

Client Alert

Labor & Employment Practice Group
Antitrust Practice Group

October 31, 2016

Employers Are Advised to Proceed Cautiously Before Discussing Employee Recruitment and Compensation with Competitors as the DOJ and FTC Crack Down on Violations of Antitrust Laws

On October 20, 2016, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) jointly issued Antitrust Guidance for Human Resource Professionals intended to alert those involved in hiring and compensation decisions of potential violations of the U.S. antitrust laws.

Though the Guidance does not actually shed light on any new law, it undoubtedly serves as a warning to employers that the DOJ and FTC intend to aggressively enforce existing antitrust laws. As outlined in the Guidance, it is unlawful for companies to either implicitly or explicitly agree to not compete with their competitors on matters relating to employment. Such action takes shape in many forms, but potential violations of antitrust laws include:

- agreeing to refuse to solicit or hire another company's employees ("no-poaching" agreements);
- agreeing to limit or fix wages and other terms of employment for potential hires ("wage-fixing" agreements); and
- sharing company-specific information about wages and other terms and conditions of employment with other companies who compete for the same type of employees.

The Guidance makes clear that agreeing to not hire, solicit, or recruit a competitor's employees, for example, chips away at the foundation of a productive economy by reducing competition, which in turn, negatively impacts employees in the form of lower wages and benefits. The Guidance cautions that "[e]ven if participants in an agreement are parties to a proposed merger or acquisition, or are otherwise involved in a joint venture or other collaborative activity, there is antitrust risk if they share information about terms and conditions of employment."

To help guide HR professionals and others, the DOJ and FTC have identified the following practices as activities that may raise antitrust concerns in the employment setting:

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- Agreeing with another company about employee salary or other terms of compensation, either at a specific level or within a range.
- Agreeing with another company to refuse to solicit or hire that other company's employees.
- Agreeing with another company about employee benefits.
- Agreeing with another company on other terms of employment.
- Expressing to competitors that you should not compete too aggressively for 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 the above topics are discussed.
- Discussing the above topics with colleagues at other companies, including during social events or in other non-professional settings.
- Receiving documents that contain another company's internal data about employee compensation.¹

The DOJ and FTC have taken aim at companies that engage in employment practices in violation of the antitrust laws. The Guidance highlights numerous recent actions in which the DOJ and FTC have successfully brought actions against companies such as eBay, Apple, and Debes Corp. for unlawfully setting uniform rate schedules, entering into "no poach" agreements, and limiting hiring of a competitor's employees. The Guidance reminds companies that the DOJ has the power to bring both civil enforcement actions and criminal prosecutions against individuals and companies alike, and specifically cautions that, "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."

Due to the complexity of various antitrust laws and the severe penalties imposed upon those individuals and companies that violate these laws, we advise all employers to consult their King & Spalding attorneys before considering sharing any information or conducting any interactions with a competitor that relate to the recruiting, hiring, compensation, or benefits of employees.

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¹ Antitrust Red Flags for Employment Practices, available at <https://www.justice.gov/atr/file/903506/download>.