

# Antitrust Guidance for Human Resource Professionals and the Potential for Criminal Liability

November 4, 2016

## Introduction

On October 20, 2016, the Federal Trade Commission (“FTC”) and Department of Justice: Antitrust Division (“DOJ”) jointly issued antitrust law guidance for human resource professionals (the “Guide”).<sup>1</sup> These agencies are placing renewed interest on the way firms compete to hire and retain employees. Importantly, the Guide makes clear that these agencies consider firms that compete for employees “competitors in the employment marketplace, *regardless of whether the firms make the same products or compete to provide the same services.*”<sup>2</sup>

According to the FTC and DOJ, this Guide is intended (1) to “help protect workers against anticompetitive conduct,” (2) “to educate HR professionals about how the antitrust laws apply to the employment arena,” and (3) “to put firms on notice that the DOJ will proceed *criminally* against naked wage fixing and no-poaching agreements.”<sup>3</sup>

The Guide also provides a “Questions and Answers” section that describes real-life scenarios that raise antitrust issues, and suggests how HR professionals should respond to them.

## Key highlights from the Guide include:

- Naked wage-fixing or no-poaching agreements are per se illegal under the antitrust laws and going forward the DOJ intends to proceed *criminally* against these agreements;
- Sharing information with competitors about the terms and conditions of employment may violate antitrust laws, but not all information exchanges are illegal;
  - The DOJ has an established review process that allows businesses to determine how the DOJ may respond to proposed joint ventures or other business conduct;
- Reporting violations may insulate companies and individuals from criminal liability; and
- When in doubt, seek legal advice.

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<sup>1</sup> DOJ: Antitrust Division and FTC, Antitrust Guidance for Human Resource Professionals (Oct. 20, 2016) [hereinafter Guide] (available at [https://www.ftc.gov/system/files/documents/public\\_statements/992623/ftc-doj\\_hr\\_guidance\\_final\\_10-20-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf)) (last visited Nov. 2, 2016).

<sup>2</sup> *Id.* at 2 (emphasis supplied).

<sup>3</sup> Press Release, FTC, FTC and DOJ Release Guidance for Human Res. Prof'ls on How Antitrust Law Applies to Emp. Hiring and Comp. (Oct. 20, 2016) (available at <https://www.ftc.gov/news-events/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how>) (last visited Nov. 2, 2016) (emphasis supplied).

## Criminal Liability for Naked Wage-Fixing and No-Poaching Agreements

One of the most important and controversial takeaways is the DOJ's announcement that it intends to proceed criminally against so-called "naked" wage-fixing and no-poaching agreements.<sup>4</sup>

Wage-fixing agreements are agreements between firms, entered into directly or through a third party, to fix employee salary or other terms of compensation (including benefits as innocuous as subsidized gym memberships) at a specific level or within a determined range.<sup>5</sup> Similarly, no-poaching agreements are agreements between firms, entered into directly or through a third party, to refuse to solicit or hire another company's employees.<sup>6</sup> These types of agreements are considered "naked," or stand-alone, when they are "separate from or not reasonably necessary to a larger legitimate collaboration between employers."<sup>7</sup> Criminal liability may apply regardless of whether "the agreement is informal or formal, written or unwritten, spoken, or unspoken."<sup>8</sup> Moreover, "merely inviting a competitor to enter into an illegal agreement may be an antitrust violation."<sup>9</sup>

Through the Guide, the DOJ has made clear that it "will criminally investigate allegations" that companies have entered into these types of agreements, and "if that investigation uncovers a naked [agreement], [it] may, . . . bring criminal, felony charges against the culpable participants in the agreement, including individuals and companies."<sup>10</sup>

Notably, the DOJ has limited the scope of criminal liability to "no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between employers."<sup>11</sup> There may exist circumstances where these types of agreements are legitimate and not subject to criminal liability.<sup>12</sup> For example, the Guide suggests that "[l]egitimate joint ventures" such as "appropriate shared use of facilities" are not "per se illegal," and therefore not subject to criminal liability.<sup>13</sup>

## Sharing Sensitive Information with Competitors

Unlike wage-fixing and no-poaching agreements, sharing information with competitors about the terms and conditions of employment isn't per se illegal, and therefore, according to the Guide, not subject to criminal prosecution. Sharing such information may, however, still violate antitrust laws and result in civil antitrust liability if the exchange has an anticompetitive effect.

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<sup>4</sup> Including the potential for individual criminal convictions, prison terms, and fines.

<sup>5</sup> See e.g., Final Judgment, *U.S. v. Az. Hosp. and Healthcare Assoc.*, Case No. CV 07-1030-PHX (D. Ariz. Sept. 12, 2007) (available at <https://www.justice.gov/atr/case-document/final-judgment-17>) (last visited Nov. 2, 2016).

<sup>6</sup> See e.g., Final Judgment, *U.S. v. Ebay Inc.*, Case No. 12-CV-05869-EJD-PSG (N.D. Cal. Sept. 9, 2014) (available at <https://www.justice.gov/atr/case-document/file/494626/download>) (last visited Nov. 2, 2016).

<sup>7</sup> Guide *supra* note 1, at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> Press Release, FTC, FTC and DOJ Release Guidance for Human Res. Prof'ls on How Antitrust Law Applies to Emp. Hiring and Comp. (Oct. 20, 2016) (available at <https://www.ftc.gov/news-events/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how>) (last visited Nov. 2, 2016).

<sup>12</sup> Even if an agreement would not constitute a criminal violation, "it may still lead to civil liability under the statutes enforced by both agencies." *Id.*

<sup>13</sup> Guide *supra* note 1, at 3.

The Guide recognizes that “benchmarking” surveys of compensation practices may, under certain circumstances, be legitimate and procompetitive. The FTC and DOJ provide that an information exchange in connection with such surveys 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.

This guidance is consistent with prior statements from the DOJ and FTC.<sup>14</sup>

Additionally, the exchange of information may be lawful pursuant to a legitimate merger or acquisition where appropriate precautions are taken.

Before a company shares potentially sensitive information regarding compensation or other terms of employment pursuant to a scheme developed to conform to the antitrust laws, the company may wish to utilize the DOJ’s business review process<sup>15</sup> or seek an advisory opinion from the FTC.<sup>16</sup> By seeking review from one of these agencies, companies are able to avoid engaging in potentially illicit conduct and may be able to reform their schemes to avoid violating antitrust laws.

## Reporting Violations

The Guide encourages individuals to report possible antitrust violations. Reports can be made either to the DOJ or the FTC.

In order to incentivize reporting, the DOJ offers a leniency program for Corporations and Individuals whereby the first firm or individual to report participating in a criminal antitrust violation can avoid criminal convictions and fines so long as they fully cooperate with the investigation and meet other specified conditions.

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<sup>14</sup> See e.g., J. Thomas Rosch, Antitrust Issues Related to Benchmarking and Other Information Exchanges: Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, before the ABA Section of Antitrust Law and ABA Center for Continuing Legal Education’s Teleseminar on Benchmarking and Other Information Exchanges Among Competitors (May 3, 2011) (*available at* [https://www.ftc.gov/sites/default/files/documents/public\\_statements/antitrust-issues-related-benchmarking-and-other-information-exchanges/110503roschbenchmarking.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-issues-related-benchmarking-and-other-information-exchanges/110503roschbenchmarking.pdf)) (last visited Nov. 2, 2016); Press Release, DOJ, Justice Dep’t Will Not Oppose Proposal by Trucking Cos. for Benchmarking Survey (Apr. 10, 2007) (*available at* [https://www.justice.gov/archive/atr/public/press\\_releases/2007/222532.htm](https://www.justice.gov/archive/atr/public/press_releases/2007/222532.htm)) (last visited Nov. 2, 2016).

<sup>15</sup> DOJ: Antitrust Division, Introduction to Antitrust Division Business Reviews (*available at* <https://www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf>) (last visited Nov. 2, 2016).

<sup>16</sup> FTC, Guidance From the Bureau of Competition on Requesting and Obtaining an Advisory Opinion (*available at* [https://www.ftc.gov/system/files/attachments/competition-advisory-opinions/advisoryopinionguidance-bctextjune2011\\_update\\_links\\_oct\\_2015.pdf](https://www.ftc.gov/system/files/attachments/competition-advisory-opinions/advisoryopinionguidance-bctextjune2011_update_links_oct_2015.pdf)) (last visited Nov. 2, 2016).

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