

Antitrust Division and FTC Issue Guidance on Antitrust Law and Hiring and Compensation Issues

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Robert E. Connolly (GeyerGorey LLP)

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In a press release issued on October 20, 2016, the Antitrust Division and the FTC issued antitrust guidance for human resource (HR) professionals and others who are involved in hiring and compensation decisions. While the guidance on how the antitrust laws apply to hiring is useful, the big news in the press release is:

Going forward, the Justice Department **intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers.** (emphasis added). These types of agreements eliminate competition in the same irredeemable way as agreements to fix the prices of goods or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Agreements that do not constitute criminal violations may still lead to civil liability under statutes enforced by both agencies.

The press release announced the agencies' joint guidance and includes a Q&A section that explains how antitrust law applies to various scenarios that HR professionals might encounter in their daily work lives. The press release also contained links to the Antitrust Division's Citizen Complaint Center and the FTC's Report an Antitrust Violation page.

I am happy to see the Division give a warning that future naked restraints on employee hiring and/or wage agreements will be criminally investigated/prosecuted. As noted in the guidance, “[I]n the past few years, the DOJ brought three civil enforcement actions against technology companies (eBay and Intuit, Lucasfilm and Pixar, and Adobe, Apple, Google, Intel, Intuit, and Pixar) that entered into “no poach” agreements with competitors.” I thought these cases could have been brought criminally. It really isn’t that complicated. Buyer cartels are illegal whether an enterprise is buying computers, software or the employees who create/operate them. Labor is an input and wage-fixing agreements are illegal. Of course, as in purchasing other inputs, there may be legitimate pro-competitive joint ventures efforts with an ancillary agreement on labor. But, the cases the DOJ was bringing, were by the express terms of the Complaint, *per se* violations.

Aggressive criminal enforcement of naked wage/hiring agreements is highly warranted. There are some cartels, the auto part cartels for example, that can cumulatively cause a lot of economic damage, but the illegal profit may be dispersed over so many consumers that the collusion does not have a material effect on any one purchaser. But, a “no poach” or wage setting agreement, has a direct and targeted effect on specific individuals. The damage inflicted can be significant, not just monetarily, but on an individual’s ability to chart her own career path.

[If I seem a little bitter about employee related agreements, it is because I am sure I should have been playing in the Major Leagues if not for an agreement to boycott me. In fairness, others have noted that it was likely because I peaked in Little League and after that I stunk].

Not to nitpick, because the joint guidance from the agencies is very helpful and the shot across the bow about possible criminal consequences, is refreshing. But, the guidance is titled “Guidance for Human Resources Professionals.” To me, this makes it sound like the HR folks were the problem. As best as I recall, the knuckleheads who were engaged in forming the no-poach and wage fixing agreements were the most senior people at some of America’s most prominent technology company; not a cabal of HR managers. It reminds me of when I was in grade school and me and my friends engaged in some prank, and the whole school would be called into assembly for a refresher from the Monsignor on just how hot it was in hell. Still, the guidance to HR personnel may give them the thought to

Speak up internally or even file a complaint with the government if they believe/suspect they are being asked to carry out an illegal hiring agreement.

Thanks for reading.