Insights: Alerts

Department of Justice Releases Guidance for Human Resources Professionals

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On October 20, 2016, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") published a joint guidance for HR professionals to alert them to potential antitrust violations. Importantly, in addition to describing the types of conduct that could violate the antitrust laws, the guidance announces for the first time the DOJ's intent to "criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other's employees."

The guidance comes on the heels of several successful civil cases brought by DOJ against various employers for no-poach agreements and agreements to fix compensation for employees, which the agencies reference in the guidance. Notably, the DOJ brought three successful cases against groups of high-tech companies that had agreed not to cold call each other's employees. The agencies note that such conduct is a *per se* violation of the antitrust laws, meaning that once established, the conduct is considered illegal on its face, and the defendant cannot present evidence of procompetitive consequences that might justify the behavior. Previously, the agencies had brought only civil cases against offenders and settled for conduct sanctions or conduct sanctions and money damages. Now, however, DOJ intends to exercise its criminal enforcement power to prosecute this behavior.

The guidance also singles out agreements among competitors to fix the price of employee compensation. Both agencies have recently brought successful suits against several organizations for fixing pay rates at artificially low levels across a variety of industries. The guidance affirms that such agreements are also illegal *per se* and that violators can now expect to face criminal enforcement by the DOJ. It is crucial to note that (1) agreements in this context are not limited to formal written agreements; rather, they include oral agreements and informal understandings; and (2) compensation in this context includes benefits, like health insurance or transportation reimbursement, as those are also part of what companies pay employees.

The agencies also address the exchange of competitively sensitive information about hiring and compensation, which can facilitate illegal agreements not to hire or to suppress compensation. To ensure the lawfulness of an exchange of such information, the agencies recommend that competitors refer to Statement 6 of the Health Care Guidelines, which outlines a safe harbor for the exchange of competitively sensitive information. The agencies have previously committed to not prosecuting exchanges that comply with the safe harbor conditions.

Perhaps the most useful part of the guidance is the Questions and Answers section, in which the agencies outline certain fact patterns and explain whether they present antitrust violations. The agencies have also published a list of red flags that may indicate anticompetitive conduct. All HR professionals should take the time to read these materials and may wish to consider providing updated compliance training for their employees, given the heightened risk of criminal liability in this area.

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