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Antitrust Agencies Release Guidance on Employee Hiring and Compensation

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The Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) have jointly issued [written guidance](#) for human resource (HR) professionals on how antitrust law applies to employee hiring and compensation decisions (Guidance). The purpose of the Guidance is to help educate and inform HR professionals, as well as in-house counsel and compliance personnel, so they can implement safeguards to ensure that their companies' hiring and compensation practices comply with the antitrust laws.

The Guidance makes clear that workers are entitled to the benefit of competition for their services; therefore, agreements among employers to fix wages or other terms of employment, and agreements not to recruit each other's employees (so-called "no poaching" agreements), are both likely to be considered *per se* illegal under the antitrust laws (specifically, Section 1 of the Sherman Act). This means that such agreements are deemed to be anticompetitive, irrespective of the employers' motives (e.g., to reduce costs), unless related to a larger legitimate collaboration between the employers or a bona fide merger or acquisition transaction. These anticompetitive agreements can be formal or informal, written or verbal, explicit or tacit. In addition, merely inviting a competitor to enter into an illegal agreement may violate the antitrust laws, even if the invitation does not result in an agreement to fix wages or otherwise limit competition.

Of particular note, the Guidance states that, going forward, the DOJ intends to criminally investigate such naked wage-fixing or no-poaching agreements. This is because such agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct." Criminal violations of the antitrust laws are felonies that can expose companies to significant fines and individuals to fines and imprisonment.

The Guidance also discusses how the antitrust laws apply to companies' decisions to share sensitive compensation and other employment-related information with competing employers. Companies may wish to share such information for legitimate reasons, such as a benchmarking exercise, or as part of due diligence in connection with a proposed merger or acquisition. Even if competing employers do not agree to fix compensation or other terms of employment, sharing such information may expose companies to civil antitrust liability if it is likely to harm competition, for example, by causing companies to decrease compensation to certain employees. Such information exchanges, as with any sharing of sensitive information between competitors, should be managed carefully to prevent harm to competition. There are various

ways to do this, such as using historical or aggregated data, and using a neutral third party to manage the exchange.

The Guidance includes a Q&A section that explains how antitrust law applies to various scenarios that HR professionals might encounter in their day-to-day work. The antitrust agencies also issued a [*quick reference card*](#) that provides a list of antitrust red flags to help identify potential issues in the employment context.