

Coppersmith Briefs

ANTITRUST ENFORCERS WEIGH IN ON COVID-19

Karen Owens, Coppersmith Brockelman PLC
April 23, 2020

On March 24, 2020, the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice (Agencies) have issued a *Joint Antitrust Statement regarding COVID-19* (Statement 1)¹ which provides some insights into the Agencies' enforcement posture during the COVID-19 emergency. Then, on April 13, 2020, the Agencies issued a second joint statement, this time explicitly warning employers, staffing companies, and recruiters against anticompetitive conduct to disadvantage workers. *Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets* (Statement 2).²

CENTRAL POINTS IN STATEMENT 1

Statement 1 does not modify any specific enforcement position previously taken by the Agencies. However, in it the Agencies do state that:

- They will “account for exigent circumstances in evaluating efforts to address the spread of COVID-19 and its aftermath.”
- The Agencies “aim to” provide expedited review of virus-related requests submitted through the Antitrust Division’s Business Review Process and the Federal Trade Commission’s Advisory Opinion Process. In fact, the Agencies promise to resolve public health and safety requests with seven calendar days of receiving all necessary information.
- The Agencies will “work to expeditiously process” filings under the National Cooperative Research and Production Act (as amended). The Act provides certain limited liability protections when joint research, development or production ventures are disclosed to the Agencies voluntarily.
- The Agencies will come down hard on actions by individuals and businesses to subvert competition, prey on vulnerable people, or otherwise take advantage of the emergency through fraudulent and illegal schemes. This warning is amplified in Statement 2, discussed below.

¹ <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19>

² https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf?utm_source=govdelivery

Statement 1's Reassurances As To Permitted Collaborative Activities

Statement 1 grounds its discussion on the understanding that the COVID-19 emergency is likely to require extensive collaborative activities to develop necessary products and services and bring those goods and services to communities that need them. With this in mind, Statement 1 lists various collaborative activities likely to be permitted by law:

- ✓ Collaborations on research and development.
- ✓ Sharing technical know-how (as opposed to data about prices, wages, outputs or costs).
- ✓ Collaborative development of suggested standards for patient management developed to assist providers in clinical decision making.
- ✓ Joint purchasing arrangements that meet certain standards.
- ✓ Industry lobbying with federal officials to discuss strategies for responding to the emergency.

Statement 1's Discussion of "Exigent Circumstances"

Statement 1 goes on to give examples of the kinds of "exigent circumstances" that the Agencies will take into account in evaluating efforts to deal with the virus. These joint efforts are expected to be limited in time and necessary to assist patients, consumers and communities. They include:

- Collaboration in providing resources and services to communities without access to personal protective equipment, medical supplies, or care.
- Temporary combinations of production, distribution, or service networks to facilitate production and distribution of COVID-19 related supplies, such as when the businesses have not previously manufactured or distributed such supplies.

Statement 1 on Enforcement Activities

The Statement warns that the Agencies "will not hesitate" to pursue civil violations of the antitrust laws (exclusionary conduct by firms with market power; various agreements to restrain competition, such as anticompetitive non-compete agreement) and criminal violations (price- or wage-fixing, bid rigging, market allocations). Statement 1 expressly reaches out to readers seeking information about fraudulent schemes in connection with the emergency.

CENTRAL POINTS IN STATEMENT 2

While Statement 1 seems to be aimed at reassuring businesses that many kinds of collaborative activities necessary to address national needs to goods and services to deal with the Covid-19 emergency are permissible, Statement 2 is all about enforcement priorities. The focus in Statement 2 on the consequences of anticompetitive conduct that harms workers is repeating warnings the Department of Justice issued in 2016.³ Statement 2 repeats those warnings in the context of workers “on the front lines addressing the [COVID-19] crisis.”

Statement 2 begins by repeating the Agencies’ understanding that the crisis may require “unprecedented cooperation” among elements of state, tribal and federal government, private businesses and individuals. The Statement goes on to warn: COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms works, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers”

More specifically, the Agencies are concerned about *staffing companies, including medical travel and locum agencies and recruiters* engaging in collusion or other anticompetitive conduct. Statement 2 focuses on “[c]ompanies and individuals involved in the hiring, recruiting, retention, or placement of workers” and notes the Agencies’ authority to challenge:

- Unlawful wage-fixing agreements – agreements to suppress competition in competition, benefits, hours, or other employment terms. The Agencies may criminally prosecute appropriate cases.
- “No-poach” agreements, that is, agreements between two employers not to recruit or hire each others’ employees. The Agencies warn that criminal prosecution is possible here as well.
- Anticompetitive non-compete agreements.
- Unlawful exchanges of competitively sensitive employee information, including salary, wages, benefits, and compensation data.
- Anticompetitive conduct by individual employers that harms competition in the labor markets.

As in Statement 1, the Agencies make clear that they will hold individuals and businesses accountable for conduct that preys on workers by subverting competition in labor markets. It would be prudent to expect that potentially unlawful conduct in the context of COVID-19 will attract particular attention from the Agencies.

³ *Joint Antitrust Guidance for Human Resources Professionals*, <https://www.noncompetereport.com/wp-content/uploads/sites/635/2018/01/Antitrust-Guidance-for-HR-Professionals.pdf>

The logo for Coppersmith Brockelman Lawyers is centered at the top of the page. It features the name "COPPERSMITH" in a large, white, sans-serif font, followed by a thin horizontal line, and then "BROCKELMAN" in the same font. Below this, the word "LAWYERS" is written in a smaller, white, sans-serif font. The background of the logo is a dark blue image of a city skyline.

COPPERSMITH
BROCKELMAN
LAWYERS

Karen Owens' practice focuses on health care administrative, regulatory, operations, and litigation matters. She regularly represents health care systems, hospitals, clinics, and other institutions in matters of quality management, medical staff peer review, practitioner credentialing, hospital and medical staff structure, and confidentiality. She also counsels hospitals and health care entities about Medicare certification, state licensure, EMTALA compliance, and many other regulatory matters touching clinical operations.

*By the way, you know the Coppersmith Briefs are not legal advice, right? Right!
Check with your attorney for legal advice applicable to your situation.*