

DOJ and FTC Issue Antitrust Guidance for Human Resource Professionals

by Michael A. Lindsay and Jaime Stilson

Everyone knows that price-fixing among sellers of competing products is illegal, but price-fixing by buyers can also violate the antitrust laws. That is true even in the market for buying services of employees, regardless of whether the colluding employers are competitors in their downstream markets. In other words, it does not matter under the antitrust laws whether the employers have competing products – only that they compete for employees and enter into an agreement to restrain trade within the employee market. Last week the nation's two leading antitrust enforcers – the Federal Trade Commission (FTC) and U.S. Department of Justice's Antitrust Division (DOJ) – published *Antitrust Guidance for Human Resources Professionals*, along with an index card of “red flags,” reminding employers and HR personnel in particular that the antitrust laws will be enforced to prevent agreements that restrain competition in the employment market.

Dorsey has been advising clients about the antitrust perils in buyer-markets in general and employment-purchasing markets in particular for years (see endnotes), and for the most part, the substantive principles in the DOJ/FTC guidance itself are not “new” news. For example:

- An agreement between two independent employers that does nothing more than fix wages, salaries, or other compensation (a naked “wage-fixing agreement”) is illegal per se. The DOJ took this position in the *High Tech Employee Antitrust* cases (a trio of cases brought against Ebay and Intuit, Lucasfilm and Pixar, and Adobe, Apple, Google, Intuit, and Pixar).
- An agreement in which two independent employers agree not to solicit each other's employees (or otherwise agree to limit methods of competition) (a naked “no poaching agreement”) is also illegal per se, although there may be an exception if the agreement is closely and narrowly tied to a joint venture between the employers.
- An agreement to exchange current or prospective compensation information is problematic. It may not be illegal per se, but it can be illegal under the “rule of reason” (that is, on a facts-and-circumstances basis) – and it may be evidence of a per se agreement not to compete. Information exchanges that involved sufficiently old compensation data, or use independent neutrals to manage and aggregate data available in the exchange typically don't raise the same concerns.

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What is new – or at least noteworthy – is the very clear statement that DOJ intends to treat naked wage- or compensation-fixing agreements, no-poaching agreements, and other naked restraints in labor markets as *criminal* violations and may, where appropriate, bring felony charges against both the individuals responsible for the violation and their companies as well. In one sense, this should not be a surprise to anyone. DOJ has previously made clear its view that these restraints are illegal per se, and naked agreements between competing sellers to fix prices have been the bread and butter of criminal antitrust enforcement for a century. And now DOJ has forewarned employers and managers that they should expect this same basic approach in employment markets.

The DOJ/FTC's issuance of *Antitrust Guidance for Human Resources Professionals* provides an opportunity for law and HR departments to take stock of in-house compensation-related issues and recruiting practices that may raise antitrust red flags, including the topics addressed by the guidance. Employers should balance the legal and business risks and Dorsey is always ready to help.