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The Department of Justice Will Criminally Prosecute Employee No-Poaching and Wage-Fixing Agreements

Companies across industries should review hiring policies pre-emptively to avoid serious law enforcement consequences.

On October 20, 2016, the Department of Justice's Antitrust Division (Antitrust Division) and the Federal Trade Commission (FTC) (together the Agencies) announced that agreements between companies not to hire each other's employees (no-poaching agreements) and agreements not to compete on salaries or terms of employment ("wage-fixing agreements") will be "criminally investigated and prosecuted as hardcore cartel conduct."[1] Accordingly, companies and individuals who engage in this type of conduct may face substantial monetary penalties and jail time.

The Agencies' pronouncement represents a significant change in enforcement policy. To date, and going back to the first no-poach case the Antitrust Division filed in September of 2010, the government has treated such agreements as civil violations of the antitrust laws. However, with this guidance, the Antitrust Division has given warning that it intends to treat no-poaching and wage-fixing agreements the same way it treats agreements to fix prices of goods, allocate customers or reduce output, *i.e.*, as criminal violations.

This *Client Alert* describes the Antitrust Division's recent policy on no-poaching and wage-fixing agreements, its implications, and advice for companies and individuals who may be affected by the Agencies' new focus on hiring and compensation practices.

The Federal Government's New Antitrust Guidance on Hiring and Compensation Practices

With the new "Antitrust Guidance for Human Resources Professionals" (Antitrust Guidance), the Agencies have declared that they will treat naked no-poaching agreements and wage-fixing agreements as crimes that are per se illegal under the antitrust laws.[2] Conduct that is per se illegal is deemed illegal without any inquiry into its competitive effects.

The Antitrust Guidance also advises HR professionals to carefully consider any exchange or discussion of company-specific information about employee compensation or terms of employment with other competitor companies or their employees, noting that such conduct may lead to an inference of no-poaching or wage-fixing agreements in violation of the antitrust laws.[3] Further, the Antitrust Guidance encourages individuals to report any potential antitrust violation to the Antitrust Division's Citizen Complaint Center or the FTC's Bureau of Competition.[4]

Recognized Exceptions to the General Rule Against No-Poaching and Wage-Fixing Agreements

Not all interactions or agreements with competitor companies or their employees regarding hiring and compensation practices violate the antitrust laws. The Antitrust Guidance explains that legitimate joint ventures, such as appropriate shared use of facilities, are not considered per se illegal under the antitrust laws.[5] Accordingly, tailored agreements to restrict hiring that are "reasonably necessary" for legitimate collaborations may not violate the antitrust laws. In a blog post accompanying the Antitrust Guidance, FTC officials Debbie Feinstein, Geoffrey Green and Tara Koslov also identify "consulting services, outsourcing vendors, and mergers or acquisitions" as part of a non-exhaustive list of circumstances in which no-poaching agreements or other restraints on recruiting and compensation may not violate the antitrust laws.[6,7]

The Antitrust Guidance also explains that competitors may exchange information regarding hiring and compensation practices in ways that conform with the antitrust laws, such as if a neutral third party manages the exchange, the exchange involves information that is relatively old, the information is aggregated to protect the identity of the underlying sources and enough sources are aggregated to prevent competitors from linking particular data to an individual source.[8]

Finally, the Antitrust Guidance explicitly "does not address the legality of specific terms contained in contracts between an employer and an employee, including non-compete clauses."

Lessons to Learn from the New Antitrust Guidance on Hiring and Compensation Practices

The breadth and scope of the Antitrust Guidance establishes several implications for all major corporations, their counsel and their executives.

First, the Antitrust Guidance arises from a series of investigations into and civil prosecutions of technology and healthcare companies regarding anti-poaching and wage-fixing agreements. As the Antitrust Division noted in a press release touting its settlement with certain high tech companies, there is "strong demand for employees with advanced or specialized skills." With these guidelines, the Antitrust Division and FTC have articulated that their concerns regarding no-poach and wage-fixing agreements extend beyond technology and healthcare industries and reach into any area where the covered conduct may take place.

Second, the Antitrust Guidance explicitly states that *both* individuals and companies engaged in anti-poaching and wage-fixing agreements may be subject to "criminal, felony charges." This signals an additional shift for the Antitrust Division, which in the recent past has only prosecuted companies for participating in anti-poaching and wage-fixing agreements. In follow-on class action lawsuits brought by affected employees of the various technology companies targeted by the Antitrust Division, plaintiffs have alleged that high-profile executives of leading technology companies participated in the no-poaching agreements. If those executives participated in the same conduct today, they might be personally subject to criminal prosecution and face the possibility of jail time and substantial fines. However, as the Antitrust Guidance explains, even non-executive HR employees who participate in anti-poaching or wage-fixing agreements may be subject to criminal prosecution.

Third, the Antitrust Division may decide to prosecute participants of anti-poaching or wage-fixing agreements that predate the Antitrust Guidance, and may do so in industries that have seen no previous enforcement activity related to these issues. As one court has held, "the government is under no obligation to pursue a history of civil enforcement proceedings in a particular industry in advance of bringing criminal prosecutions for anti-competitive conduct" because the antitrust law "establishes one

uniform rule applicable to all industries alike" with regards to price-fixing agreements. *United States v. Cinemette Corp. of Am.*, 687 F. Supp. 976, 982 (W.D. Pa. 1988), *citing Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 349 (1982). Notably, the Antitrust Guidance Q&A section highlights the Antitrust Division's Leniency Policies, which provides that the first qualifying corporation or individual to report a potential antitrust offense will not be criminally charged for the reported antitrust offense. This appears to be a thinly-veiled invitation to companies and individuals currently engaged in anti-poaching and wage-fixing agreements to report this conduct to the Antitrust Division to escape criminal prosecution.

Fourth, the recent release of the Antitrust Guidance and the Antitrust Division's accompanying press release indicates that it will prioritize the investigation and prosecution of anti-poaching and wage-fixing agreements. This, in turn, may result in an increase in follow-on class action lawsuits by affected employees. Following the Antitrust Division's first civil prosecution of high tech companies, affected employees filed a class action against the defendant companies and ultimately secured a US$415 million civil settlement. Subsequent prosecutions have likewise been followed by private class action lawsuits against those companies, leading to multimillion dollar settlements. Discovery in these class actions has even ensnared other technology companies that were never sued by the Antitrust Division in separate class action lawsuits. Accordingly, companies that participate in anti-poaching or wage-fixing agreements may still be exposed to expensive class action litigation even if not under active investigation by the Antitrust Division or FTC.

Conclusion

Companies and their employees can expect increased antitrust scrutiny regarding their hiring and compensation practices following the release of the Antitrust Guidance. Accordingly, companies — regardless of industry — should take care to prevent, detect and remedy any improper antitrust conduct.

Among steps to consider:

- Update your antitrust compliance policy and training programs to reflect a renewed focus on your hiring and compensation practices.
- Initiate an audit of your HR department to expose any gaps in your current situation.
- Review all merger agreements or joint development agreements to ensure that any restrictions on solicitation of employees are narrowly tailored to the needs of your transaction.
- Reach out to experienced antitrust counsel if you are considering sharing competitively-sensitive information or otherwise collaborating with your competitors regarding hiring and compensation practices. Counsel can advise you on how to best proactively manage any potential risks associated with potentially anticompetitive behavior, such as seeking a business review from the Antitrust Division.[9]
- Reach out to experienced antitrust counsel *before* contacting the Antitrust Division if you learn of any existing potential antitrust issues relating to your hiring and compensation practices. Reporting potential criminal antitrust violations prior to a complete evaluation and analysis of your situation may result in unnecessary criminal fines and penalties for your company and employees.

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Endnotes

[1] https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals

[2] https://www.justice.gov/atr/file/903511/download at 3.

[3] *Id*. at 3-5.

[4] *Id*. at 6.

[5] *Id*. at 3.

[6] https://www.ftc.gov/news-events/blogs/competition-matters/2016/10/competitive-job-markets-offer-more-just-fringe?utm_source=govdelivery.

[7] The consent decree entered between the Antitrust Division and several high tech companies on March 18, 2011 included a section entitled "Conduct Not Prohibited" that set forth examples of permissible agreements. Available at https://www.justice.gov/atr/case-document/final-judgment-0. While instructive, the consent decree applied only to the settlement of that civil action and may not reflect the evolution of the Agencies' position.

[8] https://www.justice.gov/atr/file/903511/download at 5.

[9] https://www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf.