

DOJ Threatens Criminal Charges and Heightened Enforcement for Employment-Related Antitrust Violations

Following and citing years of enforcement of employee-focused antitrust violations, the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) jointly announced an aggressive shift in enforcement intent with the issuance on October 20 of “Antitrust Guidance for Human Resources Professionals” (Guidance). The most significant element of the Guidance is DOJ’s unprecedented announcement that it will pursue criminal antitrust charges against individuals and companies alleged to have entered into wage-fixing or no-poaching agreements. This type of announcement is not merely *pro forma*, but is made when DOJ believes it will face similar situations in the future and wants to ensure that criminal targets cannot claim that they were not on

notice of the severity of the consequences of their alleged conduct. It signals that the criminal component of the Antitrust Division is looking for cases, and companies should take care to avoid even being subject to such an inquiry.

Directed at human resource managers and others involved in the recruitment and hiring process, the Guidance builds off of a series of antitrust enforcement actions involving allegations of wage fixing, agreements not to poach rivals’ employees and anticompetitive sharing of wage information. Although the Guidance largely recites familiar antitrust principles, it reflects a striking shift in tone from the antitrust enforcement agencies in the employment and hiring context.

Key Points

- **DOJ will bring criminal charges for naked wage-fixing and no-poaching agreements.** Perhaps the most startling aspect of the Guidance is DOJ’s announcement that it “intends to proceed criminally against naked wage-fixing or no-poaching agreements.” Although the agencies have challenged similar conduct in the past, DOJ has never previously used its criminal authority in a case involving such claims. Going forward, however, DOJ may “bring criminal, felony charges against the culpable participants in the agreement.” Included in DOJ’s focus are agreements among firms regarding salary, benefit levels or other elements of compensation, “either at a specific level or within a range.” DOJ has also announced intent to proceed criminally against no-poaching agreements, in which companies agree not to solicit or hire each other’s employees.
- **DOJ and FTC are focused on exchange of wage and benefit information as well.** Although not prosecuted criminally, the exchange of competitively sensitive information can also be an antitrust violation. Here again, the agencies have signaled their intent to take an aggressive approach to the exchange of wage, benefit and other employment-related information, threatening to bring civil antitrust cases where they believe such exchange “has decreased or is likely to decrease compensation.” The agencies even warned parties involved in due diligence in connection with a proposed merger, or participants in an otherwise-lawful joint venture, that their exchange or discussion of wage information could attract a government investigation.
- **The agencies do not need a “smoking gun” to prove an illegal agreement.** It has long been accepted law that a court can infer an illicit agreement from circumstantial evidence, even without direct evidence of an explicit oral or written agreement. In a further reflection of the seriousness of the October 20 announcement, the agencies went out of their way to make this point in their Guidance, noting that they may infer an agreement based on “evidence of discussions and parallel behavior.”

With the issuance of their Guidance document, the federal antitrust enforcement agencies have clearly announced their intent to carefully scrutinize recruitment and hiring practices for potential antitrust problems. Now, more than ever, firms should take a careful look at their policies and practices to ensure they do not attract unwanted antitrust attention.

For a copy of our checklist with questions to ask your HR team, please contact us.

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