Beware of Antitrust Risks in Hiring and Compensation Decisions

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Amundsen Davis
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Financial institutions and other employers must be cognizant of antitrust risks in hiring and compensation decisions. In late October, the United States Department of Justice (DOJ) and Federal Trade Commission (FTC), the federal agencies responsible for enforcing antitrust law, jointly issued an "alert" entitled "Antitrust Guidance for Human Resources Professionals." While the Antitrust Guidance is aimed at HR professionals in order to put them on notice regarding employer hiring and compensation practices that may violate antitrust laws, executives and board members should be made aware of the risks. The DOJ and FTC have signaled a potential increase in federal enforcement actions, although it remains to be seen whether the change in administration from President Obama to President-elect Trump will affect the threatened escalation of action.

The Antitrust Guidance focuses on two main points:

1. Wage fixing and no-poaching agreements between companies are illegal.

Even if companies are not competitive with each others' business, if companies compete to hire and retain employees, they are competitive in the *employment marketplace*. Agreements between companies to set compensation at a given level (wage fixing) and to not recruit each others' employees (no poaching) are illegal, whether they are direct or indirect through a third party, in writing or verbal. Moreover, it does not matter if there is no actual harm or negative effect on competition.

It's not just the companies who face potential liability; the DOJ warns that it may bring criminal charges against the "culpable participants in the agreement, including…individuals…" Thus, executives, board members, and human resources personnel face individual culpability and liability for violations of antitrust law. In addition, individuals who are aggrieved by the illegal agreement may sue for treble damages (i.e., three times the actual damages) and attorneys' fees.

There are some exceptions. The restrictions listed in the Antitrust Guidelines do not appear to extend to "no-hire" provisions that are related to legitimate business transactions (e.g., severance agreements, joint venture agreements,

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Debra A. Mastrian
Partner

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settlement agreements, vendor agreements, etc.). However, the no-hire agreement should be part of the broader, legitimate business endeavor so that it is clear that it is not aimed at suffocating competition. Even then, the restrictions must be reasonable in length and scope.

2. Avoid sharing sensitive information with competitors

Sharing information with competitors regarding employee work terms and conditions may also violate antitrust laws. The Antitrust Guidance states that "[e]ven if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement." Further, "[e]ven if participants in an agreement are parties to a proposed merger or acquisition, or are otherwise involved in a joint venture or other collaborative activity, there is antitrust risk if they share information about terms and conditions of employment."

Does this restriction extend to benchmarking and compensation surveys? The Antitrust Guidance indicates that soliciting or responding to HR association salary/wage surveys may be unlawful. It cautions those who belong to HR organizations to avoid "discussing specific compensation policies or particular compensation levels" with members who work for competitor companies. DOJ/FTC guidance regarding how to share such information without running afoul of antitrust laws can be found here. *See,* Statement 6. Not all exchanges of information are unlawful. It may be permissible if (a) a neutral third party manages the exchange; (b) the exchange involves relatively old information; (c) the information is aggregated to protect the identity of the underlying sources; and (d) enough sources are aggregated to prevent competitors from linking particular data to an individual source.

The DOJ has identified a non-exhaustive list of examples of illegal conduct in "Antitrust Red Flags for Employment Practices," including discussions with competitors regarding not competing to aggressively for employees, agreements not to solicit another company's employees, and participating in trade association meetings where compensation is discussed.

Bottom line: FTC and DOJ enforcement focus may shift in 2017. The DOJ also expects that the Antitrust Guidance will lead to stronger cooperation with *state* antitrust enforcers. Executives, board members and other corporate decisions makers, as well as HR personnel, must be aware of antitrust issues, including the "red flags" identified by the DOJ. Consider training for all who are involved in hiring and compensation practices. Review your non-solicitation agreements with other companies, including service providers, to ensure they are legal.