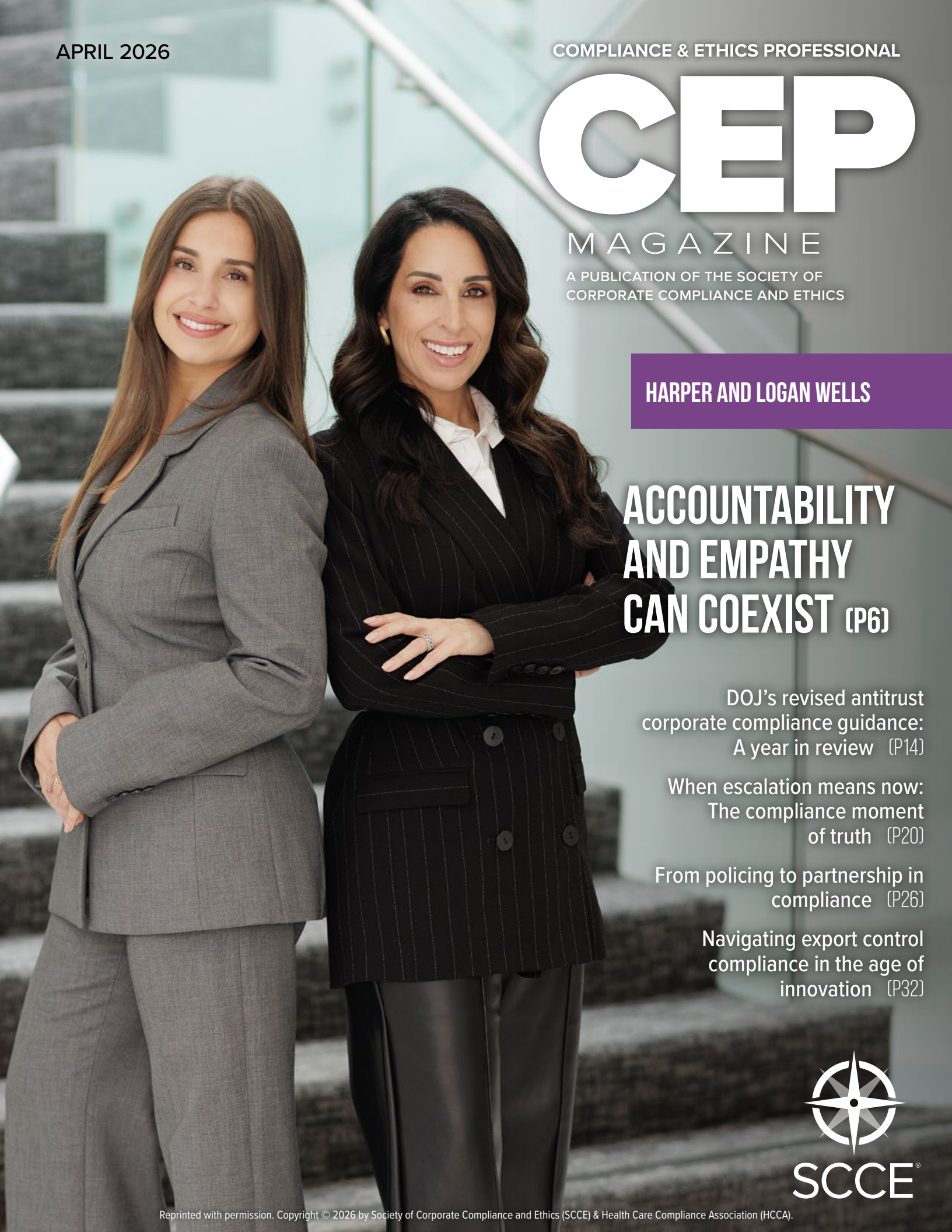
APRIL 2026

COMPLIANCE & ETHICS PROFESSIONAL

CEP

MAGAZINE

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS



HARPER AND LOGAN WELLS

ACCOUNTABILITY AND EMPATHY CAN COEXIST (P6)

SCCE®

DOJ'S REVISED ANTITRUST CORPORATE COMPLIANCE GUIDANCE: A YEAR IN REVIEW

by James W. Attridge and Andrew L. Freeborn

CCB article click for CEU quiz

James W. Attridge
(jattridge@axinn.com) is a Partner at Axinn, Veltrop & Harkrider LLP in Washington, DC, USA.

Andrew L. Freeborn
(afreeborn@axinn.com) is a Counsel at Axinn, Veltrop & Harkrider LLP in San Francisco, California, USA, and former in-house antitrust counsel for two major tech companies.

More than a year has passed since the U.S. Department of Justice (DOJ) Antitrust Division updated its guidance on corporate compliance programs, and while many subjects of enforcer attention have remained the same, new areas of focus have emerged, while yet other recent developments have provided reason for compliance professionals to sharpen their pencils and reassess their compliance programs.[1]

Here are three areas of enforcer focus that the in-house and compliance communities should be aware of.

1. New whistleblower rewards program

The biggest change since the Antitrust Division issued its guidance is its new and *first-ever* whistleblower rewards program, announced in July 2025.[2] Whistleblowers — individuals, not companies, are eligible — who "voluntarily" provide the Antitrust Division with "original information" about an antitrust or related violation are eligible for a financial reward of 15%–30% of any resulting fine or penalty.

Because antitrust violations can result in fines of hundreds of millions of dollars, this rewards program provides a powerful financial incentive for individuals to report potential violations of the antitrust laws. The concomitant result of that new incentive will be increased reporting, and therefore an increased likelihood that violations and potential violations will be detected and investigated by authorities. Those incentives are already playing out in practice, with the Antitrust Division announcing the first reward ($1 million) only six months after the program was initiated and reporting that it is seeing a "frenzy of people coming forward" with information about potential antitrust violations.[3]

As a result, the whistleblower rewards program has changed the risk calculus involved when a company is considering self-reporting and seeking non-prosecution protection under the Antitrust Division's Leniency Policy.[4]

It also raises a host of practical implications.

The importance of a well-functioning internal reporting system

Under the whistleblower policy, whistleblowers who report internally first are still eligible for a whistleblower reward so long as

they report their information to the Antitrust Division within 120 days of their internal reporting. To meet that quick turnaround and allow sufficient time for compliance professionals to properly assess internal reports, it is critical that employees:

- Understand how to identify potential antitrust violations;
- Know where and to whom to report; and
- Are incentivized to promptly report.

Investigating quickly

When companies receive internal reports, they should be investigated quickly and efficiently. Companies are on the clock in three ways.

First, under the Antitrust Division's corporate Leniency Policy, only the first company to self-disclose its conduct is eligible for non-prosecution protection and the benefits of the policy. So, if a whistleblower report results in the company deciding to self-report and seek leniency, the company is in a race to do so before any other company.

Second, whistleblowers remain eligible for a reward if they report their concerns to their employer first, but must report their information to the Antitrust Division within 120 days of their internal report. So the race is not only between companies, but between the company and a whistleblower, who has a finite period to report their concerns to the government (an employee is still eligible for a reward even if the employer reports the employee's information to the Antitrust Division before the employee, so long as the employee reports within 120 days of reporting internally).

Third, if the company does not act on an internal report within 120 days, a larger group of people become eligible whistleblowers. While inside and outside counsel who obtain whistleblower information as part of privileged communications or a privileged investigation are ineligible, if the company does not self-report within 120 days, a broader group within the company becomes eligible as whistleblowers, including compliance and internal audit professionals and officers and directors. So, companies can find themselves in a race against a broader group of potential whistleblowers, which only increases the significance of quickly and thoroughly investigating any initial internal reports and reaching a consensus on whether to self-report.

Removing perceived reporting impediments

Finally, the Antitrust Division's compliance guidance emphasizes potential concerns with non-disclosure agreements (NDAs) "that act to deter whistleblowers." Since announcing the whistleblower program, enforcers have continued to express concerns about NDAs and other restrictions that could be perceived (or misperceived) as deterring potential whistleblowing. Specifically, enforcers have emphasized the need to review NDAs and ensure that "NDAs and other employee policies [make] clear that employees can report antitrust violations internally and to government authorities." Likewise, the Antitrust Division's compliance guidance also emphasizes the importance of an anti-retaliation policy and asks whether companies have a policy and training on that policy and the 2019 Criminal Antitrust Anti-Retaliation Act, which prohibits retaliation against those who report antitrust violations to the government or their supervisors.[5] Reviewing NDA templates and ensuring compliance trainings emphasize the existence of, and the company's commitment to, anti-retaliation policies can be key steps toward mitigating these enforcer concerns.

The whistleblower rewards program has changed the risk calculus involved when a company is considering self-reporting and seeking non-prosecution protection under the Antitrust Division's Leniency Policy.

2. A continued focus on labor markets

While the Antitrust Division's compliance guidance applies to price fixing, bid rigging, and competitors allocating markets for products or services (e.g., allocating individual customers or geographic territories), such concepts also apply to labor markets. Indeed, the guidance illustrates the Antitrust Division's continued focus on competition for employees by including, as one of the very first questions a company should ask when assessing its compliance program, whether the program provides "specialized compliance training for human resources personnel and executives responsible for overseeing recruitment and hiring."

The Biden-era focus on competition for workers — and

criminally charging collusion among employers to fix wages or stand-alone agreements not to recruit, hire, or poach each other's employees — has continued under the Trump administration.

At the outset of her tenure in 2025, former Antitrust Division head Gail Slater met with Teamsters President Sean M. O'Brien. The Teamsters applauded Slater as "the perfect person to lead DOJ's Antitrust Division into a new pro-worker era" and celebrated their shared commitment to protecting "American workers from anticompetitive and unfair practices in labor markets."[6]

That commitment bore fruit soon after. In April 2025, the Antitrust Division obtained its first-ever guilty verdict for wage fixing. Slater used the result to reaffirm the administration's commitment to "zealously prosecute those who seek to unjustly profit off their employees."[7]

Ensuring that human resources, compliance, and legal departments understand the risks associated with agreements to fix wages or benefits, or not to hire, poach, or solicit employees from competing employers, as well as the risks involved in participating in employer industry associations and engaging in employee wage benchmarking activities, remains just as critical today as when the guidance issued last year.

Non-solicit clauses

Beyond stand-alone agreements between competing employers not to poach, hire, or solicit one another's employees, which can be investigated and prosecuted criminally, non-solicit clauses in commercial contracts with company suppliers and customers also warrant attention from legal and compliance departments. Non-solicit clauses may be permissible but should be reviewed to determine their necessity to the commercial relationship and tailored in terms of who they cover, what they prohibit, and for how long.[8]

Non-compete enforcement

The same is true for employer–employee non-compete agreements. In September 2025, the Federal Trade Commission (FTC) abandoned a rule proposed by the Biden administration banning almost all employer–employee non-compete agreements. At the same time, the Republican-led commission made clear that it will continue to prioritize enforcement actions against employers who impose non-compete agreements that are unreasonable because of their overbroad scope, long duration, or lack of legitimate business justification (e.g., protecting company trade secrets). The FTC backed up that statement the very same month, securing a consent agreement with Gateway Services — a pet cremation company that had implemented a near-universal non-compete agreement with its employees regardless of position or responsibilities — to no longer enforce its non-competes and notify its employees that they were no longer subject to those agreements.[9]

As with non-solicit clauses, we'd suggest reviewing non-compete clauses for aspects that may draw the FTC's attention:

- **Tailored templates**: Employers can lessen risk by avoiding using standard clauses or templates that restrict all employees on the same terms, regardless of their roles, responsibilities, or locations. Using different templates for different employee categories, when possible, can help show that restrictions are tailored and reasonable.
- **Restrict hourly workers with care**: Recent enforcement actions distinguished between restricting high-level and highly-compensated employees (lower risk) who are likely to have more access to trade secret information, compared to restricting hourly workers whose duties did not require extensive training or access to confidential or proprietary information (greater risk). We'd suggest employers be mindful that restricting hourly workers — absent justification — may increase risks of enforcer attention.
- **Mind the FTC's views**: Finally, the FTC has outlined criteria that may draw their attention, including non-competes with a duration exceeding one or two years, a geographic scope exceeding beyond where the employee regularly works, and restrictions that extend beyond the employee's responsibilities. The FTC may contend that such provisions unduly restrict employee mobility with little or no legitimate justification. Taking those guideposts into account when possible can also mitigate risk.

3. Continued attention on revenue management software and AI

Although the Supreme Court has long recognized that the "gathering and dissemination" of market-level data promotes efficiency by allowing companies to benchmark their performance and improve the competitiveness of their offerings, the antitrust focus on information exchange in the era of algorithms and machine learning continues.[10]

In February 2023, the Antitrust Division withdrew longstanding safe harbors for the exchange of competitively sensitive information when the exchange occurred through a third party, involved historic data, and was aggregated and anonymized. One reason for the withdrawal was enforcers' view that "we are experiencing an inflection point in the use of algorithms, data at scale, and cloud computing" that "can increase the competitive value of historical data for some products or services."[11] While some enforcers, such as recently departed FTC Commissioner Holyoak,[12] have suggested issuing revised information exchange guidelines, for the time being, companies must navigate the use of industry data, particularly in connection with revenue management or algorithmic pricing software, without safe harbors or specific enforcer guidance.

Indeed, the revised compliance guidance asks, "How does the company's risk assessment address the use of technology, particularly new technologies such as artificial intelligence (AI) and algorithmic revenue management software, that are used to conduct company business."

Recent statements from enforcers indicate this focus continues. Last fall, now former Antitrust Division head Slater explained that while "there's nothing wrong using algorithms," the use of "shared algorithm[s]," "relying on sensitive data," can sometimes "lead to" outcomes that lessen competition.[13] States are also addressing these issues with new legislation. In California, AB 325, which took effect January 1, 2026, targets companies' use of "common pricing algorithms."

Employers can lessen risk by avoiding using standard clauses or templates that restrict all employees on the same terms, regardless of their roles, responsibilities, or locations.

The impact for executives and compliance professionals is that use of third-party revenue management software in particular, and exchange of market data with competitors more generally (either directly, or indirectly through a third party such as a data broker or industry association), should be vetted by antitrust counsel to mitigate antitrust risk.

Antitrust counsel will want to understand who uses the service, what data feeds into the algorithm, what data are reported out, and whether the tool provides any strategic

recommendations to ensure pricing decisions are made independently rather than in coordination with competitors. Even when it comes to low-risk tools that, for instance, benchmark past performance using historic, aggregated, and anonymized data, antitrust counsel can help ensure the tools are not misused or misdescribed in ways that invite unwarranted antitrust scrutiny.

Conclusion

The turn of the calendar to 2026 marks a renewed opportunity for compliance professionals to reassess the antitrust aspects of their compliance programs. Perhaps surprisingly to some, many of the Biden administration's antitrust enforcement priorities — particularly those focused on protecting labor markets, scrutinizing pricing algorithms, and AI — have carried over. There are also entirely new risk vectors, such as the DOJ Antitrust Division whistleblower rewards program, that make it even more important to ensure that companies and their employees are informed about antitrust laws and are incentivized to quickly report internally any potential violations.

Endnotes

1. U.S. Department of Justice, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*, November 2024, https://www.justice.gov/atr/media/1376686/dl.
2. U.S. Department of Justice, Antitrust Division, "Memorandum of Understanding Regarding the Whistleblower Rewards Program and Procedures Between the Antitrust Division, United States Department Of Justice, and the United States Postal Service, and the Office Of Inspector General, United States Postal Service," https://www.justice.gov/atr/media/1407261/dl?inline.
3. U.S. Department of Justice, Office of Public Affairs, "Antitrust Division and U.S. Postal Service Make First-Ever Whistleblower Payment: $1M Awarded for Reporting Antitrust Crime," news release, January 29, 2026, https://www.justice.gov/opa/pr/antitrust-division-and-us-postal-service-award-first-ever-1m-payment-whistleblower-reporting.
4. U.S. Department of Justice, Antitrust Division, "7-3.300 — Antitrust Division Leniency Policy and Procedures," updated June 2022, https://www.justice.gov/atr/page/file/1490246/dl?inline.
5. U.S. Department of Labor, "Criminal Antitrust AntiRetaliation Act (CAARA), 15 U.S.C. § 7a3," accessed February 9, 2026, https://www.whistleblowers.gov/statutes/caara.
6. Teamsters (@teamsters), "Teamsters General President Sean M. O'Brien and newly confirmed Assistant Attorney General of the U.S. Department of Justice's Antitrust Division Gail Slater met today for a lengthy and constructive conversation at the Teamsters headquarters in Washington, D.C. […] X.com, March 4, 2025, 10:55 a.m. CDT, https://x.com/Teamsters/status/190.420.0343065399645.
7. U.S. Department of Justice, Office of Public Affairs, "Jury Convicts Home Health Agency Executive of Fixing Wages and Fraudulently Concealing Criminal Investigation," news release, April 14, 2025, https://www.justice.gov/opa/pr/jury-convicts-home-health-agency-executive-fixing-wages-and-fraudulently-concealing-criminal.
8. U.S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for Business Activities Affecting Workers*, revised January 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/p251201antitrustguidelinesbusinessactivitiesaffectingworkers2025.pdf.
9. Federal Trade Commission, "FTC Takes Action to Protect Workers from Noncompete Agreements," news release, September 4, 2025, https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-takes-action-protect-workers-noncompete-agreements.
10. *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 582-83 (1925).
11. Doha Mekki, "Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023," speech, U.S. Department of Justice, February 2, 2023, https://www.justice.gov/archives/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0.
12. Chris May, "US FTC's Holyoak 'very supportive' of issuing new information sharing guidelines," MLex, October 23, 2025, https://www.mlex.com/mlex/articles/2403218/us-ftc-s-holyoak-very-supportive-of-issuing-new-information-sharing-guidelines.
13. Khushita Vasant, "US DOJ's Slater Signals Tougher Enforcement as Algorithms Spread," MLex, September 19, 2025, https://www.mlex.com/mlex/articles/2390071/us-doj-s-slater-signals-tougher-enforcement-as-algorithms-spread.

Takeaways

- Make sure company employees are generally aware of the antitrust laws and how they apply, particularly in scenarios in which employees may encounter rivals.
- Consider conducting dedicated antitrust trainings for human resources (HR) professionals, given that it may be less intuitive that the antitrust laws apply to HR, and HR departments are a surprisingly frequent source of antitrust risk.
- If not already established, create a clear employee antitrust reporting process emphasizing the company's commitment to complying with both antitrust and anti-retaliation laws.
- Consider conducting a review of the company's standard employee agreements (to the extent such standardized agreements exist) to confirm any non-compete or non-solicitation terms are appropriately tailored in terms of the scope of employees covered and duration.
- Investigate, preferably with the assistance of antitrust counsel, how the company conducts competitive intelligence, benchmarks pricing and salaries, and the extent to which it utilizes common algorithms or AI to set prices or determine company strategy with respect to any other competitive variable.