FTC Sends Strong Antitrust Warning to Gig Economy Businesses

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The Federal Trade Commission just announced that it will put gig economy businesses in its crosshairs by cracking down on worker misclassification and other alleged anticompetitive conduct – the second such attack by the same agency in the last few months. The FTC's new policy statement, released on September 15, announced that the agency would use the full portfolio of laws it enforces to prevent "unfair, deceptive, anticompetitive and otherwise unlawful practices" affecting gig workers. Specifically, the FTC said it will take on businesses that misrepresent workers' potential earnings, wrongfully use artificial intelligence to evaluate worker productivity, and engage in wage-fixing with other gig companies, commonly seen as classic antitrust behavior that is getting increased attention under the Biden administration. "No matter how gig companies choose to classify them, gig workers are consumers entitled to protection under the laws we enforce," said an agency representative. What do gig economy businesses need to know about this latest antitrust shot across the bow from the federal government?

Federal Trade Commission Enters the Arena

Gig economy companies have become quite accustomed to sweeping attacks launched by federal and state governments over the past decade, each of which could pose a threat to their very existence. These attacks have primarily sprung from wage and hour, unemployment, and insurance authorities, and have almost always focused on worker classification allegations.

In the last few months, however, a new concern has emerged: the Federal Trade Commission. While most associate the agency with consumer protection activity, its mission also involves civil antitrust enforcement. And it has made it known that it wants to enter the gig economy space in a big way. As we noted back in July, the FTC recently announced a formal collaboration with the National Labor Relations Board to enhance their information sharing and cross-agency consultations, training, outreach, and education – all in the name of cracking down against gig economy businesses. Last week's announcement is just the latest example of government oversight that should but all gig companies on notice.

Policy Statement Makes Promises to Investigate Gig Economy Companies in 3 Key Areas

The FTC's new policy statement makes clear that that the agency views "gig workers as consumers entitled to protection under the laws we enforce." The 17-page release points out that 16% of Americans now earn money through "an online gig platform," not to mention that the gig economy "touches nearly every aspect of American life, from food delivery to transportation to household services." The massive growth of the industry has certainly caught the attention of government regulators who have powerful tools at their disposal.

In the statement, the agency notes multiple areas where there is potential for harm to workers in the gig economy, including three key situations:

- **Misrepresentations about the nature of gig work:** While gig companies promote independence to potential workers, it becomes problematic and potentially runs afoul of antitrust law when businesses tightly prescribe and control their workers' tasks in ways that "run counter to the promise of independence" (and essentially create misclassified employment relationships).
- **Diminished bargaining power:** It becomes legally troubling to the FTC when gig companies provide unclear information about when work will be available, where workers will have to perform it, or how workers will be evaluated.
- **Concentrated markets:** Perhaps most troublesome to the FTC is the possibility that a small handful of gig companies might hold a large share of certain markets (such as ridesharing or food delivery). The FTC is concerned that this type of market concentration can result in reduced choice for workers, customers, and businesses. "These companies may be more likely to exert their market power in anticompetitive ways," says the agency, alleging that this could cause "harm to workers' wages, job quality, and other aspects of gig work."

The 3 Ways that the FTC Will Act Against Gig Businesses

The FTC points out three pathways that it will take against gig economy companies that it believes may be engaging in unfair competition:

1. **Holding companies accountable for claims and conduct about costs and benefits:** The FTC warns gig economy companies not to be deceptive in their claims to prospective gig workers about potential earnings. It also advises businesses to be transparent and truthful about costs borne by workers.
2. **Combating unlawful practices and constraints imposed on workers:** Gig companies that use artificial intelligence or other advanced technologies to govern workers' pay, performance, and work assignments are particularly targeted by the FTC's policy statement. These AI capabilities will not be an excuse for unlawful behavior according to the agency.
3. **Policing unfair methods of competition that harm gig workers**: The FTC says it will investigate evidence of agreements between gig companies to illegally fix wages, benefits, or fees for gig workers that should be open to competition. The FTC also notes that it will investigate exclusionary or predatory conduct that could cause harm to customers or reduced compensation or poorer working conditions for gig workers.

What Should You Do About It? An Action Plan for Gig Economy Companies

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It goes without saying that government investigations and allegations of unfair competition are no joke. They carry serious penalties and enforcement activity – and could even blossom into criminal prosecutions. So what can gig economy companies do to avoid the attention of the FTC?

- Step one always involves the correct classification of your workers in the specific areas in which you operate. Work closely with your gig economy attorney to ensure you have properly audited your workforce in light of your specific work activities.
- Make sure you are clearing your communications to prospective and existing workers about job conditions, compensation, expenses, and other key elements of the job.
- Be wary of any restrictive contract terms, including those limiting workers from seeking other jobs (including other gig opportunities), as they could run afoul of antitrust laws.
- Audit your AI practices on a regular basis to ensure they do not unfairly punish workers or otherwise create unfair working conditions.
- Tread with caution when it comes to any sort of communication with peer organizations in your industry – and train your managers to follow your lead when it comes to interacting with other businesses.

Conclusion

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have compliance questions, consult with your Fisher Phillips attorney, the authors of this Insight, or any member of our Gig Economy team.

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