

Antitrust Agencies Issue Guidance To HR Professionals Regarding Hiring and Compensation Decisions

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The U.S. Antitrust Agencies (the ***Antitrust Division of the Department of Justice*** and the ***Federal Trade Commission***) recently issued a document entitled “[Antitrust Guidance For Human Resource Professionals](#)” intended to alert HR professionals to potential antitrust violations involving hiring and compensation decisions.

The Guidance states that firms that compete to hire or retain employees are competitors in the “employment marketplace,” regardless of whether they make the same products or compete to provide the same services. It advises that it is unlawful for competitors to expressly or implicitly agree not to compete and notes that the Antitrust Agencies have taken enforcement actions against employers that have agreed not to compete for employees. To underscore this, the Guidance briefly discusses the enforcement actions that the Antitrust Agencies have taken against entities for agreeing not to compete for employees or agreeing to uniform compensation terms, including actions against high profile technology companies.

The Guidance strongly warns against entering into agreements: (i) “about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements)”; and (ii) “to refuse to solicit or hire another company’s employees (so-called “no poaching” agreements).” “Naked” wage-fixing or no poaching agreements (i.e., those that are not reasonably necessary to a larger legitimate collaboration between the employers) are per se illegal. Of particular significance, going forward, the Antitrust Division intends to proceed criminally against naked wage-fixing or no poaching agreements. (The Guidelines confirm that agreements that are reasonably necessary to a legitimate collaboration, such as a joint venture, are not per se illegal.)

In addition, the Guidelines repeat the Antitrust Agencies’ warning against sharing with competitors current information about terms and conditions of employment. Although such sharing is not illegal in and of itself, the Guidelines observe that it can serve as evidence of an implicit illegal agreement if it results in similarity of conduct that has anticompetitive effects. As an example, the Guidelines cite to an Antitrust Division lawsuit against a society of hospital HR professionals that exchanged current and prospective wage information about nurses that caused the hospitals to match each other’s wages, keeping the pay of the nurses artificially low.

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