compensation, benefits, hours worked, and other terms of employment,” and “the hiring, soliciting, recruiting, or retention of workers.” The Agencies will continue to challenge allegedly unlawful wage-fixing and no-poach agreements, anticompetitive non-compete agreements, and the unlawful exchange of competitively sensitive employee information, including salary, wages, benefits, and compensation data – now with an eye toward protecting essential workers and first responders on the front lines of the COVID-19 response.

The April Joint Statement solicits “information concerning harm to competition in a labor market,” which may be submitted to the DOJ’s Citizen Complaint Center and National Center for Disaster Fraud hotline, as well as FTC’s Bureau of Consumer Protection.

Both the March and April Joint Statements reiterate the DOJ will bring criminal actions against those that allegedly engage in agreements or conspiracies between individuals or businesses to fix prices or wages, rig bids, or allocate markets. The Agencies also warn they will prosecute civil antitrust violations, such as agreements between individuals and business to restrain competition through increased prices, lower wages, decreased output, or reduced quality as well as efforts by monopolists or “monopsonists” to use their market power to engage in exclusionary conduct. These striking warnings – not obviously motivated by an isolated event or dispute – suggest antitrust enforcers see significant risk for abuse in the new and evolving COVID-19 environment.

Companies unsure how the Agencies will categorize their proposed conduct may make COVID-19-related requests through the DOJ’s existing Business Review Process and FTC’s existing Advisory Opinion Process. Because processing time may take several months, the Agencies have committed to expediting COVID-19-related public health and safety requests, and resolving them within seven calendar days of receiving all necessary information. The Agencies’ responses will be in effect for one year from the date of the response and can be renewed using the expedited procedures if further time is needed to respond to COVID-19 and its aftermath.

The Agencies’ Joint Statements reflect not only a concern for the enforcement of the antitrust laws and the preservation of competition, but also a view towards protecting workers, especially essential workers, in these trying times. When a company is considering how to structure cooperative arrangements or how to address employment agreements with key personnel, it should evaluate any such measures with an eye toward minimizing the potential that the Agencies may look unfavorably on them.

For more information and updates on the developing COVID-19 situation, visit [GT’s Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

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