DOJ and FTC Issue Joint Antitrust Guidance on Employment Practices

On October 20, 2016, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued joint guidance for human resources professionals, identifying certain employment practices that violate antitrust laws. According to the agencies, hiring practices that limit competition between employers to hire and recruit employees undercut the benefits of a competitive job market, such as higher wages and better benefits for employees.

Wage-Fixing and No-Poaching Agreements

The guidance addresses two specific types of agreements: wage-fixing and no-poaching. In wage-fixing agreements, companies set wages, benefits, or other employee compensation to agreed-upon levels or ranges. No-poaching agreements arise when competitors agree not to solicit or hire employees from each other's company. Both types of agreements are illegal and can result in serious criminal and civil liability.

"Naked" wage-fixing and no-poaching agreements (i.e., those that are unrelated and unnecessary to a legitimate collaboration between employers) are per se violations of the antitrust laws. According to the joint guidance, the antitrust enforcement agencies intend to exercise prosecutorial discretion in bringing criminal, felony charges against participating individuals, employers, or both. The enforcing agencies also will continue to pursue civil enforcement actions in appropriate matters, which can be costly.

The guidance points out that wage-fixing and no-poaching agreements do not need to be formal, written, or directly entered into by the company to constitute a violation. "Gentleman's agreements," verbal understandings, and agreements entered into by third party intermediaries can all expose a company to liability. According to the guidance, evidence of mere discussions and parallel behavior between companies could be enough to infer that there is an illegal agreement in certain circumstances.

Information Sharing

The guidance further explains that sharing "competitively sensitive" employment information can also run afoul of federal antitrust laws. Sharing non-public information that could reduce competition between employers could lead to civil enforcement efforts. The guidance notes that sharing this kind of information can be problematic for competition because it can be used to keep wages artificially low, even when there is no clear agreement to do so among the employers.

When contemplating exchanging information among employer competitors, the guidance suggests using a neutral third party to manage the information, exchanging historical information only, and aggregating and compiling data from multiple sources to help avoid antitrust problems.

Implications for Employers

Human resources professionals and company executives should review the guidance. The Q&A section is particularly useful and presents different situations that employers may encounter along with the agencies' suggested approach. The agencies also released a non-exhaustive list of red flags that can be used to spot potential antitrust violations.

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Companies should proactively examine their employment policies and practices to ensure compliance with the antitrust laws. If it is determined that a policy or practice requires further analysis, employers should contact an attorney.

If you would like our assistance, or if you have any questions about this LEGALcurrents®, please contact a member of our Labor & Employment or Antitrust practice groups at (585) 232-6500. ■

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