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New DOJ, FTC Antitrust Compliance Guidance for Human Resources Attacks No-Poaching Agreements

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Criticizing non-solicitation of employees — or “no-poaching” — agreements as an alleged factor in holding back wage growth, the ***U.S. Department of Justice*** and the ***Federal Trade Commission*** have issued antitrust guidance on human resources issues. This is consistent with and continues the White House’s recent attacks on post-employment restrictive covenant agreements. (See our article, White House Continues Attack on Non-Compete Agreements.)

The “Antitrust Guidance for Human Resources Professionals,” released on October 20, 2016, focuses on two main areas. First, it reminds employers that they cannot engage in wage fixing with other employers. Second, the agencies highlight the importance of the latest focus on “no-poaching” agreements involving California technology companies. The guidance asserts that “naked” no-poaching agreements in employment are comparable to fixing product prices or allocating customers, which traditionally have been violations of antitrust law subject to criminal or civil action. Significantly, the Department of Justice states that it intends to apply these same antitrust concepts in the employment context and will criminally prosecute “naked” wage fixing or no-poaching agreements.

Wage Fixing Agreements

The DOJ and FTC largely reiterate historical concerns over wage fixing. For example,

several years ago, the agencies had obtained consent orders from employers in the healthcare and fashion industries. The agencies had alleged the employers sought to collude with each other by effectively establishing standard rates for particular positions within the industry. Such concerns also have been pursued in private litigation. For example, a recent class action settlement in Michigan arose from allegations that several hospitals had sought to establish wage ranges for registered nurses.

Still, the guidance does not appear to recognize, as a practical matter, that employers often seek to offer wages and benefits that are competitive with their peers. Some would argue that employers often seek to enhance their own compensation and benefits structures to ensure they are not at a competitive disadvantage in hiring the best employees. In such cases, sharing information about competitive wages actually may benefit employees.

An information exchange, such as a survey on compensation and benefits, can be lawful, according to the guidance. For example, the guidance noted that wage information may be exchanged where a neutral third party manages the exchange, the information is relatively old, or the information is presented to employers on an aggregated basis and cannot be linked to a particular employer.

No-Poaching Agreements

According to the guidance, "naked" no-poaching agreements restrict employee mobility and effectively reduce compensation. The concerns apparently stem from litigation against technology firms, where the DOJ and private litigants alleged the companies had entered into agreements not to cold call or, in some cases, not to hire each other's employees. Resolution of the DOJ actions involved consent orders entered by the applicable courts and high-dollar monetary payments.

While the guidance makes broad statements based on "naked" no-poaching agreements within the technology and healthcare sectors, it does not provide advice on the more familiar non-solicitation-of-employees agreements between competitors. For example:

- A consulting or staffing firm may send employees to work with a client and have the client agree that it will not hire such employees directly ("disintermediation").
- In a potential merger, the acquiring company will have the opportunity to meet key employees of the selling company and the due diligence documents may restrict the acquiring company from hiring those employees for a period of time in the event the contemplated transaction fails.
- In litigation in which an employer alleges that a former executive breached contractual and possibly other obligations (e.g., trade secret), to avoid future disputes over contractual breaches or misuse of confidential information, resolution might involve an agreement that the executive's new employer will not hire employees who reported to the executive at the previous employer.

The guidance does not shed light on any of these common situations. However, many

of these situations arguably are not “naked” no-poaching agreements, as they have a legitimate purpose besides limiting competition for labor, and assuming they were narrowly tailored to appropriate circumstances.

Takeaways

The extent to which the Donald Trump Administration will expend resources to pursue the DOJ/FTC guidance remains to be seen. Nevertheless, the guidance highlights the continued importance of training managers. While it is addressed to human resources professionals, company managers also are frequently in positions in which they discuss compensation with other employers or negotiate agreements that might involve hiring restrictions. Broadened training for managers on how to handle these situations should be a priority. Further, human resources professionals should be cautious when discussing compensation and benefits in professional settings involving their peers from other organizations.

Finally, the toughest issue arising from the guidance may be determining under what circumstances employers may agree not to hire or solicit employees from other employers. The guidance does not provide any instruction on what restrictions or circumstances may be appropriate in the eyes of the Department of Justice. Organizations entering into such agreements should consult counsel and ensure that their agreements are narrowly tailored to address legitimate business concerns.

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