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Employers Beware - DOJ and FTC Issue Antitrust Guidance to HR Professionals

Mitigating Expanding Antitrust Risks in Hiring and Compensation Decisions

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On October 20, 2016, the United States Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") jointly issued "Antitrust Guidance for Human Resource Professionals" (the "Guidance") to educate HR professionals about the application of antitrust laws to certain hiring and compensation practices and to suggest means for mitigating such antitrust risk in the employment context. Employers are well advised to follow this Guidance, as these federal antitrust enforcement agencies make clear their intentions to pursue, in appropriate cases, criminal and civil prosecutions of both individuals and companies for such antitrust violations.

The Guidance marks an evolution – and potential escalation – of federal antitrust enforcement challenges to companies' (1) naked "wage-fixing" and "no-poaching" agreements; and (2) improper exchanges of nonpublic information concerning employee compensation and other terms of employment. The DOJ and FTC jointly issued this Guidance to HR Professionals because it is often the HR Professionals who are in the best position to ensure compliance and implement safeguards.

The DOJ and FTC maintain that companies that compete to hire or retain employees are competitors in the employment marketplace, whether or not they compete with one another downstream in the sale of their products and/or services. The antitrust agencies assert it is always illegal for companies to expressly or implicitly agree not to compete when they enter into wage-fixing and no-poaching agreements, unless such agreements are reasonably necessary to some larger legitimate collaboration (e.g. a joint venture) between the employers. Indeed, the Guidance notes that even a solicitation by one firm of another to enter into such a naked agreement may be unlawful. Finally, the DOJ and FTC remind HR Professionals that sharing nonpublic, competitively sensitive information about wages and other terms of employment with

competitors – even absent any agreement between them to set such terms – in some circumstances may violate the antitrust laws.

The Guidance was issued in the wake of a number of recent civil and administrative actions brought against companies for allegedly engaging in illegal wage-fixing or entering into illegal no-poaching agreements. The DOJ has brought three cases over the last few years against various technology companies that entered into "no poach" agreements with competitors. It has also filed civil enforcement actions against the Arizona Hospital & Healthcare Association for acting on behalf of most hospitals in Arizona to set a uniform schedule hospitals would pay for temporary and per diem nurses, and against the Utah Society for Healthcare Human Resources Administration for conspiring to exchange nonpublic prospective and current wage information about registered nurses, which the DOJ alleged kept pay artificially low. Similarly, the FTC has brought two cases against companies challenging agreements aimed at reducing compensation for both nurses and models. To date, all of these challenges have ended in consent judgments.

Referencing these prior actions, the Guidance states that going forward the DOJ will "proceed criminally against naked wage-fixing or no-poaching agreements." The DOJ and FTC assert that such agreements "whether entered into directly or through a third party intermediary, are per se illegal under the antitrust laws" and the DOJ may bring criminal, felony charges against the *companies and the individuals* involved. Accordingly, companies are well-advised to take note of and become familiar with the Guidance.

The Guidance offers the following specific advice for HR Professionals:

- Avoid wage-fixing agreements – agreements with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range;
- Avoid no-poaching agreements – agreements with individual(s) at another company to refuse to solicit or hire that other company's employees;
- It does not matter whether the agreements are informal or formal or oral or written and even discussions or parallel behavior may lead to an inference of illegal activity;
- Naked wage-fixing and no-poaching agreements are per se illegal under the antitrust laws and will be deemed illegal without any inquiry into its competitive effects;
- If the agreement is necessary to a larger legitimate collaboration between the two employers – such as merger or a joint venture – then it is not per se illegal;
- Sharing information with competitors about terms and conditions of employment can run afoul of the antitrust laws because it can serve as evidence of an implicit illegal agreement;
- Agreements to share information may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect. There is antitrust risk even where the parties to the agreement are parties to a proposed merger or acquisition or are otherwise involved in a joint venture or other collaborative activity; and
- Parties need to share information in a very methodical and careful way to ensure compliance with antitrust laws. For example, an information exchange may be lawful if: (1) a neutral third party manages the exchange; (2) the exchange involves information that is relatively old; (3) the information is

aggregated to protect the identity of the underlying sources; and (4) enough sources are aggregated to prevent competitors from linking particular data to an individual source.

The DOJ and FTC also issued an "Antitrust Red Flags for Employment Practices" to identify specific scenarios which should raise red flags to HR Professionals and indicate a potential issue. This non-exhaustive list includes the following examples:

- Agreements with another company regarding salary, benefits, or other terms of compensation;
- Agreements with another company to refuse to solicit or hire that other company's employees;
- Discussions with competitors regarding not competing too aggressively for employees;
- Sharing company-specific information about employee compensation or other terms of employment with another company;
- Participation in a meeting, such as a trade association meeting, where these topics are discussed;
- Discussing these topics with colleagues at other companies, including at social events or in other non-professional settings; and
- Receiving documents that contain another company's internal data about employee compensation.

Note any company, acting on its own, may make decisions regarding hiring, soliciting or recruiting employees. But the company should take care not to communicate the company's policies to other companies competing to hire the same types of employees, nor ask another company to agree to follow the policies.

Next Steps for Employers

Be aware that your company, or a manager or HR Professional of the company, could be subject to criminal or civil liability for violation of antitrust laws.

Given the clear warnings that the DOJ and FTC will criminally and civilly prosecute both companies and individuals who are violating antitrust laws – and the threat of follow-on class action lawsuits seeking treble damages - employers should review this Guidance and ensure that (1) their hiring and compensation practices do not violate the antitrust laws; (2) the company's HR Professionals receive appropriate antitrust compliance training; and (3) they consider updating their employment and antitrust handbooks, policies and/or other compliance materials to address these developments. Should such a review reveal potential violations, employers should immediately consult with antitrust counsel. Under the DOJ's Corporate Leniency Policy, the first company to report a potential criminal violation to the DOJ may receive preferred treatment and avoid prosecution in the subsequent criminal proceedings. Individual employees, however, may still be subject to criminal or civil prosecution.

Employers need to use appropriate safeguards when: (1) sharing sensitive compensation information or other employment related information as part of the due diligence in mergers and acquisitions and use narrowly tailored nondisclosure agreements; and (2) undertaking benchmarking or participating in compensation surveys. Bear in mind that the antitrust laws apply not only to wages, but also to other elements of employee compensation such as, for example, gym memberships, parking, transit subsidies, meals, or meal subsidies.

Employers should review their non-solicitation of employees covenants in their agreements with potential competitors or service providers to ensure that they are narrowly tailored and do not trigger any antitrust issues.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

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