

## DOJ, FTC Announce New Antitrust Guidance for Recruiting and Hiring; Criminal Enforcement Possible

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Many companies—and the HR professionals and other executives who worked for them—have found out the hard way that business-to-business agreements on compensation and recruiting can violate the antitrust laws and bring huge corporate and personal penalties.

Last week, the ***Federal Trade Commission (FTC)*** and the ***Department of Justice Antitrust Division (DOJ)*** jointly issued antitrust guidance for anyone who deals with recruiting and compensation. The guidance is written for HR professionals, not antitrust experts. It avoids jargon and applies antitrust basics in plain English. It expands on those basics by providing short and direct answers to real-life questions.

The guidance comes in the wake of several actions in recent years by the federal antitrust agencies against so-called “no-poaching” or “wage-fixing” agreements entered by companies competing for the same talent. It announces that DOJ will prosecute criminally some antitrust violations in this space. While the new guidance is explicitly aimed at HR professionals, senior executives should understand it as well.

The guidance starts with the basics: The antitrust laws establish the rules for a competitive marketplace, including how competitors interact with each other. From an antitrust perspective, firms that compete to recruit or retain employees are competitors, even if they do not compete when selling products or services. Therefore, agreements among employers not to recruit certain employees (no-poaching) or not to compete on various terms of compensation (wage-fixing) can violate the antitrust laws.

To be illegal, these agreements need not be explicit or formal. Evidence of exchanges of information on compensation, recruiting, or similar topics followed by parallel behavior can lead to an inference of agreement. Intent to lower a company’s labor costs is no defense. Also, there is no “non-profit” defense: while they might not compete to sell services, non-profits are considered competitors for the staff they hire.

The potential costs of antitrust violations are huge: fines by the agencies; treble damages for injured actual or potential employees; and intrusive regulation of basic company operations from consent decrees and judgments. In addition, the DOJ used this guidance to announce that it will now

prosecute criminally any naked wage-fixing or no-poaching agreements. According to DOJ, these naked agreements—“separate from or not reasonably necessary to a larger legitimate collaboration between the employers”—harm competition in the same irredeemable way as hardcore price-fixing cartels. So now, any executives involved in such agreements—whether HR professionals or not—face personal consequences, including threats of potential jail time.

Even unsuccessful attempts to reach an anticompetitive agreement on these topics can be illegal in the eyes of the regulators. As the guidance makes clear, so-called “invitations to collude” have been and will continue to be pursued by the FTC as actions that might violate the Federal Trade Commission Act.

Some of these information exchanges and agreements do not automatically violate the antitrust laws and there is nothing in this new guidance that suggests otherwise. If the agreements are reasonably necessary to an actual or potential joint venture or merger, legitimate benchmarking activity, or other collaboration that might help consumers, their net effect on competition would need to be judged. In prior actions, the agencies also have recognized as legitimate certain no-poaching clauses in agreements with consultants and recruiting agencies. Even such common uses as employment or severance agreements might not run afoul of the antitrust law’s prohibitions.

The guidance does not—and really cannot—go into all the detail necessary to determine when any particular effort will pass antitrust muster. It does refer readers to the earlier [Health Care Guidelines](#) but those helpful tips relate only to information exchanges. The guidance also provides links to the many prior civil actions taken by the agencies on these types of matters. It is accompanied by a two-sided index card entitled Antitrust Red Flags for Employment Practices that could be part of an effective compliance program.

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