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Antitrust Insights for HR Practices:

When Sharing & Discussing Employment Terms Can Land You in the Sights of the Federal Government

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I. Introduction

To the surprise of many, both companies *and* human resource professionals[1] can face significant economic losses and criminal indictments for entering into wage-fixing or no-poaching agreements and possibly even for simply sharing other employee-related information.[2] In October 2016, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) jointly issued new guidance (HR Guidance) pertaining to antitrust laws. Specifically, the DOJ and FTC alerted human resource professionals of their intent to strictly enforce existing antitrust laws with respect to any contractual agreements that restrained competition in the employment market. What is more, the HR Guidance warned that, even the sharing of current or prospective employment information may be viewed as evidence of no-poaching or wage-fixing agreements and may run afoul of antitrust laws as well.

Although the application of antitrust laws in the employment market is nothing new, the HR Guidance makes clear that antitrust compliance not only applies to the goods and services a company sells, but also to the labor they employ. Most notably, the HR Guidance warns of the DOJ's and FTC's intentions to *criminally* prosecute individuals and companies who participate in naked wage-fixing or no-poaching agreements postdating the HR Guidance and to pursue via civil actions any agreements existing *prior* to the HR Guidance.[3] As recent as December 2018, Assistant Attorney General, Makan Delrahim, reiterated this warning before a regulatory subcommittee on regulatory reform. It is therefore crucial for companies and HR professionals to become familiar with the HR Guidance and ensure compliance with any related antitrust laws.

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[1] The October 2016 Guidance applies to human resource professionals and anyone who is involved in recruiting, hiring, or negotiating terms of employment.

[2] "Antitrust Guidance for Human Resource Professionals," U.S. Department of Justice Antitrust Division and Federal Trade Commission, 4 (October 2016) https://www.justice.gov/atr/file/903511/download.

[3] *Id.* at 2; *see also* As't Att'y Gen. Makan Delrahim Statements Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law Committee on the Judiciary U.S. House of Representatives, 5 (December 12, 2018), https://www.justice.gov/opa/speech/file/1119736/download (stating "[w]e have put employers on notice that agreements between employers that eliminate competition for hiring . . . are per se violations of the Sherman Antitrust Act when they are not ancillary to legitimate collaboration. . . As a matter of prosecutorial discretion, the Division will pursue no-poach agreements terminated before October 2016 through civil actions. Defendants should anticipate potential criminal enforcement actions for any such naked . . . agreements we uncover that post-date our October 2016 guidance.")

II. Background

A. Antitrust Laws Generally

Antitrust laws have been around for over 100 years and were created as a response to the immergence of immense trusts in the late 19th century.[4] When people think of such "trusts," they generally think of corporate monopolies such as John D. Rockefeller's Standard Oil Company. The DOJ and the FTC, however, have antitrust enforcement power over private employers large and small.[5]

The goal of antitrust laws is to promote and protect competition by deeming unlawful any "contract . . . or conspiracy, in restraint of trade" and prohibiting "unfair or deceptive acts or practices in or affecting commerce."[6] They also are designed to protect consumers and encourage competition in both the consumer and employment marketplace. The latter marketplace is the focus of this article.

B. The Employee Marketplace

Employees are one of the greatest assets of any company. It is therefore unsurprising that companies use a combination of "carrots and sticks" to hire and retain employees. Examples of carrots include salaries, bonuses, and benefit packages. Examples of sticks include non-compete agreements, confidentiality agreements, non-solicitation agreements, and the like.

The use of "carrots and sticks" can prove problematic, however. Offering too many carrots, for instance, may raise overhead costs making products more expensive and therefore less competitive. The use of contractual sticks, on the other hand, are often disfavored or at least restricted by state law.[7] Due to these potential pitfalls, many employers have resorted to entering into agreements with other fellow employers (think horizontal agreements) rather than agreements with individual employees (think vertical agreements). These employer-to-employer agreements are often designed for some sort of mutual benefit, such as guaranteeing that the parties to the agreement will not have to worry about

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[4] FED. TRADE COMM'N, THE ANTITRUST LAWS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited March 17, 2019).

[5] Notably, antitrust law application to government entities depends on whether the state has approved the anti-competitive activity and whether such activity is supervised by the state. *See, Parker v. Brown,* 317 U.S. 341 (1943); *see also, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980).

[6] 15 U.S.C. §§ 1 & 45.

[7] For instance, Texas law only allows enforcement of non-compete agreements the law deems "reasonable" in temporal, geographic, and subject-matter scope. TEX. BUS. & COM. CODE ANN. § 15.50.

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