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EMPLOYMENT AGREEMENTS

FTC/DOJ Guidance to Human Resource Professionals—Enforcement Scrutiny of Employment-Related Conduct

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Last month, the Federal Trade Commission (FTC) and Department of Justice (DOJ) issued their *Antitrust Guidance for Human Resource Professionals*. The HR Guidance reflects the agencies' enhanced scrutiny in a realm that may not immediately seem a focus for antitrust enforcement: agreements among human resource professionals, business executives or other employees that could reduce competition for compensation, terms of employment or hiring new employees. In this article, we summarize the key lessons and practical impact from the HR Guidance for businesses' employment practices.

Increased Enforcement Priority: Agreements Related to Employment Practices

Although most businesspeople are well aware that fixing prices, allocating markets or bid rigging with their competitors in the sale of products or services can result in prison time for individual wrongdoers and huge criminal fines and civil liability for their companies, they may be less familiar with the risks of anticompetitive conduct associated with employee compensation and hiring practices. But the antitrust agencies have in recent years brought several actions alleging that firms illegally agreed not to ''poach'' each other's employees, limited competition over wages or engaged in other conduct that could depress employee compensation or benefits when firms act as buyers of employee talent.

Reflecting this enforcement focus, the antitrust agencies have issued important new guidance regarding how they will apply the antitrust laws in the employment context. The biggest headline: Although past enforcement actions have been civil in nature—perhaps in recognition of the less familiar context—the agencies are now giving clear notice that they will **criminally prosecute** HR professionals, business executives and other employees for certain types of per se illegal agreements regarding hiring and wages. Specifically, the new HR Guidance warns that the DOJ intends to treat naked agreements not to hire or actively solicit employees or to fix wages like they treat other types of hardcore anticompetitive agreements—as criminal antitrust violations. Accordingly, companies that engage in this type of conduct may face substantial monetary penalties, while individual employees involved in wrongdoing risk imprisonment and large fines. Costly follow-on civil class action lawsuits are likely to follow any allegations and government action.

The Antitrust Agencies' HR Guidance: Three Paradigms

To their credit, the FTC and DOJ have provided HR professionals and other employees practical guidance about how they can conduct business while staying out of antitrust trouble—and jail. The HR Guidance focuses in particular on three types of conduct:

- **Naked Anticompetitive Agreements:** Businesses and their employees must not enter any agreements—whether informal or formal, written or unwritten, spoken or unspoken—regarding terms of employment with companies that compete for employees that could have no purpose other than impairing competition for talent. In particular, the agencies warn that employees must not enter any naked or stand-alone agreements with individuals at another company (i) regarding employee salaries or other terms of compensation (e.g., wage-fixing agreements), or (ii) not to solicit or hire another company's employees (e.g., ''no poaching'' agreements). Naked agreements of this variety may be prosecuted as criminal violations.
- **Employment-Related Agreements in Context of Broader Collaboration:** As the HR Guidance makes clear, employment-related agreements can

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be appropriate when reasonably related to furthering a broader legitimate collaboration. These types of agreements are not illegal per se, but are instead evaluated under the rule of reason. Companies may, for example, agree not to solicit each other's employees when such an agreement is reasonably necessary to facilitate bona fide collaborations, such as mergers and acquisitions, investments and divestitures, or joint ventures to develop new products. Any such agreements, however, must be for a legitimate business objective and narrowly tailored to addressing that purpose. For example, if Company X is considering buying one division of a large corporation (Company Y) and conducting due diligence, it may be perfectly appropriate for Company X to agree not to solicit employees of that division for a reasonable time; but it might be an antitrust violation for Company X to agree not to solicit any employees of Company Y, wherever they reside.

- **Exchanging Employment-Related Information:** The HR Guidance also recognizes that companies may have legitimate reasons to exchange employment-related information, such as data regarding salaries or benefits. But the HR Guidance makes clear that these sorts of information exchanges must be structured to avoid unduly chilling the vigor of competition for hiring and retaining employees. In particular, consistent with prior FTC and DOJ commentary on the topic, the HR Guidance provides that employment-related information exchanges may be appropriate if: (i) a neutral third party manages the exchange, (ii) the exchange involves information that is relatively old, (iii) the information is aggregated to shield the identities of the underlying sources and (iv) enough sources are aggregated to prevent competitors from linking particular data to an individual source.

Implications

Although the HR Guidance makes it clear that employment-related agreements are a target for antitrust enforcement, it also provides valuable guidance for conducting business effectively while avoiding antitrust liability. This can be a particularly challenging area for antitrust compliance because personnel may not be as sensitive to antitrust issues in the employment context as they would be when dealing with competitors in other more familiar business contexts, such as supplying their products or services. Accordingly, all employees who may play a role in employment matters—but especially HR professionals—should review the HR Guidance and its Q&A section discussing hypothetical employment scenarios, and companies should ensure that their antitrust compliance programs and training account for the new guidance.

Additionally, given the complex issues that can arise, it is important that companies and their employees consult counsel if there is any question about whether particular employment-related conduct could violate the antitrust laws. Some examples of conduct that could lead to antitrust liability include:

- agreeing with another company not to solicit or hire your company's employees;
- agreeing with another company regarding compensation, bonuses, benefits, or any other terms of employment, both at a specific level or within an agreed-upon range;
- suggesting to another company that it should not compete too aggressively for your company's employees or offer employment terms that are too generous;
- sharing with another firm information about your company's employee compensation, bonuses, benefits, or other terms of employment, either directly or through a third party; and
- participating in any meeting or conversation, such as at trade association gatherings or social events, where any of the above topics are discussed.

Finally, companies should recognize that publication of the HR Guidance and related publicity may lead to increased reporting of past or future employment-related conduct that might have violated the antitrust laws. Indeed, the HR Guidance's Q&A section conspicuously highlights the DOJ's Leniency Program, which provides enormous benefits to the first qualifying corporation or individual to report a potential criminal antitrust offense, including immunity from criminal prosecution for itself and its employees. Particularly given the spotlight that the HR Guidance has put on this area, companies are well advised to consider investigating and potentially reporting to the DOJ any potential antitrust violations in the employment context.

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