Antitrust Agencies Issue Guidance for Human Resource Professionals on Employee Hiring and Compensation

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DOJ & FTC Issue Guidance for HR Professionals

- In October 2016, the DOJ and FTC jointly issued guidance regarding the application of federal antitrust laws to hiring practices and compensation decisions
- The Guidance broadly covers several topics:
  1) Wage-fixing
  2) No-poaching agreements
  3) Information exchanges
- Focuses on HR Professionals as gatekeepers

  "HR professionals often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws."

BACKGROUND

Antitrust Law Prohibitions

Section 1 of the Sherman Act:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Agreement

- An agreement exists if two or more persons have a "meeting of minds" or a "mutual understanding."
- Agreements and understandings need not be written
- Agreements and understandings can be **inferred** from words and acts of competitors and circumstances
  - Need not be express
  - No formalities or "magic" words required
  - May be entirely unspoken ("a wink and a nod")

Per Se Unlawful Agreements

- Some agreements with competitors are considered so pernicious that they are deemed "**per se**" unlawful without regard to their effect on competition
- Per se prohibition applies to agreements with competitors to:
  - Fix prices
  - Allocate or divide markets or customers
  - Restrict output
  - Boycott competitors or companies that do business with them
- Agreements that are not per se unlawful are evaluated under the **Rule of Reason**, including agreements to exchange information (but sharing pricing information can serve as evidence of a per se illegal conspiracy)

Wage-Fixing

- "[A]ntitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them." *Brown v. Pro Football*, 518 U.S. 231 (1996)
- Wage-fixing is a form of price-fixing and includes any agreement or understanding between competitors:
  - To fix a particular salary, or set salaries at a certain level or within a certain range, or according to certain guidelines
  - To increase salaries by an agreed percentage
  - To maintain or lower salaries
- Good intentions are no defense

Antitrust Exemptions

- The **statutory labor exemption** is intended to exempt certain labor activities that occur in the course of labor disputes with management.
  - Covers "legitimate" union activities such as strikes, boycotts, and picketing but it does not cover agreements concerning wages
- Because the statutory exemption leaves a gap that would otherwise lead to liability for union-employer conduct consistent with national labor policy, the Supreme Court created the so-called **"non-statutory" labor exemption**.
  - Applies to collective bargaining agreements

No-Poaching

- A “no-poaching” agreement is an agreement not to recruit (i.e., “poach”) a competitor’s employees
  - “Competitor” includes any firm that competes to hire the same employees—regardless of whether the firm makes similar products or provides similar services.
- “No-switching” agreements are even broader—promises not to *hire* a competitors’ employees

No-Poaching

- Courts have generally *not* applied per se analysis to no-poaching and no-switching agreements
  - Cases often fact-specific, but there is a general judicial hesitance to extend per se rule to new categories of conduct
  - Ex: Second Circuit found that per se rule did not apply in case involving no-switching agreements.
- Many of the recent no-poaching cases have been settled before courts could reach the issue of whether per se analysis or rule of reason applied

GUIDANCE – WHAT'S NEW?

Per Se Approach to No-Poaching

> *"Naked wage-fixing or no-poaching agreements among employers . . . are per se illegal under the antitrust laws."*
>
> - Antitrust Guidance for HR Professionals

- Companies must assume that no-poaching agreements will be treated as per se illegal, according to the new Guidance
- Exception recognized for agreements that are ancillary to legitimate joint ventures

High Tech Employee Litigation

- DOJ filed complaint alleging that six high tech companies entered into agreements not to cold call one another's employees and that these agreements were a "naked restraint of trade" and "per se unlawful" under Section 1
  - Companies allegedly maintained "Do Not Call" lists
  - Senior executives at each firm entered into the agreements, and implemented and enforced them
  - No allegation that the companies reached any agreements regarding wages/compensation

High Tech Employee Litigation

- Companies entered into a consent decree with DOJ
  - Prohibits an agreement by a defendant that directs, requests, or pressures person to "refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person."
  - Does not prohibit companies from entering into or enforcing a direct no solicitation agreement within an employment or severance agreement, or provided it is reasonably necessary under certain specified circumstances
- Civil class action litigation followed, and resulted in over $400 million in settlements

Animation Workers Litigation

- Two animation studios, Pixar and Lucasfilm, were parties to the DOJ consent decree in the High Tech matter
- Civil class actions were filed in 2014 against Pixar, Lucasfilm and several other animation studios alleging no-poaching agreements and wage fixing
- The case is still ongoing, with settlements of over $70 million to date

Heightened Attention to Information Exchanges

- The Guidance focuses on the antitrust implications of information exchanges regarding employee compensation, terms of employment, etc.

- Even absent an explicit agreement "to fix compensation or other terms of employment," exchanging information regarding these issues "could serve as evidence of an implicit illegal agreement."

Heightened Attention to Information Exchanges

- Information exchanges *themselves* are "not per se illegal and therefore not prosecuted criminally," *but* they can result in substantial civil liability if "they have, or are likely to have, an anticompetitive effect."
  - *See, e.g.*, *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603 (E.D. Mich. 2012)
  - The DOJ previously sued the Utah Society for Healthcare Human Resources Administration, also based on alleged exchanges of information regarding the wages of registered nurses

Information Exchanges: Rules of the Road

- HR Professionals should be particularly mindful of the risks presented by information exchanges when attending industry events
- As the Guidance states, "Avoid sharing sensitive information with competitors"
  - Do not share salary, wage or benefit information with competitors at industry events (e.g., when discussing how to respond to the pending FLSA overtime rule)
  - And, of course, do not discuss the hiring or solicitation of competitors' employees at industry events (e.g., "We really need to stop hiring each other's best workers").

Information Exchanges: Rules of the Road

- Competitive intelligence gathering
  - You can use public information (such as published price and salary information, annual reports and public filings)
- However, do not use public information as a basis for communicating with a competitor
  - For example, you cannot try to confirm that information is current by asking competitors, nor can you fill in gaps in published information by asking competitors.
  - Do not use media or analyst calls to communicate with competitors (e.g., “We hope to keep employee salaries steady for the next year”)

Information Exchanges: Rules of the Road

There is also a "safe harbor" for information surveys that meet the following criteria:

- Managed by a third-party (e.g., a government agency, consultant, academic institution or trade association);
- Are based on data that is more than three months old; and
- Include a broad sampling of data, meaning:
  - At least five employers reported data for each statistic
  - No individual employer's data represents more than 25 percent of that statistic (on a weighted basis)
  - Any information is aggregated in a way that does not allow participants to identify a particular employer's information

Criminal Liability

- HR Guidance makes clear that DOJ intends to bring **criminal** charges against individuals and companies who participate in wage-fixing or no-poaching agreements
  - Criminal penalties include corporate fines of up to $100 million per violation, or twice the gain as a result of violation (whichever is higher)
  - individual criminal fines of up to $1 million
  - Up to 10 years jail time
- HR professionals urged to report personal involvement in potential criminal violations to the DOJ "quickly"
- 5 year statute of limitations

Antitrust Division Leniency Program

- Offers benefits to the first member of a conspiracy to report per se unlawful activity (provided other eligibility requirements met):
  - Company Commitment: full cooperation
  - DOJ Commitment: No prosecution/no fines/no jail time for current employees
  - Civil litigation: No treble damage, no joint & several liability
- Potential complication if individual employees disclose conduct first to DOJ (before the company)
  - May endanger company's ability to obtain leniency or obtain full protection for all current employees

Breadth of DOJ-FTC Approach

- HR Guidance suggests that agreements related to *any* aspect of compensation—even benefits such as a free gym membership or meals—may be considered potentially criminal wage-fixing
- Mere unaccepted invitations to agree on compensation matters could violate Section 5 of the FTC Act

What Should I Do?

- ***Question:*** A colleague at a competing firm suggests, at an informal luncheon, that it might be in our mutual interest not to directly recruit one another's employees. What should I do?
- ***Answer:*** What your colleague is suggesting is a no-poaching agreement. You should refuse it – clearly and unequivocally. If you think someone overheard the suggestion, you should make clear that your refusal is also overheard. As soon as the luncheon is over, you should report the conversation to the appropriate person in your in-house legal department, explaining what your colleague said and what you said in response.

What Should I Do?

- ***Question:*** A colleague at a competing firm emails me, suggesting that it might make sense for our companies to agree on an appropriate pay scale for certain job categories. What should I do?
- ***Answer:*** What your colleague is suggesting is a wage-fixing agreement. You should immediately forward the email to the relevant person in your in-house legal department so that he or she can work with you on preparing an appropriate and prompt response. The response should clearly and unequivocally refuse the offer and explain that any such conduct or agreement would violate the antitrust laws and could expose the company and its employees to criminal and/or civil liability.

What Should I Do?

- ***Question:*** I am at a cocktail party, and a friend who is an HR Professional at a competitor asks me how many of our employees are "at the cusp" of qualifying for overtime under the new, pending overtime rule. What should I do?
- ***Answer:*** Tell your friend that you can't discuss that because you can't discuss non-public information about your company's compensation.

EUROPEAN UNION

Wage Fixing and No Poaching: EU Law on upstream agreements

- No explicit guidance or enforcement focus on wage or no-poaching related conduct under EU law.
- Competition law applies to "upstream" activities, such as the purchase of inputs (including labour).
  - Article 101 TFEU covers arrangements that "indirectly fix purchase or selling prices or any other trading conditions".
- Infrequent but recent enforcement of cartel rules in analogous situations (purchasing cartels).
- Similar to U.S., no formal "agreement" required to ground infringement finding.

Wage Fixing and No Poaching: Prior EU focus not solely on upstream effects

- *Zinc producers group (1984)*.
  - Restricted the participants' "freedom to negotiate their purchase prices for zinc concentrates … and to set their selling prices for zinc metal to zinc metal purchasers to their own best commercial advantage. This agreement had the object and effect of restricting price competition".

- *Raw Tobacco Italy (2005)*.
  - "Agreements and/or concerted practices which directly or indirectly fix transaction prices or share quantities are by their very object restrictive of competition. More specifically, co-ordination by the processors of their purchasing conduct in this case affected fundamental aspects of their competitive conduct and was also by definition capable of affecting the behaviour of the same companies in any other market in which they compete, including downstream markets."

Wage Fixing and No Poaching: Likely approach under EU law

- No-poaching agreement likely to be found to have "object" of restricting competition – equivalent to *per se* infringement.
- Agreements/practices relating to wages potentially "object" infringements:
  - Explicit setting of wages
  - Coordination of wages within a particular range or above/below a threshold
  - Agreement to raise or lower wages
- Key difference with US : EU may consider downstream effects.

Information Exchange: EU Law principles

- No specific precedent on wage information sharing.
- Exchange of salary and benefits information may amount to infringement, depending on circumstances of exchange and use of information:
  - Key question is whether it is capable of reducing uncertainty as to upcoming decisions downstream
  - Depends on whether information is current/future; high-level/detailed
- Exchange of information via third party (e.g. through surveys) can be infringement if reduces uncertainty on market.
- Even unilateral disclosure of information can be infringement.

Information Exchange: EU/UK cases

- *T-Mobile (2009) EU*:
  - Info exchange on upcoming reduction of standard dealer remuneration for certain subscriptions
  - Question is whether information exchanged "would be a decisive factor in fixing the price to be paid by the end user"
- *Smart Card Chips (2014) EU:*
  - Exchange of capacity information allowed suppliers to "increase prices to specific customers (or resist the pressure for decrease) because it knew that the competitor could not expand production at the price requested by the customer"
- *Loans to large professional services firms (2011) UK:*
  - "the mere disclosure of such information to competitors will almost certainly be anti-competitive where it is capable of influencing their future conduct on the market, as will its receipt."