

DOJ Announces Intent to Proceed Criminally Against Naked Wage-Fixing or No-Poaching Agreements

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On October 20, 2016, the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission jointly released "Antitrust Guidance for Human Resources Professionals" in order "to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws." Specifically, the guidance seeks to inform HR personnel that "agreements among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities." The guidance explains that an individual "likely is breaking the antitrust laws" if he or she agrees with someone from another company to fix employees' salaries or other terms of compensation, either at a specific level or within a range (wage-fixing agreements); or agrees to refuse to solicit or hire that other company's employees (no poaching agreements). Notably, the guidance explains that companies will be deemed by the government to be "competing employers" solely on the basis that they compete to hire or retain employees, regardless of whether they make the same products or compete to provide the same services.

Consistent with the government's prior lawsuits in this area, the guidance states that "[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," such that the agreements may be deemed illegal without inquiry into the agreements' competitive effects or the defendants' justifications for the conduct. Such agreements are considered "naked" in this respect when they are "separate from or not reasonably necessary to a larger legitimate collaboration between the employers."

Most significantly, the guidance is important because it expressly places employers on notice that in contrast to the governments' prior civil enforcement actions, "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements." "Accordingly, 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." Further, 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." Wage-fixing and no-poach agreements additionally expose employers to civil class and individual lawsuits for treble damages.

The guidance additionally places employers on notice that agreements to share information about compensation or other terms of employment may also expose employers to civil investigation and enforcement. While the government acknowledges that agreements merely to share information are not illegal per se, the guidance warns that such agreements may be held illegal when they are likely to produce an anticompetitive effect.

The DOJ and the FTC also published a non-exhaustive list of potential antitrust concerns for managers and human resource professionals entitled, “Antitrust Red Flags for Employment Practices.” The red flags include agreements with another company about employee compensation and benefits; non-solicitation and no-hire agreements; suggestions to competitors to refrain from aggressively competing for employees; exchanging company-specific information about employee compensation or other employment terms; participating in either informal conversations or meetings—including trade association meetings—in which these topics are discussed; or receiving documents that contain another company’s employee compensation data. While the agencies note that a red flag does not necessarily give rise to an antitrust violation, they also warn that this is a non-exhaustive list and encourage the reporting of suspicious behavior.

The agencies’ Antitrust Guidance for Human Resources Professionals can be found [here](#), and the list of red flags can be found [here](#).

For additional background information, see Susannah P. Torpey’s article entitled, “[Human Resources: The Next Antitrust Frontier?](#)”.

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