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Antitrust Guidance for HR Professionals Raises Prospect of Criminal Prosecutions

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The *Antitrust Guidance for Human Resource Professionals* issued by the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) on October 20, 2016 is not a change in law, but it is a fair warning to human resources professionals that they can be prosecuted criminally just like any other business executive if they conspire with competitors in violation of federal antitrust laws.

The crux of the guidance is that an HR professional likely is breaking the antitrust laws if he or she:

- agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements), or
- agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called "no poaching" agreements).

The DOJ and FTC warned that these types of "[n]aked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third party intermediary, are per se illegal under the antitrust laws," and that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."

While the threat of criminal prosecution is severe, the guidance provided by the DOJ and FTC is limited in scope and based on well-established rules of antitrust law. Here are a few observations for HR professionals who may not be familiar with those rules:

It is better to be vertical than horizontal. The guidance from the DOJ and FTC is directed at wage-fixing and no-poaching agreements among employers that chill competition for the services of employees. Agreements in restraint of trade between competitors at the same level of distribution -- known as "horizontal agreements" -- have long been regarded as per se illegal, meaning that the agreement is deemed illegal without an inquiry into its competitive effects. By contrast, "vertical agreements" between businesses at different levels of distribution -- like agreements between suppliers and their customers, or agreements between employers and employees -- typically are subject to the "rule of reason," which requires proof that an agreement will have an actual anticompetitive effect in a relevant geographic and product market.

It is better to be clothed than naked. The guidance from the DOJ and FTC is focused on "naked" wage-fixing and no-poaching agreements, i.e. an agreement that "is separate from or not reasonably necessary to a larger legitimate collaboration between the employers." For example, in 2010 the DOJ successfully brought a civil enforcement action against Google and a number of other tech companies enjoining them from entering into agreements banning them from cold-calling the employees of other companies if those employees had not otherwise applied for a job opening. The DOJ argued that these agreements were per se illegal because they were not reasonably necessary to any legitimate collaboration.

Unlike these "naked" agreements, agreements that that are ancillary to a legitimate business transaction are not per se illegal, but are subject to the rule of reason. For example, a non-solicitation clause may be necessary as part of an M&A deal to protect the buyer and prevent the seller from usurping the business opportunity sold to the buyer by poaching all of the buyer's employees immediately after closing.

It is better to be outside than inside prison. The guidance from the DOJ and the FTC is not a change in law, and it is not even a change in DOJ policy. In 2015, the DOJ in the so-called "Yates Memo" stressed the importance of holding individuals accountable in criminal enforcement actions, and the recent guidance for HR professionals is consistent with this policy. When HR professionals are in doubt as to whether a particular restraint is lawful, they should err on the side of caution and seek antitrust counsel before taking action.

Finally, if you suspect a violation has already occurred, you should consult with your company's legal counsel. Under the DOJ Antitrust Division's leniency program, corporations can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to report participation in a criminal antitrust violation, cooperating with the Division's investigation and prosecution, and meeting other conditions. This leniency is available only to the first to report; as the guidance for HR professionals suggests, the DOJ will seek criminal charges against the other companies involved in the violation, as well as their employees.

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