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Labor and Employment Alert: Department of Justice Warns HR Professionals of Their Individual Liability for Antitrust Violations

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“HR professionals need to understand that these violations can lead to severe consequences, including criminal prosecution.” Acting Assistant Attorney General Renata Hesse Department of Justice Antitrust Division

On October 20, 2016, the U.S. Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) jointly issued their “Antitrust Guidance for Human Resource Professionals” to “alert human resource professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws.” The guidance is a warning to HR professionals not to engage in anti-competitive activities, to police their organizations for these activities, and to report them to the DOJ and FTC.

Agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal.

The DOJ and FTC warn HR professionals to avoid entering into agreements – whether informal, formal, written, unwritten, spoken, or unspoken – regarding terms of employment with companies that compete to hire employees. The guidance explains that an individual “likely is breaking the antitrust laws” if he or she agrees with an individual at another company about employee salary or other terms of compensation (wage-fixing agreements), or agrees with an individual at another company to refuse to solicit or hire that other company’s employees (no poaching agreements). Naked wage-fixing or no-poaching agreements among employers are per se illegal under the antitrust laws. This means the agreement is deemed illegal without any inquiry into its competitive effects if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers.

“Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.” This means 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. If the DOJ finds evidence of a naked wage-fixing or no-poaching agreement, the DOJ may decide to bring felony charges against the individuals and companies participating.

Avoid sharing sensitive information with competitors.

The guidance notes that sharing information with competitors about terms and conditions of employment can also run afoul of the antitrust laws – even without an explicit agreement to fix compensation. Exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement. Such agreements are not per se illegal (and so not subject to criminal prosecution), but may be subject to civil liability when they have, or are likely to have, an anticompetitive effect. Further, “evidence of periodic exchange of current wage information in an industry with few employers could establish an antitrust violation because, for example, the data exchange has decreased or is likely to decrease compensation.” The DOJ and FTC note that not all information exchanges are illegal, and such an exchange could be lawful if a neutral third party manages an exchange of relatively old information that has been aggregated to protect the identity of the underlying sources that cannot be linked to particular data.

Watching for the red flag – antitrust warning signs.

The DOJ and FTC have created “a **quick reference card**” “in a convenient, index-card-sized format” to provide HR professionals with a list of antitrust red flags that they should look out for during their day-to-day work. While not necessarily pointing to an antitrust violation, “antitrust concerns may arise if you or your colleagues:”

- Agree with another company about employee salary level or range, other terms of compensation, or employee benefits;
- Agree with another company to refuse to solicit or hire that other company's employees;
- Agree with another company on other terms of employment;
- Express to competitors that you should not compete too aggressively for employees;
- Exchange company-specific information about employee compensation or terms of employment with another company;
- Participate in a meeting, such as a trade association meeting, where such topics are discussed;
- Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings; or
- Receive documents that contain another company's internal data about employee compensation.

Waiving the white flag -- report potential violations.

The DOJ and FTC encourage HR professionals to report possible antitrust violations regarding agreements among competitors to fix wages, salaries, benefits, or other terms of employment, or agreements not to compete for employees in hiring decisions. The agencies explain that “with respect to potential criminal violations, in particular, it can be beneficial to report personal involvement in an antitrust violation quickly.” The DOJ's leniency program permits companies to avoid criminal conviction and fines, and individuals to

avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating, and meeting other specified conditions.

The guidance highlights the DOJ's continued focus on applying individual accountability to criminal investigations and prosecutions. Contact your Vorys lawyer if you have questions about how this guidance may affect your business.