



DOJ & FTC Release Antitrust Guidance for HR Professionals

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The Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) recently issued a strong warning to HR professionals: certain agreements to fix salaries or limit competition could result in criminal and civil penalties. The guidance is the first to address exchanges of salary and benefit information in decades, yet it comes as no surprise, due to a number of recent investigations of corporate employment agreements.

Wage-Fixing and No-Poaching

The guidance [\[found here\]](#) warns against two practices in particular, naked wage-fixing and no-poaching agreements, as per se illegal under the antitrust laws. Wage-fixing involves agreements or understandings between competitors to set or limit employee salary or benefits. No-poaching involves agreements to refuse to solicit or hire another company's employees. It should be noted that when a practice is per se illegal, the government will not inquire into the competitive impact of the arrangement. Rather, the DOJ will now proceed criminally against these wage-fixing and no-poaching agreements. The DOJ's position is that these types of agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct." If an investigation into a company's HR policies reveals a naked wage-fixing or no-poaching agreement, the DOJ might bring felony charges against the culpable individuals and companies.

In recent years, the DOJ and FTC have brought civil enforcement actions against certain employment practices in a number of industries. Indeed, an action against an Arizona hospital association resulted in a consent judgment, due to a uniform bill rate schedule the hospitals paid to temporary nurses. Furthermore, the FTC recently brought a case against the Council of Fashion Designers of America for attempting to reduce fees and compensation for models. The employment cases that have received the most news coverage have involved enforcement actions against large technology companies for no-poaching agreements. All of these cases have been civil enforcement actions, making the agencies' new position to proceed criminally particularly noteworthy.

Information Exchanges

In addition to wage-fixing and no-poaching arrangements, sharing information about employment terms could create antitrust problems. As noted in a quick reference card released with the new guidance, certain practices create a "red flag" for antitrust scrutiny. Among these red flags include participating in a trade association meeting where sensitive employment information is shared,

discussing sensitive employment information with colleagues at other companies, and receiving documents from a competitor with internal employee compensation information. It should be noted that these red flags do not necessarily mean an antitrust violation has occurred; however, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement.

While agreements to share information are not per se illegal, and not prosecuted as criminal cases, they could still involve substantial civil liability and DOJ scrutiny. For instance, the DOJ sued a society of HR professionals in Utah for conspiring to exchange wage information about registered nurses. The information exchange resulted in hospitals matching each other's wage, keeping registered nurse pay artificially low in Utah. However, it should be noted that in certain circumstances, information exchanges will not be illegal.

Given the complexity of antitrust law, each situation must be analyzed on a case-by-case basis with the assistance of your legal counsel. However, the new guidance is clear: an industry's employment practices involving information exchanges and/or agreements or understandings between competitors is an area of emphasis for government enforcement actions. Therefore, a company's antitrust compliance training must involve the human resources department just as much as the sales department.

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