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Employers, Beware: DOJ, FTC Mean Business With Enhanced Antitrust Enforcement Efforts

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Employers should assess whether their employment practices—including benchmarking, recruitment, and the sharing of information about employee compensation—comply with antitrust law requirements in the face of increased enforcement efforts by the federal government.

The U.S. Department of Justice (DOJ) has made clear that it expects human resources professionals—individuals who historically may not have had antitrust compliance top of mind—to understand and be aware of best practices to avoid running afoul of the antitrust laws. Indeed, since the DOJ's and Federal Trade Commission's (FTC) guidance on this topic in 2016, the DOJ has been active in prosecuting companies for engaging in unlawful conduct involving employment practices, which has resulted in consent decrees and significant fines. The DOJ intends to prosecute companies criminally for conduct that is unlawful and occurs after the 2016 guidance so companies must act now to avoid criminal prosecution, as well as potential treble damages and civil fines.

The push for greater enforcement of the antitrust laws in the employment context continued at the FTC's recent "Competition and Consumer Protection in the 21st Century" hearing where labor and antitrust economists and attorneys urged the FTC and the DOJ to increase enforcement of antitrust laws in the labor market. At the hearings, scholars commented that labor markets have been overlooked in both research and enforcement.

Many experts called for the anticompetitive conduct in labor markets to be treated as strictly as anticompetitive conduct in product markets. Dr. Alan Krueger, Professor of Economics and Public Affairs at Princeton University; Dr. Martin Gaynor, Professor of Economics and Public Policy at Carnegie Mellon University; Eric Posner, Professor of Law at the University of Chicago Law School; and Dr. Ioana Marinescu, Assistant Professor at the University of Pennsylvania's School of Social Policy & Practice, recommended future reviews of mergers and acquisitions for labor market effects and urged greater rulemaking, investigation, and prosecution.

If their advice is heeded, employers can expect to see continued increases in research and

enforcement activity concerning anticompetitive conduct in labor markets.

Calls for greater enforcement coincide with 2016 guidance, in which the DOJ announced that it intended to criminally prosecute wage-fixing and "no-poaching" agreements.

The areas of concern addressed by the DOJ/FTC guidance are:

- price-fixing agreements with respect to wages and other benefits;
- "no poach" agreements where companies agree not to solicit each other's employees; and
- information sharing about employment terms that can be viewed as an indicator of an agreement on wages and other benefits.

An increase in antitrust claims in this area has already been seen in enforcement actions brought by the DOJ and FTC, as well as private civil treble damage actions. Even before the joint DOJ/FTC guidance, actions were brought by the DOJ and private plaintiffs against high-tech employers alleging that they had entered into agreements not to "cold call" one another's employees. These cases resulted in a consent judgment with the DOJ and settlements with private plaintiffs in excess of $400 million.

Since the joint DOJ/FTC guidance was issued, the following cases have been brought:

- *United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp.*, alleging agreements not to solicit each other's employees and resulting in a consent judgment dated July 11, 2018.
- *FTC v. Your Therapy Source, LLC, et al*, alleging wage setting agreement and resulting in a consent order dated July 31, 2018.
- *In re Dental Supplies Antitrust Litigation*, a product price-fixing case in which it was alleged that the co-conspirators also agreed not to poach one another's sales staff, resulting in an $80 million class settlement reached August 2018.
- A 2018 investigation by Washington State's attorney general resulting in agreements with 23 major fast-food chains to discontinue the practice of requiring their franchisees to sign agreements stipulating that they would not hire or solicit the workers of other franchisees. Washington's AG has indicated an interest to expand this investigation to other industries.

Given the calls for even greater enforcement in this area, human resource professionals and in-house counsel should consider whether their company’s employment practices comply with federal and state antitrust laws. Companies should also consider training their human resources professionals, those involved in mergers and acquisitions, and others on what is and is not permissible under the antitrust laws.

Other preventative measures include adopting company-wide policies that prohibit unlawful conduct—such as entering into no-poach or information-sharing agreements (whether informal or formal)—from occurring at all. Non-solicitation provisions between two companies (as opposed to a

company and an employee) should be reviewed by counsel to ensure they comply with the antitrust laws.

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