

# Prepare For NLRB Collaboration With Antitrust Agencies

By **Marc Antonetti, Ann O'Brien and Daniel Kaufman** (August 19, 2022)

The National Labor Relations Board recently announced it had entered into new memorandums of understanding, or MOUs, with the Federal Trade Commission and the U.S. Department of Justice's Antitrust Division.[1]

The FTC press release touted the MOU as a big deal, stating that it would "bolster the FTC's efforts to protect workers by promoting competitive U.S. labor markets and putting an end to unfair practices that harm workers." [2]

The NLRB press release described the MOUs as creating partnerships with the agencies to better protect free and fair labor markets and ensure that workers can freely exercise their rights under the National Labor Relations Act.[3]

Generally speaking, an MOU between two agencies does not empower the agencies to do something they could not do otherwise. Agencies collaborate and work together routinely without the benefit of an MOU. However, an MOU may expedite a process and allow the agencies to collaborate more frequently regarding it with minimal procedural obstacles.

Furthermore, what can be particularly important about an MOU is the message it sends about future collaboration between the agencies and the areas emphasized in the MOU. It is a message from the NLRB to the agencies that there are areas of mutual concern and that they share some interests, if not jurisdiction, in a related space.

The terms of the FTC-NLRB MOU are fairly standard, as far as federal MOUs go, with both agencies committing to interagency collaboration through information sharing, coordinated outreach and cross-agency training.[4]

The preamble to the MOU emphasizes its purpose, stating that it is to "better root out practices that harm workers in the 'gig economy' and other labor markets [and] to enhance the enforcement of federal laws and regulations administered by the agencies."

The MOU emphasizes that areas of common regulatory interest include

claims and disclosures about earnings and costs associated with gig and other work; the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions; the extent and impact of labor market concentration; the impact of algorithmic decision-making on workers; the ability of workers to act collectively; and the classification and treatment of workers.

For its part, the NLRB's press release, quoting NLRB general counsel Jennifer Abruzzo, stated: "When businesses interfere with [workers'] rights [to act collectively to improve their working conditions], either through unfair labor practices or anti-competitive conduct, it hurts our entire nation." [5]



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The DOJ-NLRB MOU expresses similar goals and provides for sharing information "to the extent permitted by law, regulation, [a]gency policy."<sup>[6]</sup>

Notably, the DOJ-NLRB MOU contemplates referrals between the agencies and states that "[f]ollowing a referral from the NLRB, the Antitrust Division will determine whether to open a civil or criminal investigation into the conduct."

Since the Antitrust Division has criminal prosecutorial authority under the Sherman Antitrust Act, this cooperation and referral process may significantly raise criminal risks for those under investigation by the NLRB. It is currently unclear how such referrals will interact with the DOJ's leniency policy and how the sharing of information will affect criminal investigations.

From a labor and employment perspective, having a clean bill of health becomes more important in the realm of mergers and acquisitions. Labor unions are often very interested in how such corporate transactions will affect their collective bargaining relationships, and nonunion workers may be concerned about how corporate efficiencies will affect them in the context of a transaction.

Therefore, we may see a rise in labor activity preceding corporate transactions, as unions may have even greater leverage both with increased government interest and a fertile ground for organizing activity.

This focus on labor is nothing new for the FTC or DOJ. Since 2016, when the DOJ and FTC issued the joint Antitrust Guidance for Human Resource Professionals, labor issues have been a focus for both agencies.<sup>[7]</sup>

The guidance said human resource professionals should take steps to ensure that interactions with other employers competing with them for employees do not result in an unlawful agreement not to compete on terms of employment. The guidance also said that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."

The DOJ has since brought several criminal wage-fixing and no-poach cases, but jury trials have resulted in acquittals; the DOJ has not yet sustained a criminal conviction for this conduct.

For example, in the U.S. District Court for the District of Colorado case *United States v. Davita Inc.*, the company and CEO were each indicted in July 2021 by the DOJ on three counts of violating the Sherman Act by agreeing with competitors to avoid hiring each other's workers.

However, the DOJ's arguments proved unsuccessful, and a jury found both the company and CEO not guilty of violating antitrust law.<sup>[8]</sup> This decision as well as similar decisions in other cases have largely been seen as a major blow to the DOJ's attempt to criminally prosecute restrictive covenants using antitrust law.

However, they are a stark reminder of the government's commitment to combating perceived anti-competitive behavior in labor markets and its introduction of potential criminal penalties for anti-competitive behavior.

Civil antitrust litigation involving whether restrictions on employee movement — such as

noncompete, nonsolicit and no-hire provisions — are illegal restraints in violation of the antitrust law is also becoming more prominent.

These MOUs are quite consistent with recent pronouncements from FTC and DOJ leadership and are also consistent with a June 2021 presidential executive order on competition that emphasized, among other things, the importance of addressing competition issues in labor markets.[9]

Indeed, the DOJ's July 26 press release focused on this very point in discussing the DOJ–NLRB MOU: "[T]he agencies also achieve the objectives of the President's Executive Order on Promoting Competition in the American Economy just days after the [o]rder's one-year anniversary." [10]

Given the enhanced focus on restrictive covenants on both the federal and state levels, employers will want to review noncompete, nonsolicit and no-hire provisions in contracts to be sure their agreements can withstand increased scrutiny.

In September 2021, FTC Chair Lina M. Khan communicated to staff via a memo and set forth her visions and priorities, one of which was combating "antitrust and consumer protection violations" that "harm workers and independent businesses as well as consumers." [11]

She emphasized concerns about contractual arrangements where "[c]onsumers, workers, franchisees and other market participants are at a significant disadvantage when they are unable to negotiate freely over terms and conditions."

And over the past year, we have seen FTC activity — on the consumer protection and competition sides — that focused on issues relating to workers, ranging from the initiation of a rulemaking relating to earnings claims and the filing of a franchise rule case to competition cases focused on anti-competitive noncompete agreements. [12]

Sometimes MOUs are announced and then quickly put in a drawer, never to be heard from again. But MOUs can also be quite important and can create a framework of active interagency engagement for decades.

For example, in 1971, the FTC entered into an MOU with the Food and Drug Administration, and that MOU still is in effect today and gives the FTC primary responsibility for the advertising of foods, drugs other than prescription drugs, devices and cosmetics, with the FDA having primary authority over labeling and other areas. [13]

With respect to the new NLRB MOUs, it remains to be seen whether this is the beginning of extensive interagency engagement or just MOUs that lead to press coverage but little beyond that.

However, current NLRB, FTC and DOJ Antitrust Division leadership have emphasized their interest in a wide range of labor issues, especially those that affect the movement of employees between employers in the form of noncompete and no-poach agreements.

These MOUs will allow the FTC and DOJ to collaborate more freely with the NLRB and explore areas of joint interest. These MOUs signal to companies that if it has issues with one agency, it may well quickly be in the crosshairs of a second agency.

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[1] Press Release, Federal Trade Commission, "Federal Trade Commission, National Labor Relations Board Forge New Partnerships to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices" (July 19, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers>.

[2] Press Release, Federal Trade Commission, "Federal Trade Commission, National Labor Relations Board Forge New Partnerships to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices" (July 19, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers>.

[3] Press Release, NLRB Office of Public Affairs, "National Labor Relations Board and Federal Trade Commission Forge New Partnership to Protect Workers from Anticompetitive and Unfair Labor Practices" (July 19, 2022), available at <https://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-and-federal-trade-commission-forge-new>.

[4] Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest, available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ftcnlrb%20mou%2071922.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf).

[5] Press Release, NLRB Office of Public Affairs, "National Labor Relations Board and Federal Trade Commission Forge New Partnership to Protect Workers from Anticompetitive and Unfair Labor Practices" (July 19, 2022), available at <https://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-and-federal-trade-commission-forge-new>.

[6] Memorandum of Understanding Between the U.S. Department of Justice and the National Labor Relations Board, available at <https://www.justice.gov/opa/press-release/file/1522096/download>.

[7] Department of Justice Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resources Professionals (October 2016) at 4, available at <https://www.justice.gov/atr/file/903511/download>.

[8] Cara Salvatore, DaVita, Ex-CEO Acquitted In Antitrust No-Poach Trial, Law360 (April 15, 2022), available at <https://www.law360.com/articles/1484766/davita-ex-ceo-acquitted-in-antitrust-no-poach-trial>.

[9] Exe. Order No. 14036, Executive Order on Promoting Competition in the American

Economy, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

[10] Press Release, Department of Justice Office of Public Affairs, "Justice Department and National Labor Relations Board Announce Partnership to Protect Workers" (July 26, 2022), available at <https://www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers>.

[11] Memorandum, Federal Trade Commission Chair Lina M. Khan, Vision and Priorities for the FTC (Sept. 22, 2021), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1596664/agency\\_priorities\\_memo\\_from\\_chair\\_lina\\_m\\_khan\\_9-22-21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf).

[12] Press Release, Federal Trade Commission, "FTC Sues Burger Franchise Company That Targets Veterans and Others with False Promises and Misleading Documents" (Feb. 8, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-sues-burger-franchise-company-targets-veterans-others-false-promises-misleading-documents>.

[13] Memorandum of Understanding Between The Federal Trade Commission and The Food and Drug Administration, "MOU with Federal Trade Commission Concerning Exchange of Information," available at <https://www.fda.gov/about-fda/domestic-mous/mou-225-71-8003>.