Cooley

# DOJ to Criminally Pursue Anticompetitive Employment Violations

October 24, 2016

On October 20, 2016, the Antitrust Division of the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) jointly released important guidance aimed at informing human resource (HR) professionals (and others involved in hiring and compensation decisions) on the topic of how the antitrust laws apply to the field of employment. Antitrust enforcement in the employment arena is increasing substantially and carries the risk of "treble damages," potentially resulting in millions of dollars in civil fines, as well as follow-on class action lawsuits by private parties. And now the DOJ has put companies on notice that the agency will enforce against anticompetitive employment violations using its arsenal of criminal sanctions against companies and personal liability for culpable individual employees. HR professionals must beware of this increasing antitrust scrutiny and embrace the opportunity to steer clear of antitrust pitfalls.

Employee hiring and compensation practices already have been in the antitrust crosshairs over the past few years, as illustrated by numerous high-profile enforcement actions taken by both the DOJ and the FTC alleging anticompetitive 'no poaching' and 'wage-fixing' agreements, in particular in the high-tech and healthcare industries. To educate companies and their HR personnel regarding the types of agreements that potentially violate antitrust laws, the DOJ and FTC jointly issued a policy statement entitled "Antitrust Guidelines for Human Resources Professionals" (the "HR Guidelines").[1] The agencies also provided a quick reference card that provides a list of "antitrust red flags" that HR professionals should be on the lookout for during their everyday work routines.

Perhaps most striking, the DOJ put companies on notice that the agency now "intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers." DOJ's announcement signals a marked shift from past treatment of these kinds of agreements. While both the FTC and the DOJ have civilly enforced against employers for entering agreements with competitors that limited employee wages and benefits, this is the first indication that the DOJ intends to pursue criminal enforcement.[2] The stakes are now much higher, with both companies and individual employees facing potential criminal felony convictions for this same conduct.

The Guidelines indicate that any agreement "among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities." The agreement can be written or oral, and can be explicit or implicit. Whether the parties are for-profit or not-for-profit companies does not matter, nor does it matter whether the agreement is entered directly by the parties or indirectly through a third party, such as a trade association. The Guidelines also note the risk of information exchanges – even in the context of potential mergers or acquisitions – regarding employee compensation or terms of employment.

The announcement signals the potential for a significant ramping up of antitrust enforcement in the employment arena. Although no industry was singled out in the announcement, past challenges have focused closely on the healthcare and high-tech industries, where highly sophisticated and skilled employees are often in high demand and short supply. Those industries are most likely to continue under close scrutiny as the DOJ and FTC continue their enforcement efforts against anticompetitive employment practices under the newly-issued Guidelines.

**Notes**

1. The HR Guidelines comprise the first formal guidance regarding the legality of exchanges of salary and compensation information under the antitrust laws since the agencies jointly issued Statements of Antitrust Enforcement in Healthcare in the last 20 years. In 1996 the agencies provided guidance to the healthcare industry regarding when exchange of price and cost information between health care providers is less likely to raise antitrust concerns. See Section 6 of the Antitrust Enforcement Policy in Health Care.
2. The FTC pursues actions against employers under Section 5 of the Federal Trade Commission Act, which

prohibits unfair methods of competition; the DOJ pursues actions under Section 1 of the Sherman Act, which prohibits contracts or agreements that unreasonably restrain trade. Criminal charges can only be brought under the Sherman Act provision.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

# Key Contacts



| | |
|---|---|
| **Wendy Brenner**<br>**Palo Alto** | **brennerwj@cooley.com**<br>**+1 650 843 5371** |
| Sharon Connaughton<br>Washington, DC | sconnaughton@cooley.com<br>+1 202 728 7007 |
| Beatriz Mejia<br>San Francisco | mejiab@cooley.com<br>+1 415 693 2145 |



This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.