Insight

IN-DEPTH DISCUSSION

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DOJ and FTC Release Antitrust Guidance for HR Professionals

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Employment lawyers and human resources professionals, take note: In 2016, in addition to knowing the ins and outs of labor and employment law, the federal government and its enforcement entities expect that you have more than a passing familiarity with antitrust law.

On October 25, 2016, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) jointly released a publication entitled "Antitrust Guidance for Human Resources Professionals." It focuses principally on two things: 1) "no-poaching agreements", in which competitor companies agree (secretly or otherwise) not to hire the other's employees, and 2) the exchange between competitors of wage information, and with that exchange improper efforts to fix wages, or "wage-fixing agreements."

These activities, the Guidance points out, violate federal antitrust laws, which may result in criminal penalties being imposed not only on employers, but on the individuals involved in those activities. Based on the language of the Guidance, these individuals presumably include human resources executives. Indeed, the Guidance notes that these agreements are per se illegal under antitrust laws, meaning a violation does not require proof of anti-competitive effects.

It is not coincidental that on the same day of the Guidance's release, the White House issued a "Fact Sheet" on the same topics—what it termed "wage collusion, unnecessary non-compete agreements, and other anticompetitive practices."

Background

The DOJ has been pursuing no-poaching agreements on antitrust grounds for several years, including bringing action against several companies regarding anti-poaching concerns. Many of those same companies were

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also targeted in related class action lawsuits, where alleged damages were hundreds of millions of dollars. The DOJ's recent guidance shows this area remains a key target for them and area of risk for employers.

The Guidance

The Guidance specifically advises that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements." It continues, "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."

And if such an investigation "uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, *including both individuals and companies*."

The Guidance cautions companies against exchanging competitively sensitive wage information. Even in the absence of a wage-fixing or no-poaching agreement, "evidence of periodic exchange of current wage information in an industry with few employers could establish an antitrust violation because, for example, the data exchange has decreased or is likely to decrease compensation."

The Guidance notes that "[e]ven if the participants in a no-poaching agreement are parties to a proposed merger or acquisition, or are otherwise involved in a joint venture or other collaborative activity, there is antitrust risk if they share information about terms and conditions of employment."

In addition, the Guidance specifically notes the role professional associations may play in facilitating potential anti-trust violations. The Guidance points to a 1994 suit the DOJ brought against the Utah Society for Healthcare Human Resources Administration, a society of human resources professionals at Utah hospitals, for "conspiring to exchange nonpublic prospective and current wage information about registered nurses." The suit alleged that the exchange caused the defendant hospitals to match each other's wages, which kept the pay of registered nurses in the area artificially low. The case ended in a consent judgment, which prevented the defendant hospitals from "communicating to, requesting from, or exchanging with any other health care facility in Utah or third party, other than one owned directly or indirectly by the hospital defendant or its parent, information concerning the current or prospective compensation paid to nurses."

Permissible No-Hire Agreements

Companies often enter into perfectly legitimate no-hire agreements with business partners. For example, a company that retains a third-party service provider might promise, as part of its contract, that it will not hire, for a limited period of time, the service provider employees who worked on the contract, and the service provider might agree not to hire employees it met in providing the services.

As part of due diligence in a potential merger, the target and acquiring companies may quite properly agree not to hire each other's employees.

Of course, employment and severance agreements may also properly require the individuals not to poach employees for a certain period after employment terminates.

Thus, these agreements are permitted in employment or severance agreements; in a business agreement, where they are reasonably necessary for contracts with consultants and similar third parties; for the settlement or compromise of legal disputes; for the function of a legitimate collaboration agreement, such as joint development, technology integration, joint ventures, joint projects (including teaming agreements), and the shared use of facilities; and where they are reasonably necessary for mergers or acquisitions, investments, or divestitures, including due diligence.

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Impermissible no-poaching agreements that are the target of antitrust enforcement are made not in pursuit of a legitimate business interest, but to squelch competition.

Thus, no-hire agreements that are ancillary to a legitimate business interest are generally permissible. But to be enforceable, employers should incorporate them into the broader agreement, so that the business-related context is clear. They should, like all non-competes, be narrowly tailored—they should not be imposed on broad swaths of employees, but only those whose competitive activities, in the context of the agreement, need to be limited, and should be narrowly tailored as to time, geographic scope, and duration.

Permissible Information Exchanges

As noted above, information exchanges are per se unlawful if they are separate from or not reasonably necessary to a larger legitimate collaboration between the employers.

However, the Antitrust Guidance points out that not all information exchanges are unlawful. They may be lawful where a neutral third party manages the exchange; the exchange involves information that is relatively old; the information is aggregated to protect the identity of the underlying sources; and enough sources are aggregated to prevent competitors from linking particular data to an individual source.

And again, in the context of determining whether to pursue a merger or acquisition, the Guidance notes, an information exchange may be lawful because the buyer may have a legitimate need to obtain limited competitively sensitive information.

What Does the Guidance Mean for Employers and Human Resources Executives?

The Guidance concludes by recommending, "if HR professionals or other interested parties have information about a possible antitrust violation regarding agreements among competitors to fix wages, salaries, benefits, or other terms of employment, or agreements not to compete for employees in hiring decisions," such parties should make use of the DOJ's "business review process" or seek an advisory opinion from the FTC. However, prior to doing so, companies should consult with experienced antitrust counsel.

Notably, in many companies, human resources executives perform varied roles, with limited insight into, or control over, the decision-making process of the company's C-suite executives. Accordingly, the non-solicitation agreements and information exchanges discussed in the Guidance are not always controlled, developed or carried out by human resources executives. The Guidance does not address how the enforcement agencies will handle a situation in which the company engages in unlawful activity, but the human resources executive was unaware of the prohibited conduct.

Additionally, in its Q&A portion, the Guidance presents the question of whether a member of an HR professional organization interested in determining industry trends may "distribute a survey asking companies within the industry about current and future wages." The Guidance notes that soliciting or responding to such a survey may be unlawful. In another question, the Guidance cautions members of human resources organizations to avoid "discussing specific compensation policies or particular compensation levels" with members who work for competitor companies.

Many human resources executives are part of local or regional networking groups. These groups may regularly share information—including salaries—pertaining to recruitment and retention and strategies for problem-solving. While this information-sharing can be one of the main reasons that networking is valuable, given the Guidance's specific call-out of sharing salary information, human resources professionals should exercise caution in the types of information they share regarding their respective organizations.

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The Obama Administration Fact Sheet

As noted above, the Obama Administration released a Fact Sheet on no-poaching and wage-fixing agreements. Headlined: “The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth,” the document assesses the negative effect on employment and the economy that these agreements can have.

Perhaps more significantly, the Fact Sheet calls on both the U.S. Congress and state legislatures to take action to limit the legality of non-compete agreements. The Fact Sheet recommends that non-competes be limited to individuals above a certain salary threshold; that they be banned from occupations that promote public health and safety, or from workers who are “unlikely to possess trade secrets;” or from workers who are laid off or terminated without cause, and thus “may suffer undue adverse impacts from non-competes.”

The Fact Sheet also suggests that such legislation should disallow non-competes unless they are proposed before a job offer or significant promotion has been accepted; that they mandate providing consideration “over and above continued employment;” and that they encourage employers to “better inform workers about the law in their state and the existence of non-competes in contracts and how they work.”

Finally, the Fact Sheet suggests that legislatures “[i]ncentivize employers to write enforceable contracts, and encourage the elimination of unenforceable provisions by, for example, promoting the use of the ‘red pencil’ doctrine, which renders contracts with unenforceable provisions void in their entirety."

Within days of the White House’s release of the Fact Sheet, New York State Attorney General Elliot Schneiderman called for the passage of legislation in New York that would mirror these proposals exactly.

It is fair to assume that a Clinton Administration would continue to pursue these initiatives with some vigor. Employers should not rule out the possibility that even a Trump Administration, with its populist clarion call, would be in favor of narrowing non-competes.

Conclusion

Employers should review their non-compete agreements in general to be sure that they are justified by legitimate business concerns. Likewise, human resources professionals should exercise caution not to enter into agreements that could be challenged as anti-competitive, such as no-hire or information exchanges that could be misconstrued as wage-fixing agreements.

Companies may also want to consider providing training regarding the Guidance to employees—human resources and otherwise—who are involved in hiring and who work in positions in which they could be involved in information exchanges. Companies and human resources professionals are well-advised to heed with care the DOJ’s and the FTC’s specific warning that they will prosecute these agreements against companies and the individuals who enter into them.

Littler and its Workplace Policy Institute will continue to monitor developments in this area.

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