Employer Beware: Antitrust Enforcement Agencies Set Their Sights on Anti-Competitive Hiring and Compensation Agreements

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The Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC), the two federal agencies responsible for enforcing the antitrust laws, have issued a "Guidance" document for HR Professionals, outlining the types of compensation and hiring agreements that the enforcement agencies will challenge as violations of the antitrust laws. The Guidance document does not represent a change in antitrust law, but it does represent a clear signal that the agencies are placing unprecedented importance on policing such agreements. The Guidance document is blunt:

> *Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. 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. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked* [1] *wage-fixing or no-poaching agreement, 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.*

What Types of Agreements Create Antitrust Risks

The types of agreements in question are agreements between competing employers, in antitrust lingo, "horizontal agreements." [2] It is important to note that in employment markets your competitors are those who employ similar types of employees, regardless of whether you compete for customers. For example, aerospace companies and automotive companies are likely

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competitors for certain types of engineers, even though they don't compete for customers.

Horizontal agreements which directly restrict competition on salary, benefits or other terms of employment are highly likely to violate the antitrust laws. Likewise, non-hire, non-solicitation or similar "I'll stay away from yours if you stay away from mine" agreements are highly likely to violate the antitrust laws. Antitrust law condemns most agreements restricting hiring or compensation as anti-competitive because they create a high likelihood of suppressing compensation and reducing employee mobility, without offsetting pro-competitive benefits. Other types of agreements, such as exchanging current or planned compensation information with competitors also create material antitrust risks, although not as clearly unlawful as the agreements described above.

The risks of these types of employment practices are not merely hypothetical, as a variety of employers have painfully learned in recent years. In the most prominent case, a who's who of Silicon Valley companies, including Google, Apple, Intel and others, allegedly entered into various types of "no-poaching" agreements. They were sued both by the government and by employees in a class action suit. They ultimately paid more than $400 million to effected employees to settle the class action lawsuits. Similarly, this month, Dreamworks paid $50 million to settle a similar lawsuit alleging a "no-poaching" agreement for animators. Similar lawsuits regarding "no-poaching" were recently filed against Samsung and LG. Likewise, a group of competing hospitals who exchanged nursing compensation information paid approximately $90 million to nurses to settle class action lawsuits. Importantly, the thrust of the nurses' claim was that the exchange of information suppressed wages, even if there was no actual agreement as to wages.[3]

The Ancillary Agreement Exception

Although horizontal agreements restricting hiring or compensation are usually unlawful, there is an important exception for "ancillary" agreements. In broad terms, ancillary agreements are agreements that are related to, and important to, a pro-competitive primary business agreement. More specifically, an ancillary agreement is generally lawful if: (1) The Primary Agreement is pro-competitive; (2) the Ancillary Agreement is reasonably necessary to the Primary Agreement; (3) there is not a so substantially less restrictive alternative; and (4) any anti-competitive harm does not outweigh the pro-competitive benefits. For example, if two companies agree to collaborate on the development of a new product, then an agreement prohibiting one party from hiring key employees of the other involved in the collaboration for a reasonable period of time might be a lawful ancillary agreement.

Risk Management

The prudent employer should take a variety of steps to manage the antitrust risks in hiring and compensation

- Most importantly, recognize that hiring and compensation practices are a primary area of antitrust risk that should be part of any antitrust compliance program.

- Effectively train the people on the front lines of hiring and compensation decision making.
- Do not enter into agreements with competitors concerning compensation, recruiting or hiring without the advice of experienced antitrust counsel.
- Do not participate in wage surveys or other exchanges of compensation information without understanding the applicable safe harbor.

[1] A "naked" agreement is one which is not "ancillary" to another pro-competitive agreement. The ancillary agreement exception is discussed later in this Alert.
[2] The Guidance does not apply to "vertical" agreements between employers and employees, although those too present important, though different, legal risks.
[3] The exchange of compensation information is not always unlawful and indeed, the enforcement agencies have defined safe harbor practices that will protect from liability.