

Employment Practices Liability

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DOJ Publishes Antitrust Guidance for HR Professionals Relating to No-Poaching and Wage-Fixing Agreements

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Executive Summary: In a series of investigations and subsequent court actions, HR professionals have been identified as being potential targets for investigation of allegations of violations of antitrust laws related to employment practices, generally under the topic of “anti-poaching” policies. Under federal antitrust policies competitors may not agree to limit or fix the terms of hiring for potential employees. In October of this year the Department of Justice Antitrust Division (DOJ) issued a guideline to HR Professionals to prevent inappropriate discussions or practices among competitors seeking to hire the same employees. The Antitrust Guidance for Human Resource Professionals (the “Guidance”) (October 2016) states that it is “unlawful for competitors to expressly or implicitly agree *not to compete with one another*” when they are competing for the same employees. (emphasis supplied). The Guidance is available at: <https://www.justice.gov/atr/file/903511/download>.

In the Guidance the DOJ states that competitors may violate antitrust laws when HR professionals agree to provide salaries or compensation to employees at a specific level or within a range or when they agree to refuse to solicit or hire another company’s employees (“no-poaching agreements.”)

The Guidance states that “naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws.” That means if the agreement is separate from or not necessary to a larger legitimate collaboration between employers, the agreement is deemed illegal without an inquiry into its competitive effects. However, the DOJ has stated that legitimate joint ventures, including, for example, using shared facilities, are not considered per se illegal under the antitrust laws.

The Guidance references civil actions brought by the DOJ against the Arizona Hospital & Healthcare Association where hospitals in Arizona attempted to set uniform rate schedules for pay for temporary and per diem nurses. Further, three DOJ civil actions have been brought against competing technology companies that entered into agreements not to cold-call other companies’ employees. In two of the cases, at least one company also agreed to limit its hiring of employees who currently work for a competitor. The antitrust claims in these cases were resolved by consent judgments against the companies.

Additionally, the Guidance indicates that the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. According to the Guidance, such agreements “eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated...”

The DOJ emphasized that it has sued the Utah Society for Healthcare Human Resources Administration, a society of HR professionals at Utah hospitals, for antitrust violations where competitors directly shared with each other information about terms and conditions of employment, and such sharing was found to have an anticompetitive effect.

Information exchanges can avoid per se antitrust scrutiny where:

- A neutral third party manages the exchange;
- The exchange involves information that is relatively old;
- The information is aggregated to protect the identity of the underlying sources; and
- Enough sources are aggregated to prevent competitors from linking particular data to individual sources.

The Guidance goes on to provide a series of questions and answers for HR professionals to review when dealing with specific competitor exchanges of information or agreements between competitors about policies or practices. The Guidance notes, however, that these are general discussions and that particular concerns by an HR professional about a specific practice should be discussed with legal counsel.

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