

May 8, 2024

The Honorable Merrick B. Garland
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable Jonathan Kanter
Assistant Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Garland and Assistant Attorney General Kanter,

We write to urge the Department of Justice (DOJ) to open criminal investigations into Kroger Company (Kroger) and Albertsons Companies, Inc. (ACI or Albertsons) to determine if the companies or their executives were engaged in criminal anticompetitive collusion. As recently revealed in the Federal Trade Commission's and Colorado Attorney General Philip Weiser's complaint to block the proposed Kroger-Albertsons merger, evidence suggests that the companies engaged in wage-fixing, no-poach, and non-solicitation activities.¹ These allegations, if true, represent per se violations of Section 1 of the Sherman Act.²

Kroger and Albertson's Illegal Conduct

On February 26, 2024, the FTC along with Attorneys General of Arizona, California, D.C., Illinois, Maryland, Nevada, New Mexico, Oregon, and Wyoming sued to block the merger.³ The complaint outlines the harm to workers that would result from this merger, along with a history of Kroger and Albertsons illegally coordinated. For example, "in Portland negotiations in 2019"

¹ U.S. Federal Trade Commission, "FTC Challenges Kroger's Acquisition of Albertsons," press release, February 26, 2024, <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons>; *The Federal Trade Commission v. The Kroger CO et. al.*, docket no. D9428, complaint, https://www.ftc.gov/system/files/ftc_gov/pdf/d9428_2310004krogeralbertsonsp3complaintpublic.pdf; Colorado State, Office of the Attorney General, "Colorado Attorney General Phil Weiser files lawsuit to block proposed Kroger/Albertsons merger," press release, February 14, 2024, <https://coag.gov/2024/colorado-attorney-general-phil-weiser-files-lawsuit-to-block-proposed-kroger-albertsons-merger/>; *State of Colorado v. The Kroger CO et. al.*, case no. 2024CV30459, February 14, 2024, complaint, 149-163, p. 20-22, p. iii, <https://coag.gov/app/uploads/2024/02/2024-02-14-Complaint-Public.pdf>; https://www.huffpost.com/entry/kroger-albertsons-strike-collusion-union_n_65cfcdb4e4b043f1c0ab2c2b.

² 15 U.S. Code § 1.

³ U.S. Federal Trade Commission, "FTC Challenges Kroger's Acquisition of Albertsons," press release, February 26, 2024, <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons>; *The Federal Trade Commission v. The Kroger CO et. al.*, docket no. D9428, complaint, https://www.ftc.gov/system/files/ftc_gov/pdf/d9428_2310004krogeralbertsonsp3complaintpublic.pdf.

Kroger and Albertsons “successfully coordinated” which led to union contracts with less favorable salaries and benefits for workers.⁴

An additional incident took place a few years later. In January 2022, collective bargaining agreements between the United Food and Commercial Workers International Union (UFCW) employees at King Soopers (Kroger) and Safeway (Albertsons) stores were about to expire in Colorado.⁵ UFCW and Albertsons reached an agreement to extend the bargaining agreement, while UFCW and Kroger did not reach an agreement, resulting in a strike by UFCW employees.⁶ Shortly after, on January 9, 2022, Albertsons’ Senior Vice President of Labor Relations Daniel Dosenbach wrote to Kroger’s Vice President for Labor & Associate Relations Jon McPherson to communicate:

“We [ACI] don’t intend to hire any King Soupers [Kroger] employees... [and] we [ACI] don’t intend to solicit or publicly communicate that King Soupers [Kroger] employees should transfer their scripts to us.”⁷

And according to the FTC, “Kroger’s concern about losing customers led them to ask Albertsons [redacted]” while Albertson’s Senior VP of Labor Relations “emailed Kroger that [redacted].”⁸ The companies have also “tried to coordinate and align more closely during [union] negotiations.”⁹

This is a clear act of no-poach and non-solicitation agreements between the two companies. And as a result of these complaints, UFCW Local 7 filed a complaint with the National Labor Relations Board for the alleged illegal no-poach agreement between Kroger and Albertsons.¹⁰

Criminal Violation of the Antitrust Laws

Price or wage fixing is an agreement between competitors to raise, lower, maintain, or stabilize prices, including the “prices or wages they will pay.”¹¹ No-poach and non-solicitation agreements are agreements between employers to restrict the hiring or solicitation of each other’s employees.¹² These types of arrangements harm workers to the benefit of the monopolist and violate the Sherman Act.

⁴ *The Federal Trade Commission v. The Kroger CO et. al*, docket no. D9428, complaint, 81, p. 19, https://www.ftc.gov/system/files/ftc_gov/pdf/d9428_2310004krogeralbertsonsp3complaintpublic.pdf.

⁵ *State of Colorado v. The Kroger CO et. al*, case no. 2024CV30459, February 14, 2024, complaint, 150, p. 20, <https://coag.gov/app/uploads/2024/02/2024-02-14-Complaint-Public.pdf>.

⁶ Id.

⁷ Id.

⁸ *The Federal Trade Commission v. The Kroger CO et. al*, docket no. D9428, complaint, 75, p. 18, https://www.ftc.gov/system/files/ftc_gov/pdf/d9428_2310004krogeralbertsonsp3complaintpublic.pdf.

⁹ *The Federal Trade Commission v. The Kroger CO et. al*, docket no. D9428, complaint, 79, p. 19, https://www.ftc.gov/system/files/ftc_gov/pdf/d9428_2310004krogeralbertsonsp3complaintpublic.pdf.

¹⁰ Alejandro A. Alonso Galva, “Local union files labor practice charges against Kroger and Albertsons over ‘no poaching agreement’,” CPR, February 15, 2024, <https://www.cpr.org/2024/02/15/local-union-files-labor-practice-charges-against-kroger-albertsons-no-poaching-agreement/>.

¹¹ U.S. Federal Trade Commission, Competition Guidance, Price fixing, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing>.

¹² U.S. Federal Trade Commission, “FTC and DOJ Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation,” press release, October 20, 2016, <https://www.ftc.gov/news-events/news/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how-antitrust-law-applies-employee-hiring>.

Crucially, overt violations like price-fixing via non-solicitation agreements, as well as wage-fixing via no-poach agreements, carry potential criminal penalties. Section 1 of the Sherman Act makes illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce,” and that any person making such a contract “shall be deemed guilty of a felony.”¹³ While Section 1 prohibits a variety of different agreements that may restrain competition, criminal prosecution is usually reserved for the most egregious violations like overt or “naked” bid-rigging, wage-fixing, no-poach agreements, and market allocation agreements.¹⁴ By apparently seeking agreement to not poach each other’s employees or customers, Kroger and Albertson’s agreements fall into this category where criminal investigation is warranted.

Considering the serious harms of antitrust violations against labor, in recent years the DOJ has significantly increased its criminal enforcement against no-poach and non-solicitation agreements.¹⁵ In 2020, the Department of Justice began bringing criminal prosecution of wage fixing and no-poach agreements.¹⁶ For example, DOJ brought cases against companies Surgical Care Affiliates LLC, VDA, Davita Inc., and former executives Jindal and Patel.¹⁷ In total, DOJ has brought cases against four companies and sixteen individuals for these schemes.¹⁸

Crime shouldn’t pay. We urge you to open a criminal investigation into the conduct of Albertsons and Kroger.

Sincerely,

¹³ 15 U.S. Code § 1.

¹⁴ U.S. Department of Justice, “Identifying Sherman Act Violations,” <https://www.justice.gov/archives/jm/antitrust-resource-manual-2-antitrust-division-field-offices>.

¹⁵ Ted Serra, Karen Sharp, and Jeff VanHooreweghe, “DOJ Brings First Criminal “No Poach” and “Wage Fixing” Antitrust Prosecutions,” JDSupra, January 11, 2021, <https://www.jdsupra.com/legalnews/doj-brings-first-criminal-no-poach-and-4657712/>; U.S. Department of Justice, “Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses,” press release, October 27, 2022, <https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses>.

¹⁶ Stephen A. Miller and Nathan J. Larkin, “DOJ Continues Crackdown on No-Poach Agreements,” The Temple 10-Q, <https://www2.law.temple.edu/10q/doj-continues-crackdown-on-no-poach-agreements/>; Leslie E. John, James A. Mitchell, et. al., “DOJ Gives Up on Its Sole Remaining Criminal No-Poach Prosecution,” Ballard Spahr, November 17, 2023, <https://www.ballardspahr.com/insights/alerts-and-articles/2023/11/doj-gives-up-on-its-sole-remaining-criminal-no-poach-prosecution>.

¹⁷ U.S. Department of Justice, “Former Owner of Health Care Staffing Company Indicted for Wage Fixing,” press release, December 10, 2020, <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>; “Health Care Company Indicted for Labor Market Collusion,” press release, January 7, 2021, <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>; “Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses,” press release, October 27, 2022, <https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses>; “Former Aerospace Outsourcing Executive Charged for Key Role in a Long-Running Antitrust Conspiracy,” press release, December 9, 2021, <https://www.justice.gov/usao-ct/pr/former-aerospace-outsourcing-executive-charged-key-role-long-running-antitrust-conspiracy>; “DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry,” press release, July 15, 2021, <https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care>.

¹⁸ Lauren E. Briggerman and Kirby D. Behre, “Is No Poach No More?,” Miller & Chevalier, May 3, 2023, <https://www.millerchevalier.com/publication/no-poach-no-more>.

American Economic Liberties Project

UFCW Locals Stop the Merger Coalition (locals 5, 7, 324, 400, 770, 1564 and 3000)