Federal regulators are taking an increasing hard line on what are normally
Federal regulators are taking an increasingly hard line on what are normally ordinary business operations that regulators view as suppressing wages and competition.

Antitrust issues can arise in every aspect of your business, from the way you interact with customers, employees, competitors, and suppliers to the manner in which you set prices and distribution strategies. What may seem like normal and routine business decisions could inadvertently lead to antitrust violations:

- Could a planned merger, acquisition, or joint venture violate the Clayton Act’s prohibition of transactions that substantially lessen competition?
- Could enforcing an employee agreement inadvertently lead to a visit by the DOJ to your HR department?
- Could your innocent communications with competitors or trade groups be unlawful agreements or coordination to fix prices, allocate markets or customers, rig bids or establish a group boycott?
- Could your innocent communications with customers or suppliers be unreasonable restraints of trade?

**Antitrust Enforcement – Ever-Expanding Horizon**

Antitrust enforcement lines are shifting rapidly and expanding into previously dormant areas. Separately but as part of the same enforcement philosophy, mergers are now under greater scrutiny than ever before and DOJ is targeting labor market agreements among competitors to fix wages or avoid soliciting each other’s employees. President Biden’s July 9 Executive Order instructs the FTC to “curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”

- In 2020, DOJ indicted the owner of a Texas healthcare staffing company for conspiring with physical therapy businesses to decrease and fix the wages of physical therapists and their assistants.
- In 2021, a grand jury indicted a health care provider for entering into “no-poach agreements” with competitors under which the businesses committed to not hiring each other’s senior-level employees.
- In early 2021, the US Court of Appeals ordered door manufacturer Jeld-Wen to divest its Pennsylvania plant, following an antitrust lawsuit brought by a competitor. Jeld-Wen had acquired the plant in a 2012 merger and the plaintiffs argued the merger restricted competition in the market.

Antitrust law is a complex network of federal and state law and it can be difficult to determine whether you are in compliance with the intricate schemes. Enforcement can be equally daunting and can include:

- Investigations by the federal government (DOJ and FTC) and state attorneys general
Criminal prosecution or civil enforcement by federal or state authorities

Potential follow-on enforcement actions by foreign governments

Civil class action lawsuits by private plaintiffs

Even if you know the general contours of antitrust regulations, it can be difficult to discern whether the conduct at issue is a per se violation or assessed under the "rule of reason" standard. Defending an investigation, lawsuit or prosecution is enormously expensive and can expose the target to injunctive orders to do or refrain from doing something, treble damages or multi-million dollar fines.

The Value of a Compliance Program

Given the increased scrutiny from federal regulators and law enforcement, antitrust compliance is more important now than ever before. Earlier detection of antitrust issues may allow a business to take advantage of corporate leniency programs. In 2019, the DOJ Antitrust Division announced changes to its corporate leniency program, which expanded opportunities for businesses with robust and effective compliance programs to avoid or mitigate prosecution.

Now, the DOJ will take into account whether a business has a viable compliance program in making decisions whether, or to what extent, to prosecute an antitrust violation.

If certain conditions are met, leniency will be granted by the DOJ to a business reporting illegal activity. DOJ Antitrust Division prosecutors will consider a number of factors, including “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense and charging decision” in deciding whether and to what extent to bring criminal charges against a corporation.

Benefits of a robust compliance program:

1. May insulate business from antitrust liability or mitigate the scope of the prosecution.

2. Trains businesses to identify issues and prevent potential violations before they occur and can help businesses limit exposure to liability.

3. Helps businesspeople understand the type of competition that is permitted under the antitrust laws, thereby allowing firms to vigorously engage in lawful competition with confidence that the antitrust laws are not being broken.

4. Informs businesspeople about the nature of antitrust violations so they can be on the lookout for improper behavior from competitors and respond accordingly.