As If You Didn't Have Enough to Worry About: Antitrust Law and Personal Liability

Labor & Employment Law Update

By Beverly Alfon on November 22, 2016

The Department of Justice (DOJ) and Federal Trade Commission (FTC), the agencies that jointly enforce antitrust law, issued an "alert" last month: "Antitrust Guidance for Human Resources Professionals." The guidance is aimed at HR professionals in order to put them on notice regarding employer hiring and compensation practices that may violate antitrust laws. There are two main points:

1. **"No-Poaching" agreements (agreements not to recruit certain employees) and wage-fixing agreements (agreements not to compete on terms of compensation) between employers are illegal.**

These types of agreements are illegal *per se* even if they are not made formally in writing or through a third-party. This means that if the DOJ uncovers one of these agreements, it will be deemed a violation of antitrust law, regardless of whether it has an actual negative effect on competition.

The DOJ warns that in these cases, it may "…bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies." Therefore, in addition to prosecuting the company, the DOJ may prosecute you *individually* for criminal felony for your participation in the agreement. Even if the agencies do not pursue criminal charges, they may nonetheless pursue civil liabilities. Also, any individuals injured by the agreement may also sue for treble damages (i.e., three times the actual damages) and attorneys' fees.

These restrictions do not appear to extend to "no-hire" agreements that are related to legitimate business transactions (e.g., severance agreements, joint venture agreements, settlement agreements, etc.). However, the no-hire agreement should be part of broader, legitimate business endeavor so that it is clear that it is not aimed at suffocating competition.

1. **Avoid sharing sensitive information with competitors.**

Sharing information with competitors regarding employee work terms and conditions may also violate antitrust laws. The 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 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 (1) a neutral third party manages the exchange; (2) the exchange involves relatively old information; (3) the information is aggregated to protect the identity of the underlying sources; and (4) enough sources are aggregated to prevent competitors from linking particular data to an individual source.

Bottom line: While the FTC and DOJ enforcement focus may shift in 2017, there is no guarantee – and antitrust law is nothing new. The DOJ also expects that the guidance will lead to stronger cooperation with *state* antitrust enforcers. HR and corporate decision-makers need to be on the same page. Be aware of the "red flags" identified by the DOJ and consider training for all who are involved in hiring and compensation practices, including those in the C-suite.