KIRKLAND ALERT

November 30, 2016

DOJ and FTC Release Joint Guidance for Human Resource Professionals on Naked No-Poaching and Wage-Fixing Agreements

On October 20, 2016, the U.S. Department of Justice, Antitrust Division ("DOJ") and Federal Trade Commission ("FTC") (collectively the "Agencies") issued joint guidance for human resource ("HR") professionals and other relevant individuals detailing how to avoid potential violations of antitrust laws in employee hiring and compensation practices. Renata Hesse, the acting assistant attorney general for the DOJ, noted in a recent interview that, "This seems to be an area where there may be a lack of understanding about how antitrust laws apply" and that she expects "you will continue to see activity in that area."[1] The guidance makes it clear that the Agencies will continue their enforcement efforts to prevent anticompetitive practices in the employment market. Most notably, the guidance announces DOJ's intent to criminally investigate naked (unrelated to a broader legitimate collaboration between employers) no-poaching and wage-fixing agreements going forward. Previously, the DOJ had only pursued civil actions in this area. Additionally, the guidance suggests a need for greater vigilance by companies regarding the exchange of employee compensation information, even in the context of a proposed transaction.

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Anticompetitive Hiring Practices

Just as agreements to fix prices of goods or allot customers have traditionally been viewed as unlawfully anticompetitive, so, too, are hiring practices that involve agreements to limit employee hiring and compensation outside the context of broader, legitimate collaborations between employers. Employers, like sellers, compete in the marketplace, albeit for employees rather than customers. Just as restricting competition in a particular consumer market may lead to higher prices, lower quality products and services, and less choice, limiting employee hiring and compensation may result in fewer job opportunities, lower wages, less competitive benefits, and other degraded terms of employment.

The Agencies have already had success in bringing civil actions against employers for participating in unlawful naked agreements to limit employee hiring and benefits, such as those against Arizona Hospital & Healthcare Association[2] and various tech giants like eBay[3] and Google.[4] The guidance they have provided for HR professionals and anyone else involved in the hiring practices of a company is consistent with the lessons derived from these cases.

Naked agreements not to recruit certain employees or not to compete on terms of compensation are illegal

Wage-fixing and no-poaching agreements in the context of broader legitimate collaborations, like mergers or joint ventures, are generally lawful. They are unlikely to

raise flags with the Agencies so long as the agreements are reasonably ancillary to a legitimate arrangement and reasonable in scope and duration. Where no-poaching and wage-fixing agreements are unrelated to legitimate arrangements, however, the guidance has warned that the DOJ will criminally investigate them for *per se* illegality in the same way as deals that fix prices or allocate customers. It does not matter whether the agreement is formal or informal, written or unwritten, or spoken or unspoken. In fact, circumstances involving evidence of discussions and parallel behavior may be enough to lead to the inference that the individual has entered an agreement.

An individual may be breaking criminal and/or civil antitrust laws if he or she:

- Agrees with individual(s) at another company about employee salary or other terms of compensation (including benefits), either at a specific level or within a range ("wage-fixing" agreements), or
- Agrees with individual(s) at another company to refuse to solicit or hire that other company's employees ("no-poaching" agreements).

Sharing of information with competitors about terms and conditions of employment may violate antitrust laws

Under the new guidance, even where an individual does not agree to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an illegal agreement to fix prices; alternatively, such an exchange could lead to civil antitrust liability when it has, or is likely to have, an anticompetitive effect. For example, periodic, nonpublic exchanges of wage information in an industry with relatively few employers competing for the same employees could establish an antitrust violation because such a data exchange is likely to decrease competition between these employers, possibly resulting in lower wages and less competitive terms for prospective employees.

Special Considerations for Mergers, Acquisitions & Joint Ventures

Though lawful when reasonable in scope and duration, exchanges of employment data between employers competing for similar employees may still run the risk of violating antitrust laws even when it is done in conjunction with a proposed merger, acquisition or joint venture under certain conditions. To limit the risk of antitrust liability, companies must take appropriate precautions, which may include:

- Managing the exchange of information through a neutral third party,
- Exchanging only historical information, and
- Aggregating information in order to obscure the identity of the underlying sources and any current or future price terms.

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Takeaways

With the announcement of the DOJ's intention to proceed criminally against naked wage-fixing and no-poaching agreement, it is important now more than ever to carefully review employment practices and policies, including in conjunction with merger activity. Companies should avoid agreeing to no-poaching or wage-fixing provisions in agreements with other employers except where such provisions are reasonably ancillary to separate, legitimate collaborations. It is advisable to first seek legal counsel if you are considering sharing specific employment information or otherwise collaborating with competitors.

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The DOJ and FTC guidance is available here.

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1 Lipman, Melissa, "DOJ to Keep Focus on No-Poach Deals After Criminal Shift," *Law360*, November 17, 2016.

2 *United States and the State of Arizona v. Arizona Hospital and Healthcare Association and AzHHA Service Corporation*, No. CV 07-1030-PHX (D. Ariz. Sept. 12, 2007).

3 *U.S. v. eBay, Inc.*, No. 12-CV-05869-EJD-PSG (N.D. Cal. Sept. 2, 2014).

4 *U.S. v. Adobe Systems, Inc., et al.*, No. 10-CV-01629-RBW (D.C. Mar. 17, 2011).

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