Wage-Fixing, No-Poaching Agreements to Be Prosecuted Criminally Under New Guidance

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On October 20, 2016, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) jointly issued new guidance designed to help human resources professionals and their companies understand the potential antitrust implications of their work. The guidance relates primarily to the prohibition against wage-fixing and "no-poaching" agreements between competitors, as well as to the sharing of employment information between rival companies. In a questions-and-answers section, the agencies provide their view on hypothetical situations that may pose antitrust concerns. The guidance also announces a policy change: "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."

Wage-fixing agreements are promises between individuals at two or more companies to limit employee salaries or terms of compensation to a specific level. No-poaching agreements are arrangements between individuals at two or more companies within which all agreeing companies refuse to solicit or hire the other companies' employees. Both types of agreements, whether entered into directly or through a third-party intermediary, have consistently been considered *per se* illegal under the antitrust laws and can be subject to criminal enforcement by the DOJ. In essence, unless the agreement is a reasonably necessary part of a legitimate collaboration between the employers (like a joint venture), such an agreement is deemed to be illegal without regard to its anti-competitive effects. Additionally, these agreements need not be in writing or even made orally. In fact, other circumstances, particularly evidence of discussion and subsequent parallel behavior, may permit an inference that a company has made one of these prohibited agreements.

While the application of the antitrust laws to anti-competitive agreements in the employment space is not a departure from past practice, addressing them through criminal enforcement is. According to the guidance, wage-fixing and no-poaching agreements eliminate competition in the same "irredeemable" way as agreements to fix prices or allocate customers, which have traditionally been prosecuted criminally as "hardcore cartel conduct." If the DOJ follows through on its stated intention, companies and implicated executives alike could face prosecution.

The guidance does not explain why the DOJ saw the need to announce this policy change. Over the years, the DOJ has effectively imposed civil liability on companies engaging in wage-fixing or no-poaching agreements. In 2007, the DOJ obtained a consent decree against an Arizona hospital association that had set the rate structures for temporary nursing hires in most of the hospitals in the state. The association had, in essence, facilitated an agreement among the hospitals to wage-fix. The association settled the matter in response to the civil complaint, and no criminal charges were filed. More recently, the DOJ has brought civil enforcement actions against a number of technology companies for variations of no-poaching schemes, specifically agreements not to solicit the employees of other companies through direct cold calls.

Technology firms should be particularly vigilant in the wake of this stated change in DOJ policy, as the industry may be more susceptible than others to no-poaching agreements due to the specialized skills necessary for its workforce. Many qualified employees already are employed by other technology firms and thus less likely to be found on the open market. Recruiters often "cold call" such employees in an effort to spirit them away to a new employer. Tempting as it might be for firms to prevent cold calls through no-poaching agreements with other companies, such conduct now would risk criminal charges.

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The guidance also cautions against sharing competitively sensitive personnel-related information. The agencies noted that such exchanges can be used as evidence of an agreement that violates the antitrust laws. For example, an agreement to share nonpublic information about nurses' wages at Utah hospitals resulted in a DOJ civil complaint alleging that the information exchanges caused hospitals to match each other's wage levels. The case settled with a consent decree. The guidance expressly cautions that there is "antitrust risk" to companies sharing employment information, even in the context of a proposed merger or a joint venture between the parties.

It is important for human resources professionals and other employees who make personnel decisions to understand the potential antitrust implications of their work. At a basic level, they should not enter into agreements regarding employment compensation, terms of employment or recruitment with their counterparts at other companies that compete for the same type of employee. They also should avoid discussing specific compensation policies with their counterparts, even in nonbusiness settings like social events.

From a companywide perspective, unless as part of a legitimate collaboration, no employee of the company should communicate employment or compensation policies to other firms with whom the company competes to hire employees. Nor should any employee ask another company to "go along" and collude in a way that could suppress employee compensation.

Lastly, company leadership should be aware that violation of the prohibition against wage-fixing and no-poaching agreements could expose both individuals and the company to criminal liability in addition to the traditional civil antitrust liability, which is a change from previous DOJ policy.