ASSISTANT ATTORNEY GENERAL ANNOUNCES THAT DOJ ANTITRUST DIVISION IS BUILDING CRIMINAL CASES AGAINST COMPANIES FOR ANTI-POACHING AGREEMENTS

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U.S. Antitrust, Competition & Trade Regulation Alert

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The Assistant Attorney General for the Antitrust Division of the Department of Justice (DOJ) recently announced that the DOJ is currently developing criminal cases against companies who form agreements not to hire each other's employees. [1]

This announcement signals the DOJ's first possible criminal action following the policy shift that the DOJ and the Federal Trade Commission (FTC) (collectively, the "Agencies") announced last year through the issuance of their Antitrust Guidance for Human Resource Professionals. [2] The Antitrust Guidance expressed the DOJ's intent to criminally prosecute employers and individuals who enter into naked wage-fixing or no-poaching agreements with other employers. [3] While such conduct has always carried potential criminal liability (both for corporations and individuals) under the antitrust laws, the Agencies typically dealt with such violations through civil proceedings that ended in civil settlements requiring the companies to cease engaging in such prohibited conduct.

Assistant Attorney General Makan Delrahim, speaking at a conference hosted by the Antitrust Research Foundation at the Antonin Scalia Law School at George Mason University on January 19, 2018, stated that the DOJ "has a handful of criminal cases in the works" and explained that in "the coming couple of months you will see some announcements, and to be honest with you, I've been shocked about how many of these there are, but they're real," reported *Law360*. [4] Delrahim specifically warned that even companies who reached a civil settlement with the Antitrust Division may face criminal charges if they have not fulfilled their obligations. [5] "If the activity has not been stopped and continued from the time when the DOJ's [new anti-poaching] policy was made, a year and a couple of months ago, we'll treat that [activity] as criminal," he said. [6]

Delrahim's comments, in conjunction with the issuance of last year's Antitrust Guidance, sends an important warning to employers and human resources (HR) professionals that such conduct is now more likely to be investigated by the Agencies and prosecuted criminally by the DOJ instead of through a civil action.

Accordingly, all companies that compete for employees — including nonprofits, universities, and other entities that typically view themselves as having little exposure to violations of antitrust law — should review their compliance programs to ensure that proper policies and procedures are in place and that management and HR professionals are appropriately trained to avoid inappropriate discussions or agreements with other companies seeking to hire the same employees.

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THE EFFECT OF THE ANTITRUST LAWS ON THE EMPLOYMENT MARKET

The purpose of the antitrust laws is to promote a competitive marketplace. A competitive marketplace among employers "helps actual and potential employees through higher wages, better benefits, or other terms of employment." [7] Firms that compete to hire or retain employees are considered competitors in the employment marketplace, even if those firms do not compete in the same product or service market. Employers may violate the antitrust laws when they agree not to compete for employees. Some examples of illegal conduct provided by the Agencies include:

- An agreement "with an individual at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements);"
- An agreement "with an individual at another company to refuse to solicit or hire that other company's employees (so-called 'no poaching' agreements). [8]

An agreement need not be formal or in writing to violate the antitrust laws — any kind of informal or "gentlemen's agreement" or other tacit or implied understanding concerning employee compensation or recruiting is similarly prohibited. In this regard, unlawful arrangements may be inferred from circumstantial evidence. For example, exchanges of competitively sensitive information related to terms of employment or recruitment strategies among competitors can be used to infer an agreement.

The Agencies have indicated their intent to criminally prosecute naked wage-fixing or no-poaching agreements — that is, agreements separate from or not reasonably necessary to achieve a legitimate business purpose between the employers. Such agreements will be considered "per se" illegal, meaning that the agreement need not result in actual adverse competitive effects to be deemed illegal.

VIOLATIONS OF THE ANTITRUST LAWS CAN RESULT IN SEVERE PENALTIES

Violations of the antitrust laws can result in serious consequences for employers and any individual directly or indirectly involved in an illegal agreement. Such consequences include:

- Criminal prosecution under felony charges for both the corporation and culpable individuals (i.e., internal management, HR personnel, or third parties). Corporations found guilty of criminal violations of the antitrust laws face significant fines (up to $100 million), while individuals may be subject to imprisonment (up to 10 years) and significant fines (up to $1 million).
- Civil enforcement actions by the Agencies that can result in broad-ranging injunctions governing future conduct.
- Private, civil actions by employees or third parties injured by the violation. Such lawsuits can be extremely costly to defend, both in terms of monetary costs and business disruption, including lost time of officers and employees, and can result in treble damages (three times the losses suffered by the complaining party) and payment of the plaintiff's attorneys' fees.

AVOIDING LIABILITY

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There are a few important steps employers can take to avoid liability under the antitrust laws.

First, refrain from engaging in agreements — or potentially problematic communications —with competitors regarding wages, salaries, benefits, terms of employment, or recruitment strategies that do not serve a legitimate purpose. Such agreements among employers are considered per se illegal under the antitrust laws. In the past, simple agreements to refrain from cold calling a certain competitor's employees have subjected companies to civil liability but could now result in criminal prosecution. If you believe such an agreement serves a legitimate business purpose (such as a joint venture), antitrust counsel should be consulted to ensure the defensibility of the agreement.

Second, abstain from sharing competitively sensitive information regarding wages, salaries, benefits, terms of employment, or recruitment strategies with competitors. Competitors that share this type of information absent a reasonable, legitimate purpose for doing so risk violating antitrust laws since such information sharing can be used as evidence of an implicit illegal agreement. In limited circumstances, such as when companies are evaluating a merger, acquisition, or joint venture proposal, the sharing of limited competitively sensitive information may be lawful provided it is reasonably necessary to evaluate the proposed transaction and appropriate precautions are taken. Additionally, the Agencies have indicated that an information exchange may be lawful if:

- "a neutral third party manages the exchange;
- the exchange involves information that is relatively old;
- the information is aggregated to protect the identity of the underlying sources; and
- enough sources are aggregated to prevent competitors from linking particular data to an individual source." [9]

PRACTICAL GUIDANCE

Companies should consider Assistant Attorney General Delrahim's recent comments and the Agencies' Antitrust Guidance as a warning that HR professionals are not immune to the antitrust laws. Often, HR departments are viewed as having a low risk of antitrust exposure and may not be considered a high priority for antitrust compliance and training. Additionally, organizations that view themselves as having little exposure to violations of antitrust law — such as nonprofits and universities — should heed these warnings and ensure that their management and personnel are appropriately educated on the antitrust laws. HR departments should be included in antitrust audits. Accordingly, all companies should review their compliance programs and ensure that they contain the following elements, at a minimum:

1. Education and training programs for all management and employees with HR responsibilities. Training for HR personnel can be narrowly targeted to emphasize best practices for external communications related to employee information and the severe consequences associated with inappropriate agreements or disclosures. In particular, the company's compliance standards and procedures should be effectively communicated and readily available to HR professionals. In this regard, it may be helpful to distribute the

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Agencies' "Antitrust Red Flags for Employment Practices" quick reference card to all management and HR personnel (available for download at https://www.justice.gov/atr/file/903506/download).

2. Proactive reviews of any agreements with other employers related to employment issues. If any agreements raise concern, consulting antitrust counsel immediately may assist in limiting a company's exposure.
3. Effective communication of the risks to both the company and individuals associated with naked wage-fixing or no-poaching agreements and the sharing of competitively sensitive employment information to management, HR personnel, and company representatives. Individuals whose roles expose them to competing employers, such as through trade association involvement, should be especially aware of the significant exposure that can result from oral exchanges of competitively sensitive employment terms.

As evidenced above, in certain circumstances, competing employers might have legitimate purposes for sharing competitively sensitive information or entering into employment-related agreements. If you believe that you might fall within this category, first document the legitimate business justification for your policy or practice and then seek the opinion and guidance of antitrust counsel.

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[1] Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are In The Works*, LAW360.COM (January 19, 2018), *available at* https://www.law360.com/competition/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works.
[2] Department of Justice Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 20, 2016), available at https://www.justice.gov/atr/file/903511/download ("Antitrust Guidance").
[3] Antitrust Guidance at 1.
[4] Perlman, *supra* note 1.
[5] *Id.*
[6] *Id.*
[7] Antitrust Guidance at 2.
[8] Antitrust Guidance at 3.
[9] Antitrust Guidance at 5.

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