

Federal Trade Commission and Department of Justice Issue Antitrust Guidance for HR Professionals

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The DOJ will now treat wage-fixing and no-poaching agreements criminally.

On October 20, the US Department of Justice (DOJ) and Federal Trade Commission (FTC) issued guidance (the Guidance) signaling that they will bring enforcement actions for wage-fixing and no-poaching agreements under federal antitrust law.^[1] Significantly, this is the first time that the DOJ indicated that it would consider a “criminal prosecution against individuals, the company, or both” for wage-fixing and no-poaching agreements. The DOJ has authority to enforce criminal and civil violations of antitrust laws. The FTC enforces civil, not criminal, laws. The agencies provided the “alert” for human resources (HR) professionals concerning “potential violations of the antitrust laws” based on hiring and compensation decisions.

Many companies currently take steps, such as providing compliance training for their sales and marketing employees, to reduce the risk of criminal and civil penalties associated with price fixing and market allocation agreements. In light of the Guidance, companies should consider adding compliance training for HR personnel and seek appropriate legal guidance to avoid entering into wage-fixing and no-poaching agreements.

New Criminal Focus

This Guidance marks a significant turning point because the DOJ had not previously pursued a criminal case against wage-fixing and no-poaching agreements or even indicated that its policy was to criminally pursue such agreements. Instead, the DOJ and the FTC have previously pursued civil cases against companies that engaged in wage-fixing and no-poaching agreements. Even these civil cases were often limited to the healthcare and technology industries. For instance, in 2010, the DOJ sued several high-tech companies over an alleged no-poaching agreement that prohibited the companies from recruiting employees of other companies via cold calling.^[2] In another case, the DOJ sued a healthcare association for acting on behalf of hospitals to set the rates that they would pay nurses.^[3] Both cases were settled with the DOJ imposing only behavior remedies.

The Guidance now makes clear that “the DOJ will criminally investigate allegations that employers

have agreed among themselves on employee compensation or not to solicit or hire each other's employees."^[4] Moreover, under the Guidance, naked wage-fixing and no-poaching agreements are considered per se illegal; they are unlawful regardless of whether there is a procompetitive or anticompetitive effect. The Guidance also includes specific examples of conduct that the DOJ may prosecute.

The Guidance notes that the DOJ and the FTC will still pursue civil actions against other types of employment-related conduct, such as companies sharing sensitive employee compensation information without actually agreeing to fix wages. The Guidance specifically notes that companies should avoid exchanging their hiring policies with other companies competing to hire the same type of employee or suggesting another company to go along. The Guidelines caution that any exchange of this type of information should be designed to comply with antitrust laws. In addition, certain narrowly tailored wage-fixing or no-poaching agreements entered into in connection with a procompetitive collaboration such as a joint venture or merger negotiations will also be subject to civil, instead of criminal, enforcement. Finally, the agencies issued "Antitrust Red Flags for Employment Practices,"^[5] which cautions against agreements with other companies on compensation terms, refusals to solicit or hire another company's employees, on other terms of employment, and similar practices.

The DOJ's Increasing Focus on Individual Accountability

The new guidance parallels other recent DOJ efforts to focus on individual accountability in both criminal and civil cases. Last year, Deputy Attorney General Sally Quillian Yates announced several steps that the DOJ would take to hold individual wrongdoers accountable. Notably, the "Yates Memo" announced the DOJ's new policy to require companies to cooperate and disclose the identities of all wrongdoers in order to get credit for cooperation.^[6] Acting Associate Attorney General Bill Baer, presently the third-highest ranking DOJ official and previously the head of the DOJ's Antitrust Division, recently underscored the DOJ's resolve to pursue individual wrongdoers civilly in Fraud Claims Act proceedings.^[7]

Tips and Takeaways for In-House Counsel

- Expand antitrust compliance training to HR personnel. Just as sales and marketing personnel need to learn how to avoid entering into criminally unlawful price-fixing and market-allocation agreements, HR personnel should learn how to identify and ameliorate any potential wage-fixing or no-poaching agreements, some of which may not be apparent on their face. For instance, under the Guidance, naked wage fixing and no poaching between noncompeting firms are now per se unlawful and subject to criminal prosecution. Further, agreements between companies to not partake in certain recruitment practices or offer certain perks, such as gym memberships, could also be subject to criminal prosecution.
- Information exchanges are permissible if carefully designed to conform with antitrust laws. Although exchanging sensitive employee compensation information without an agreement is not per se criminally unlawful, the Guidance notes that the DOJ and the FTC will still pursue civil actions against participants in such information exchanges if those exchanges have an anticompetitive effect and cautions companies to not exchange hiring policies among one another. Companies seeking information on what "market" wages are in a particular industry may use a third party to aggregate compensation information, obscuring the underlying source of any information. Further, a buyer may receive employment compensation information from a target company if such information is aggregated or through use of a clean

team.

- Distinguish “naked” and legitimate wage-fixing and no-poaching agreements. Although agreements to fix wages or eliminate poaching that serves no other purpose than cost savings are per se and criminally unlawful, other similar agreements may be lawful if they serve a legitimate purpose. For instance, an agreement between two joint venture partners to restrict competition between them for the joint venture’s employees may be lawful if narrowly tailored to aid the joint venture’s success. Similarly, employee noncompetes may also be lawful if reasonable in scope and duration. Always consult with antitrust counsel if the antitrust risks associated with a specific agreement are unclear.
- Consult with antitrust counsel if wrongdoing is detected. In the event that in-house legal counsel becomes aware of improper wage-fixing or no-poaching agreements, promptly consult with antitrust counsel, who can help determine which appropriate steps to take. For example, if a company can qualify for the Antitrust Division’s Leniency Program, the company may avoid criminal fines and minimize civil liability.

[1] See [Antitrust Guidance for Human Resource Professionals](#) (Oct. 2016) [hereinafter Antitrust Guidance].

[2] *United States v. Adobe Sys., Inc.*, No. 10-cv-01629 (D.D.C. filed Sep. 24, 2010); see also Press Release, US Dep’t of Justice, [Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements](#) (Sept. 24, 2010).

[3] *United States v. Ariz. Hosp. and Healthcare Ass’n*, No. 07-cv-01030 (D. Ariz. Sep. 12, 2007); see also Press Release, US Dep’t of Justice, [Justice Department Reaches Settlement with the Arizona Hospital And Healthcare Association and Its Subsidiary](#).

[4] Antitrust Guidance, at 5.

[5] See [Antitrust Red Flags for Employment Practices](#).

[6] US Dep’t of Justice, [Individual Accountability for Corporate Wrongdoing](#) (Sept. 9, 2015) at 3 (“To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.”).

[7] US Dep’t of Justice, [Bill Baer Delivers Remarks on Individual Accountability at American Bar Association’s 11th National Institute on Civil False Claims Act and Qui Tam Enforcement](#) (June 9, 2016) (“Much of the focus to date has been on application of individual accountability principles to our criminal investigations and prosecutions. My emphasis today is on those aspects of our approach to individual accountability that have a direct impact

on civil matters, particularly those brought under the False Claims Act.”).

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