



A Review of the DOJ/FTC's Antitrust Guidance for Human Resource Professionals

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In October 2016, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued an eleven-page joint guidance document entitled “Antitrust Guidance for Human Resource Professionals” (the Guidance).¹ Directed at human resource (HR) professionals, the Guidance reaffirms the two antitrust agencies’ stance that the antitrust laws apply with equal force to firms that compete to recruit and retain the same employees, irrespective of whether those firms compete in the same product or service market. In pertinent part, the Guidance asserts that “naked” agreements (*i.e.*, facially anti-competitive agreements that lack pro-competitive justifications) between competitors in an employment market to fix wages or to not “poach” employees from one another constitute *per se* violations of the antitrust laws. Importantly, in a significant policy shift, DOJ announced its intention to prosecute such *per se* violations criminally.

DOJ and FTC published the Guidance in the final month of President Obama’s tenure and, to date, DOJ has yet to announce any criminal indictments pursuant to the aggressive new policy set forth in the document. However, as the Trump administration continues to fill top Justice Department vacancies – including the September 27, 2017 confirmation of Assistant Attorney General Makan Delrahim to lead DOJ’s Antitrust Division – statements made by newly-appointed DOJ officials suggest that the Department intends to fully embrace the policy shift,² and that criminal investigations of alleged wage-fixing and no-poaching agreements may currently be underway.³ Additionally, in November 2017, U.S. Senators Elizabeth Warren (D-MA) and Cory Booker (D-NJ) drafted a letter to Attorney General Jeff Sessions to voice their concerns regarding the prevalence of “no-poach” agreements used by franchisors, and requesting information as to what actions Congress might take to curb the use of such agreements.⁴

For these reasons, employers should take care to review their current hiring policies to ensure compliance with the Guidance. As noted in the Guidance, HR professionals are often in the best position to ensure such compliance by implementing safeguards to prevent inappropriate discussions or agreements with other companies competing for the same employees. Indeed, pursuant to the Guidance, the antitrust agencies now consider HR professionals to be on notice that their firms’ hiring practices could subject the company, or the *HR director individually*, to civil or *criminal* liability under the antitrust laws.

¹ Department of Justice, “Antitrust Guidance for Human Resource Professionals,” (Oct. 2016) [hereinafter, “Guidance”], available at <https://www.justice.gov/atr/file/903511/download>.

² See Department of Justice, “Acting Assistant Attorney General Andrew Finch Delivers Remarks at Global Antitrust Enforcement Symposium,” (Sept. 12, 2017), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust> (“Your clients should be on notice that a business across the street from them—or, for that matter, across the country—might not be a competitor in the sale of any product or service, but it might still be a competitor for certain types of employees such that a naked no-poach agreement, or wage-fixing agreement, between them would receive *per se* condemnation”).

³ See Liz Crampton, “No-Poach Deals Could Invite Criminal Antitrust Charges,” BLOOMBERG BNA (Sept. 12, 2017), <https://www.bna.com/nopoach-deals-invite-n57982087759> (noting that Deputy Assistant Attorney General Barry Nigro commented, during a session at an antitrust symposium at Georgetown Law Center, that “he was ‘surprised’ to learn about the number of active no-poaching investigations DOJ is pursuing. . . .”).

⁴ Ltr. from Elizabeth Warren, United States Senator, and Cory A. Booker, United States Senator, to The Honorable Jeff Sessions, Attorney General (Nov. 21, 2017), available at https://www.warren.senate.gov/files/documents/2017_11_21_No_Poach.pdf.

What Types of Agreements are Considered Per Se Violations Subject to Criminal Liability?

The Guidance highlights two types of anticompetitive agreements that, without any pro-competitive justification, may give rise to a *per se* violation of the antitrust laws:

1. “Wage-Fixing” Agreements. Agreements pertaining to employee salary or other terms of compensation.
2. “No Poaching” Agreements. Agreements to refuse to solicit or hire another company’s employees.⁵

The Guidance cites to prior civil enforcement actions pertaining to such wage-fixing and no-poaching agreements, including three separate civil suits brought against Silicon Valley technology companies for agreeing with competitors not to cold call each other’s employees. The Guidance makes clear that “naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws.”⁶

Importantly, DOJ only intends to criminally prosecute “naked” wage-fixing or no-poaching agreements, meaning that “the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers,” and that, therefore, the agreement will be “deemed illegal without any inquiry into its competitive effects.”⁷ Generally, the DOJ Antitrust Division has only prosecuted price fixing or bid rigging agreements as criminal *per se* offenses.

What Types of Agreements May Be Subject to a Civil Enforcement Action?

Any *per se* violation for entering into a wage-fixing or no-poaching agreement could be enforced civilly by either DOJ or FTC. Indeed, as noted in the Guidance, both antitrust agencies have successfully brought such actions in the recent past.⁸

The Guidance further notes that the sharing of certain sensitive information (e.g., employee salaries, benefits, or terms and conditions of employment) between competitors in an employment market, though not *per se* illegal, could be subject to civil antitrust liability if it is likely to have an anticompetitive effect.⁹ Indeed, even if the parties are currently engaged in a proposed merger or acquisition, or involved in a joint venture or other collaboration, civil antitrust liability may still attach if the parties share information about the terms and condition of employment, prior to the finalization of the agreement.¹⁰ However, the Guidance does note that not *all* information exchanges are illegal under the antitrust laws, and that an exchange of sensitive information can be designed in such a way that ameliorates the anti-competitive concerns.¹¹

What Kinds of Employment Practices May Lead to an Antitrust Violation?

In conjunction with the Guidance, DOJ and FTC published a corresponding “cheat sheet” document entitled “Antitrust Red Flags for Employment Practices.”¹² The two-page document cautions HR professionals that “antitrust concerns may arise” if the manager, HR professional, or any employee is engaged in any of the following practices:

- Agreeing with another company about employee salaries, benefits, other terms of compensation, or terms of employment;
- Agreeing with another company to refuse to solicit or hire that company’s employees, or expressing to competitors that neither company should compete too aggressively for the other’s employees;
- Exchanging company-specific information about employee compensation or terms of employment with another company;
- Participating in a meeting, such as a trade association meeting, where any of the above topics are discussed,

⁵ Guidance, *supra* n.1, at 3.

⁶ *Id.*

⁷ *Id.*

⁸ See *id.* at 3-4.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² Department of Justice, “Antitrust Red Flags for Employment Practices” (Oct. 2016), available at <https://www.justice.gov/atr/file/903506/download>.

or discuss the above topics with colleagues at other companies (even during social events or in other non-professional settings);

- Receiving documents that contain another company's internal¹³

Conclusion

If you have any questions involving these issues, please contact Mr. Jacobovitz and Mr. Shapiro for further guidance.

¹³ *Id.*

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