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Department of Justice and FTC Release Antitrust Guidance for Employee Hiring and Compensation

The Antitrust Division of the Department of Justice and the Federal Trade Commission recently published "Antitrust Guidance for Human Resource Professionals," the agencies' first official public guidance on antitrust issues in hiring and employment practices.[1] Relatedly, the White House Council of Economic Advisors released an issue brief discussing the effects on wages of decreased competition among employers for employees.[2] These documents follow in the wake of several antitrust enforcement actions concerning hiring practices, including in Silicon Valley, and reinforce that agreements among employers relating to hiring raise potential antitrust concerns and may be subject to criminal prosecution by the DOJ. While certain enforcement policies and priorities may change with the new administration, this recent guidance remains important for companies to understand and consider – especially given potential criminal penalties for non-compliance.

DOJ/FTC Guidance Covers Agreements As Well As Information Sharing

The enforcement agencies' guidance notes that "[a]n agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities." The agencies admonish employers to "take care not to communicate the company's policies to other companies competing to hire the same types of employees, nor ask another company to go along." Doing so could result in serious consequences, including risking substantial monetary damages and even criminal penalties. In a press release accompanying the release of the guidance, the Department of Justice states that "[g]oing forward . . . the Justice Department intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers."[3] Even in the absence of criminal prosecution (which presents a

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[1] *Available at* https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf

[2] Council of Economic Advisers Issue Brief, "Labor Market Monopsony: Trends, Consequences, and Policy Responses," Oct. 2016, *available at* https://www.whitehouse.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

[3] Press Release, U.S. Dep't of Justice, "Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation," Oct. 20, 2016, *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

much higher burden for the Justice Department to clear), employers remain at risk of civil investigations by the Department, as was the case in the Silicon Valley prosecution.

The guidance specifically warns employers that "[a]greements among employers not to recruit certain employees or not to compete on terms of compensation are illegal" and that "[s]haring information with competitors about terms and conditions of employment can . . run afoul of the antitrust laws." The guidance goes on to highlight specific examples of problematic behavior. For instance, if an HR professional at one company approaches an HR professional at a competing company suggesting that the two firms "agree[] not to recruit or hire each other's employees," this "amounts to a solicitation to engage in serious criminal conduct." Even if there is no agreement between the two firms, the FTC may treat the solicitation itself as an "invitation to collude" under section 5 of the FTC Act and bring an appropriate action. If an agreement is formed, the Department of Justice could bring criminal charges against both firms (and the individuals involved in making the agreement) under section 1 of the Sherman Act. Discussions between managers at competing firms to establish a common pay scale or "cap wage increases" would be similarly problematic. The guidance notes that even agreements among competitors on non-wage elements of compensation – such as "gym membership, parking, transit subsidies, meals, or meal subsidies and similar benefits of employment" – "would likely violate antitrust law."

The agencies' guidance follows several enforcement actions in the area of hiring practices, the highest profile of which were the Department of Justice's actions involving several prominent Silicon Valley firms. As the guidance notes, in these "cases, the competitors agreed not to cold call each other's employees. In two cases, at least one company also agreed to limit its hiring of employees who currently worked at a competitor." The government entered consent decrees settling the cases, and follow-on private class action litigation was settled in 2015.[4]

White House Council of Economic Advisers Reinforces Antitrust Implications of Hiring Practices

Some of the same themes in the agencies' guidance are echoed in the White House Council of Economic Advisers' recent Issue Brief addressing "how monopsony, or wage-setting power, in the labor market can reduce wages, employment, and overall welfare, and describes various sources of monopsony power." The brief notes that, among other things, market concentration and employer collusion may lead to effects on wages. Particularly notable is the observation in the brief (citing a recent speech by the Acting Assistant Attorney General in charge of the Antitrust Division) that "[t]he antitrust laws apply to reductions in competition for employees as a result of mergers as readily as they do to reductions in product market competition. Yet few merger complaints have cited employment monopsony concerns as a reason to challenge a transaction. . . . Even when product market and labor market harms do not coincide, the law compels antitrust authorities to protect competition in both employment and product markets."

[4] *In re High-Tech Employee Antitrust Litig.*, No. 11-cv-2509 (N.D. Cal. Sept 2, 2015).

Conclusion

These recent publications serve as important reminders that firms must be aware that antitrust problems can arise not just with respect to the products and services a firm sells to consumers, but also with respect to firms' participation in the labor market. Under the new administration, the enforcement agencies' policies and priorities may shift to some degree. In the past, however, criminal enforcement of the antitrust laws has remained a high priority across administrations, and agency policy in that area has been more consistent than in others. The recent guidance concerning potential criminal antitrust violations in hiring practices thus may be particularly significant for companies to consider – including in the context of structuring and reviewing antitrust compliance programs.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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