

NEW COLLABORATION BETWEEN FEDERAL AGENCIES SPELLS ANTITRUST TROUBLE FOR GIG ECONOMY – OR ANY BUSINESS WITH INDEPENDENT CONTRACTORS

Insights
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Two federal agencies just announced plans to join forces and scrutinize business arrangements involving independent contractors, among others, to determine whether there are antitrust concerns – a troubling sign for gig economy businesses or any with a contractor workforce. In a July 19 press release, the National Labor Relations Board (NLRB) and the Federal Trade Commission (FTC) announced a Memorandum of Understanding (MOU) to enhance their information sharing and cross-agency consultations, training, outreach, and education. [This sounds similar to the MOU that the NLRB entered into with the Department of Labor's Wage and Hour Division earlier this year.](#) The NLRB's July 19 press release shows the agency is committed, as evidenced by these MOUs, to work closely with other federal agencies to promote fair competition and advance workers' rights. Businesses in the gig economy and elsewhere that fail to properly classify employees or impose non-compete and disclosure provisions could find themselves subject to scrutiny like never before – and with powerful federal laws at the disposal of regulators. With the MOU between the FTC and NLRB in effect, here is what businesses need to know.

The NLRB and the FTC's Partnership

Through their partnership, the MOU between the NLRB and FTC facilitates information sharing and cross-agency consultations on an ad hoc basis, cross-agency training, and coordinated outreach and education as appropriate. The

Related People



Alba V. Aviles

Partner

908.516.1058

Service Focus

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language is broad and does not provide much detail – but it heralds a concerning new trend for employers. The MOU was effective as the date of the signing and remains in effect unless terminated by either party with 30 days' advance written notice to the other agency.

What's the Significance of the MOU?

While the MOU is broad, we expect the agencies to focus on the gig economy and pursue anti-competitive conduct – which is [high on the priority list of federal authorities given recent events](#). The NLRB and FTC have identified mutual areas of interest for the two agencies such as the misclassification of workers in the gig economy, imposition of restrictive noncompete and nondisclosure provisions, and the “ability of workers to act collectively.”

What this means for employers is that each agency will have a greater breadth of laws and regulations available to it for enforcement activities such as laws that prohibit unfair methods of competition (antitrust) and the National Labor Relations Act (protects workers' rights to organize and bargain collectively). The MOU provides for and encourages interagency enforcement through “information sharing, cross-agency training, and outreach in areas of common regulatory interest.”

In its press release, the NLRB stated that “when businesses interfere with [the right under federal law to act collectively to improve their working conditions], either through unfair practices, or anti-competitive conduct, it hurts our entire nation.” Similarly, the FTC Chair Lina M. Khan added that the FTC is “committed to using all tools at its disposal to promote free and fair labor markets in which companies must compete with each other to attract and retain workers.” FTC Chair Khan specifically identified that one of the goals of the MOU was to “crack down on anticompetitive mergers and unfair practices that deny workers and their families the pay, benefits, and conditions they deserve.”

What Should Businesses Do?

Businesses that are part of the gig economy or have independent contractors should perform internal audits to assess their level of risk for misclassification. You should also review any noncompete and nondisclosure agreements to determine whether they may be considered anti-competitive in light of this new era we find ourselves in. You

should also use this as an opportunity to refresh your managers on the ins and outs of the NLRA – regardless of whether you are unionized – and make them aware of how a unfair labor practice could lead to broad enforcement of the FTC’s laws and regulations.

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