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HEALTH LAW NEWS

OCTOBER 28, 2016

# FTC AND DOJ RELEASE JOINT ANTITRUST GUIDANCE FOR HR PROFESSIONALS, WARN OF CRIMINAL ENFORCEMENT FOR "NO-POACHING" AND WAGE-FIXING AGREEMENTS

On October 20, 2016, the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") released joint guidance for human resources ("HR") professionals and others involved in hiring and compensation decisions. The joint guidance outlines how the federal antitrust laws apply to the employment arena and also warns employers that the agencies will be investigating problematic agreements and information sharing between firms competing to hire similar employees, including bringing *criminal* enforcement actions against naked wage-fixing or no-poaching agreements.

**AGREEMENTS AMONG EMPLOYERS NOT TO RECRUIT CERTAIN EMPLOYEES OR NOT TO COMPETE ON TERMS OF COMPENSATION ARE ILLEGAL AND POTENTIALLY CRIMINAL.**

In particular, the joint guidance highlights two types of agreements that would run afoul of the antitrust laws.

- Wage-Fixing Agreements - An agreement between competing companies about employee salary or other terms of compensation, either at a specific level or within a range.
- No-Poaching Agreements - An agreement between competing companies to not solicit or hire the other company's employees.

Naked wage-fixing and no-poaching agreements among employers are per se illegal under the federal antitrust laws. Such agreements could result in *criminal felony charges* against the participants in the agreement, the companies and the individuals. Private parties injured by an illegal agreement among potential employers can bring a civil lawsuit for treble damages (i.e., three times the damages the party actually suffered). Potential liability increases significantly when damages are trebled and also asserted on behalf of a "class" of similarly situated plaintiffs.

Importantly, wage-fixing and no-poaching agreements may be found illegal even if they are not in writing. That is, evidence of discussions and parallel behaviors (e.g., gentleman's or handshake agreements) may be sufficient to implicate the federal antitrust laws. As such, companies competing to hire similar employees should avoid entering into agreements of any kind relating to terms of employment.

A recent example of a potentially problematic no-poaching agreement occurred in the health care industry where a physician alleged that her employer, a university-based health system, entered into a gentleman's agreement with the CEO of a local, competing university health system to forego hiring each other's medical facility faculty and staff. The case is currently before the U.S. District Court.

An example of a problematic wage-fixing agreement in the health care industry comes from a 2007 DOJ enforcement action in which the DOJ brought an enforcement action against a state hospital and health care association alleging that the association and its participating member hospitals jointly set prices and other terms governing the hospitals' purchases of per diem and travel nursing services, which resulted in lower "bill rates" than what the market would otherwise allow. That action resulted in a consent judgment.

Another example of a problematic wage-fixing agreement in the health care industry comes from the widely publicized nurse wage-fixing cases. These cases began in 2006 and were brought as antitrust class action lawsuits against health systems in Albany, NY; Detroit, MI; Chicago, IL; Memphis, TN; and San Antonio, TX. In each instance, the nurses alleged hospital executives shared confidential wage information and agreed on compensation levels for nurses, leading to below market pay. After years of defense costs while these cases made their way through the courts, many of these health systems either entered into large settlements or had large judgments levied against them.

**BE CAREFUL WHEN SHARING COMPETITIVELY SENSITIVE INFORMATION.**

While agreements to share information are not per se illegal, sharing information with competitors about the terms and conditions of employment or exchanging other competitively sensitive information could implicate the federal antitrust laws and even serve as evidence of an illegal agreement. These violations may subject the company or individual to civil antitrust liability when they have, or are likely to

have, an anticompetitive effect.

Participants in a merger, acquisition or joint venture often need to share competitively sensitive information. However, there can be significant antitrust risk if the parties share information about terms and conditions of employment. Parties should take appropriate precautions in structuring information exchanges to minimize their risk under the antitrust laws.

As noted in the guidance, an example of problematic information sharing in the health care market occurred in 1994 when the DOJ sued the Utah Society for Healthcare Human Resources Administration for conspiring to exchange wage information about registered nurses. The exchange resulted in local hospitals matching wages, keeping the pay of registered nurses artificially low. This enforcement action resulted in a consent judgment to facilitate competition for registered nursing services.

**PRACTICAL TAKEAWAYS**

In order to avoid running afoul of the federal antitrust laws, employers should consider the following takeaways when structuring hiring and compensation practices:

- The FTC and DOJ intend to investigate and *criminally* prosecute companies and individuals for naked wage-fixing and no-poaching agreements. These arrangements can be formal or informal, written or unwritten or spoken or unspoken.
- Be careful when talking to other HR professionals in your industry at conferences or trade association meetings. Simple conversations that seem harmless could become the basis for a criminal or civil prosecution.
- Individuals and companies should avoid agreeing or coordinating with competitors about: (1) employee salary or other terms of compensation; or (2) refusing to solicit or hire another company's employees.
- Be wary of exchanging any wage information with a competitor or trade association. Unless properly structured, this exchange of information could be direct evidence of an unlawful wage-fixing agreement.
- Keep in mind that the cost to defend a FTC or DOJ investigation is incredibly high in terms of both money and time. Plus, if a private party subsequently files suit, on top of those additional defense costs, damages could be trebled.
- Consult counsel if you have any questions related to current practices or if you have been, or are approached by, a competitor to enter into this type of arrangement.

**ADDITIONAL RESOURCES**

Contained in the FTC and DOJ's joint guidance, is a practical Q&A for HR professionals to reference when considering specific situations that may occur.

Additionally, the FTC and DOJ have developed a Reference Card outlining a number of antitrust "red flags" that HR professionals should be aware of so they can avoid engaging in anticompetitive conduct.

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