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A DOJ Crackdown On Employee Recruiting And Compensation

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Law360, New York (December 5, 2016, 12:44 PM EST) -- On Oct. 20, 2016, the Antitrust Division of the U.S. Department of Justice and Federal Trade Commission (collectively, the "federal antitrust agencies") jointly issued guidance for human resource professionals regarding the application of the federal antitrust laws to hiring practices and compensation decisions.[1] The guidance focuses on HR professionals as gatekeepers, explaining that they "often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws."

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According to the federal antitrust agencies, "HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees." In addition to providing practical guidelines for HR professionals, the guidance announces a significant shift in the DOJ's enforcement policies with its statement that the DOJ intends to proceed criminally against "naked wage-fixing and no-poaching agreements," i.e., standalone agreements that are not a legitimate part of a broader joint venture or other lawful collaboration. The guidance, which directs HR professionals to avoid sharing competitively sensitive information with competitors, may also signal an increased focus by the agencies on information exchanges.

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Potential Criminal, Per Se Offenses

The guidance asserts that an agreement among employers to limit or fix the terms of employment for potential hires may violate the federal antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, terms of employment or job opportunities. The antitrust laws apply to "competitors," which in this context means firms that compete to hire the same employees — regardless of whether the firms make the same or similar products or compete to provide the same services.

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According to the federal antitrust agencies, employees are harmed if companies that would ordinarily compete against each other to recruit and retain employees agree to fix wages or other terms of employment

(including seemingly minor benefits such as gym memberships) or enter into “no-poaching” agreements by agreeing not to recruit each other’s employees. In the past, both the DOJ and FTC have instituted civil enforcement actions against companies for allegedly entering into such agreements, many of which have ended in consent decrees. For example, in 2010 the DOJ entered into a widely publicized consent decree with six high-tech companies — Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc. and Pixar — after alleging that the companies agreed not to cold call one another’s employees.

Significantly, in their just-released guidance, the federal antitrust agencies announced that, on a going-forward basis, the DOJ intends to bring criminal charges against individuals and companies who participate in agreements to fix wages or to refrain from poaching employees. In the guidance, the federal antitrust agencies equate “[n]aked wage-fixing or no-poaching agreements” with “hardcore cartel conduct” and contend that such agreements are per se illegal under the antitrust laws. Because a per se violation is condemned as illegal without any inquiry into competitive effects, according to the federal antitrust agencies, a naked wage-fixing or no-poaching agreement could not be justified by a desire to reduce costs, become more efficient or increase employment opportunities. The guidance urges HR professionals to report personal involvement in potential criminal violations to the DOJ “quickly.” Under the DOJ Antitrust Division’s leniency program, corporations and individuals can avoid criminal convictions and fines by being the first to confess participation in such an agreement, fully cooperating with the division and meeting other specified conditions.

It is unclear whether the courts will agree with the federal agencies that no-poaching agreements are per se unlawful criminal violations under the antitrust laws. While the federal agencies and private plaintiffs have previously argued for per se treatment in the civil context, no court has yet applied the per se analysis (much less criminal sanctions) to employee “no-poach” agreements, and there is a general judicial hesitance to extend the per se rule to new categories of conduct. For example, in a decision that addressed an agreement to restrict the transfer of junior life insurance agents among competing general life insurance agents, the Second Circuit affirmed the district court’s grant of summary judgment for the defendants, finding that the plaintiffs had failed to establish the per se rule applied.[2] The Second Circuit distinguished widely recognized categories of per se conduct, such as group boycotts, from the no-switching agreement alleged. (No-switching agreements are even broader than no-poaching agreements. No-switching agreements are promises not to hire competitors’ employees, not just promises not to recruit competitors’ employees, as in typical no-poaching agreements.)

Moreover, many of the recent no-poaching cases have been settled before courts could reach the issue of whether a per se, quick look or rule of reason applied. In the civil litigation that followed the DOJ’s investigation of high-tech employers, the district court found that plaintiffs had plausibly plead a violation of the Sherman Act, but at the same time declined to decide, on the pleadings, what mode of analysis applied.[3] The litigation was settled before the court reached the issue. Thus, while the guidance makes clear that the federal agencies will pursue these types of agreements as per se offenses in certain circumstances, it is less clear whether courts will agree and ultimately hold defendants liable under such an analysis.

The guidance recognizes that wage-fixing and no-poaching agreements may not be considered per se illegal if they are ancillary to a legitimate, procompetitive collaboration between two employers, such as a joint venture. The agencies, however, do not go as far as to say that all such agreements made in connection with a legitimate joint venture would be immune from antitrust scrutiny. The federal antitrust agencies also expressly decline to address employee noncompete agreements, which many courts have traditionally analyzed using principles borrowed from antitrust law, on the grounds that

noncompete agreements are “disfavored restraints on trade.”[4] Furthermore, the guidance does not mention available exemptions that may exist for collective bargaining and other related practices permitted under the federal labor laws.[5] Applying such an exemption, the U.S. Supreme Court previously sanctioned NFL teams’ agreement setting a fixed pay for rookie players after the NFL and the pro players reached an impasse in their collective bargaining regarding which channels the companies would carry.[6]

Information Exchanges Subject to Increased Scrutiny

The guidance also signals that the federal antitrust agencies will subject information exchanges to increased scrutiny. Specifically, the agencies assert that even absent an express or implicit agreement on wages or terms of employment between firms, evidence of exchanges of wage information (including discussion of compensation levels or policies at industry meetings or events) could be sufficient to establish an antitrust violation. In fact, less than two weeks after the release of the guidance, albeit in a nonemployment context, the DOJ filed a complaint against DirecTV and its corporate successor AT&T Inc. for standalone violations of the Sherman Act stemming from an alleged series of unlawful information exchanges between competitors regarding which channels the companies would carry.[7]

The guidance acknowledges that information exchanges would most likely be reviewed under the rule of reason and are permissible in certain circumstances. For example, the agencies note that it may be appropriate for a company to obtain competitively sensitive information in the course of merger and acquisition due diligence, but only if suitable precautions are taken. Under past guidance regarding information exchanges (i.e., the so-called “safe harbor provisions”), the federal antitrust agencies asserted that antitrust risk presented by sharing competitively sensitive information can be mitigated under certain circumstances.[8] Namely, a survey of wages, salaries or benefits given to personnel may be lawful if:

- The survey is managed by a third-party (e.g., a government agency, consultant, academic institution or trade association);

- The information provided by survey participants is based on data more than three months old; and

- There are at least five providers (or employers) reporting data upon which each disseminated statistic is based, no individual provider’s data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

The antitrust guidance for HR professionals cites to these guidelines (originally written to apply to the health care context) in explaining how it is possible to design and carry out information exchanges in ways that conform with the antitrust laws.

While it has always been risky for human resources professionals to share competitively sensitive information, it is even more imperative now that companies use third-party surveys that comply with the safe harbor provisions or seek legal counsel should they wish to engage in benchmarking or best-practices exchanges with competitors (e.g., exchanging information about how companies have adjusted compensation in response to the Department of Labor’s new overtime rule). Exchanges of

competitively sensitive information between competitors that fall outside the DOJ/FTC guidelines and the safe harbor provisions will likely carry risk.

Agencies Identify Red Flags for HR Professionals

In support of the guidance, the agencies issued a "red flag" list for both "human resource professional[s]" and "manager[s]." That red flag list identifies agreements, discussions or information exchanges among competitors that could run afoul of the federal antitrust laws. Among the red flags identified are:

- Agreeing with another company about employee salary or other terms of compensation, either at a specific level or within a range;
- Agreeing with another company to refuse to solicit or hire that other company's employees;
- Agreeing with another company about employee benefits;
- Agreeing with another company on other terms of employment;
- Expressing to competitors that you should not compete too aggressively for employees;
- Exchanging company-specific information about employee compensation or terms of employment with another company;
- Participating in a meeting, such as a trade association meeting, where the above topics are discussed;
- Discussing the above topics with colleagues at other companies, including during social events or in other nonprofessional settings; and
- Receiving documents that contain another company's internal data about employee compensation.

The guidance also contains a question and answer section, designed to assist HR professionals in identifying and responding to potential antitrust violations, as well as to emphasize that HR professionals can be held personally criminally liable for engaging in wage-fixing and no-poaching agreements. The Q&A suggests that agreements related to any aspect of compensation, even benefits such as free gym memberships or meals, may be considered potentially criminal wage fixing. The guidance also notes that mere unaccepted invitations to agree on such matters could violate Section 5 of the Federal Trade Commission Act.

Finally, as noted, the guidance encourages self-reporting and whistleblowing by HR professionals with information regarding potential antitrust violations.

Looking Forward

With the issuance of this guidance, the federal antitrust agencies have clearly communicated their intent, going forward, to closely scrutinize recruitment and hiring practices, as well as information

exchanges between competing employers, for potential antitrust violations. This includes the pursuit of criminal charges and per se liability against HR professionals and companies alleged to participate in wage-fixing and no-poaching agreements.

While it remains to be seen whether courts will follow the agencies lead and afford per se treatment to no-poaching agreements, the added specter of individual and corporate criminal liability creates increased risk for companies. Therefore, now more than ever companies should ensure that their hiring and compensation policies and practices conform with antitrust law, including any available exemptions that may exist for collective bargaining and other practices permitted under the federal labor laws (a topic not addressed in the new guidance). Moreover, companies should proceed with caution when sharing potentially competitively sensitive information with competitors, and should ensure that any use of third-party surveys complies with the safe harbor provisions.

Disclosure: Gibson, Dunn & Crutcher LLP represented DreamWorks Animation in connection with the DOJ investigation and currently represents the company in follow-on class action litigation discussed herein. The firm also represents AT&T Inc. and DirecTV in U.S. v. DirecTV Group Holdings LLC, in the U.S. District Court for the Central District of California.

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[1] Department of Justice, Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resources Professionals (October 2016), https://www.justice.gov/atr/file/903511/download. See also Department of Justice, Press Release, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professional on How Antitrust Law Applies to Employee Hiring and Compensation, Oct. 20, 2016, https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals; Federal Trade Commission, Press Release, FTC and DOJ Release Guidance for Human Resource Professional on How Antitrust Law Applies to Employee Hiring and Compensation, Oct. 20, 2016, https://www.ftc.gov/news-events/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how.

[2] See Bogan v. Hodgkins, 166 F.3d 509, 515 (2d Cir. 1999).

[3] In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012).

[4] See, e.g., Lanmark Tech. Inc. v. Canales, 454 F. Supp. 2d 524, 528 (E.D. Va. 2006).

[5] See California v. Safeway Inc., 651 F.3d 1118, 1125-29 (9th Cir. 2011).

[6] Brown v. Pro Football Inc., 518 U.S. 231, 237 (1996).

[7] See Department of Justice, Office of Public Affairs, Justice Department Sues DirecTV for Orchestrating Information Sharing Agreements with Three Competitors (Nov. 2, 2016), https://www.justice.gov/opa/pr/justice-department-sues-directv-orchestrating-information-sharing-agreements-three.

[8] See Department of Justice, Antitrust Division & Federal Trade Commission, "Statement 6 – Provider Participation in Exchanges Of Price And Cost Information," in Statements of Antitrust Enforcement Policy in Health Care (1996), https://www.justice.gov/atr/statements-antitrust-enforcement-policy-health-care#CONTNUM_49.

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