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FTC AND DOJ CAUTION HR PROFESSIONALS TO WATCH OUT FOR ANTITRUST VIOLATIONS

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On October 20, 2016, the FTC (Federal Trade Commission) and DOJ (Department of Justice) Antitrust Division issued a Guidance for human resource professionals regarding antitrust issues in employment. The Guidance is designed to alert human resource professionals to potential antitrust violations in hiring and employee compensation.

Antitrust laws are intended to prevent agreements, formal or informal, written or unwritten, spoken or unspoken, which limit competition. The Guidance focuses on two kinds of agreements which limit competition among employers.

1. Wage-fixing agreements.

These agreements involve competitors agreeing not to pay wages above a certain amount or not to provide better benefits or better terms of employment than agreed. These agreements keep wages low because employers agree not to exceed certain compensation levels.

In 2007, the United States and the State of Arizona sued a hospital registry organization that contracted with temporary staffing agencies to provide temporary nursing services. *U.S. v. Arizona Hospital & Healthcare Association* (Case No. 07-1030, DA3, May 22, 2007).

The hospitals set maximum compensation rates they would pay for temporary nurses through a subsidiary registry organization. The temporary staffing agencies agreed not to charge higher rates for temporary nurses and paid a fee to the registry in exchange for the hospitals' agreement to use their agencies to fill the hospitals' temporary nursing needs. The lawsuit claimed these arrangements were illegal wage-fixing agreements. The case was resolved by a consent judgment in which the hospitals, registry and temporary staffing agencies agreed not to set wage rates or other terms of employment for temporary nursing services, and not to give priority to, or pay or receive fees or bonuses for doing business with, each other.

Eight Detroit-area hospitals were sued in 2016 by a class of registered nurses over an allegedly similar conspiracy to fix nurses' wages. The hospitals exchanged detailed, non-public information at meetings, in telephone conversations and in written surveys about the compensation each hospital was paying to its nurses. The nurses claimed the hospitals used the information exchanged to keep compensation paid to nurses artificially low. The case was settled finally on January 27, 2016. The hospitals agreed to pay over $90 million to class members.

2. Anti-poaching agreements.

These agreements involve businesses agreeing not to solicit each other's key employees. The businesses do not have to be direct competitors. They only have to compete for similarly skilled employees.

The United States filed three lawsuits against various tech firms. One case involved agreements among Adobe, Apple, Google, Intel, Intuit, and Pixar not to solicit or hire each other's computer engineers and scientists. *U.S. v. Adobe, et al*, Case No 10-01629 (D.D.C. 2011). The lawsuit was settled by consent judgment prohibiting the businesses from agreeing not to solicit or otherwise compete for each other's employees. The businesses also agreed to pay $450 million.

The Guidance states the DOJ will continue to investigate allegations of wage -fixing among employers. If these investigations uncover such agreements, the DOJ might bring "criminal felony charges against the culpable participants in the agreement, including both individuals and companies."

The DOJ also cautioned against information-sharing, i.e., "exchanging competitively sensitive information [that] could serve as evidence of an implicit illegal agreement," such as allegedly occurred among the Detroit-area hospitals.

Not all agreements not to hire other employers' employees are illegal. The final judgment in the *Adobe* case made clear that the following agreements were not prohibited:

Not all agreements not to hire other employers' employees are illegal.

Agreements not to solicit employees that are:

1. Contained within existing and future employment or severance agreements with the employer's employees;
2. Reasonably necessary for mergers or acquisitions;
3. Reasonably necessary for contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers;
4. Reasonably necessary for the settlement or compromise of legal disputes; or
5. Reasonably necessary for
    a. Contracts with resellers or OEMs;
    b. Contracts with providers or recipients of services other than those enumerated above; or
    c. The function of a legitimate collaboration agreement, such as joint development, technology integration, joint ventures, joint projects (including teaming agreements), and the shared use of facilities.

The DOJ identifies the following "red flags" for human resource professionals to watch out, saying antitrust concerns may arise if you or your colleagues:

- Agree with another company about employee salary or other terms of compensation, either at a specific level or within a range.
- Agree with another company to refuse

to solicit or hire that other company's employees.

- Agree with another company about employee benefits.
- Agree with another company on other terms of employment.
- Express to competitors that you should not compete too aggressively for employees.
- Exchange company-specific information about employee compensation or terms of employment with another company.
- Participate in a meeting, such as a trade association meeting, where the above topics are discussed.
- Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings.
- Receive documents that contain another company's internal data about employee compensation.

About the Author. Karen L. Piper *represents and counsels employers on employment law issues. She has conducted a number of employment investigations and training seminars for a variety of clients and has also successfully defended numerous discrimination and wrongful discharge cases at the administrative, trial, and appellate levels. Karen is a frequent speaker and writer for national and local industry associations.*

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