Feds Target HR Professionals For Criminal Violations Of Antitrust Laws

Insights
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The Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) recently announced they are increasing their efforts to criminally prosecute employers and individuals who engage in certain behaviors with competitors on the grounds that they are violating antitrust laws. For the first time, the DOJ announced that wage-fixing contracts (which limit or fix the terms of employment for employees or potential hires) and no-poaching agreements are squarely in its sights, and those found in violation will face criminal liability. Similarly, the federal government warned employers about certain information exchanges that could also be found to be illegal.

The stakes couldn't be higher, and employers who fail to heed the federal government's warnings could find themselves on the wrong end of a criminal prosecution.

New Guidance Lands Like A Thunderbolt
Last month, in their jointly-issued Antitrust Guidance for Human Resource Professionals, the DOJ and FTC explained:

The DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.

The government made it clear that it does not matter whether such an agreement is made in writing or informally. The DOJ could bring charges against offenders based on implied conduct alone. And merely inviting a competitor to enter such an agreement may in and of itself be an antitrust violation.

The Dawning Of A New (And Scary) Day
While the DOJ has long held the view that it is illegal for two or more employers to agree about the terms of employment for employees or potential employees, this marks the first time the agency has publicly announced that it will prosecute such agreements criminally. This announcement should come as no idle threat.

Over the past several years, the DOJ has indeed ramped up its criminal prosecution of antitrust violations, most recently in the auto parts industry. Since the new initiative was unveiled, 46

companies and 65 executives have faced felony charges for price fixing in that industry alone. Many of these executives have been sentenced to jail, and the targeted companies have paid over $2.5 billion in fines.

Civil Actions Are Also Possible

But even if such agreements do not result in criminal prosecution, violations of antitrust laws by HR professionals can have other severe consequences. Both the DOJ and the FTC can bring costly civil enforcement actions, and have frequently done so in the past.

In 2011, for example, the DOJ brought three enforcement actions against several well-known technology companies that were found to have entered into no-poaching agreements with their competitors. Prior to that, in 2007, the DOJ filed an action against a hospital association in Arizona on findings that it set a uniform schedule of rates that hospitals would pay for temporary and per diem nurses. Both civil enforcement actions were resolved through costly consent judgments against the employers.

In addition to the DOJ's civil enforcement actions, an employee or other party could bring a civil lawsuit for treble damages (in other words, they could recover triple their actual damages) if that party is injured by the illegal agreement among employers. The above-mentioned technology companies paid well over $400 million to settle follow-up lawsuits filed by private plaintiffs.

Information Exchanges Can Also Be Troublesome

The Antitrust Guidance warns that, in addition to anticompetitive agreements, the mere sharing of information with competitors about the terms and conditions of employment can run afoul of antitrust laws. While sharing of information between employers is not per se illegal, and therefore not prosecuted criminally by the DOJ, it may result in civil antitrust liability in certain situations. One such situation would be if the sharing has, or is likely to have, an anticompetitive impact, such as depressing wages among workers.

For example, the DOJ sued a society of HR professionals at Utah hospitals for sharing information about prospective and current wages of registered nurses. This exchange of information caused the hospitals to match each other's wages, which kept the pay of registered nurses at artificially low levels. More recently, several Detroit-area hospitals paid $90 million to settle a class action brought by private plaintiffs alleging that an exchange of wage and benefit information among the hospitals violated antitrust laws.

It is possible for you to design information exchanges that conform to antitrust law. In previously issued guidance, the DOJ and the FTC said that an information exchange may be lawful if:

- a neutral third party manages the exchange;
- the exchange involves past information;
- the information is aggregated to protect the identity of the underlying sources; and

- enough companies are aggregated to prevent competitors from linking particular data to individual sources.

Conclusion

Last month's joint announcement is a significant development for HR professionals, primarily because their conduct will certainly be the focus of antitrust investigations by the DOJ or FTC. You would be well-served by incorporating antitrust issues into your compliance and training programs to ensure everyone in your organization understands the risks surrounding wage-fixing and no-poaching agreements, as well as proper ways to exchange employment information with competitors. The potential criminal and civil risks are simply too great to ignore.

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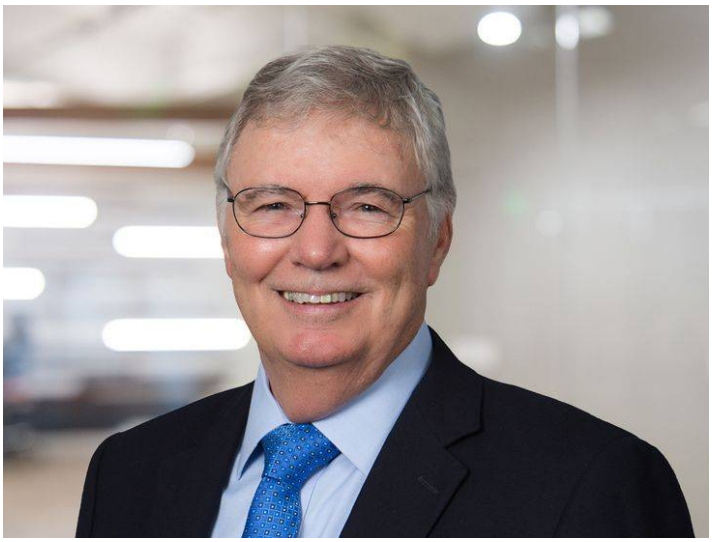

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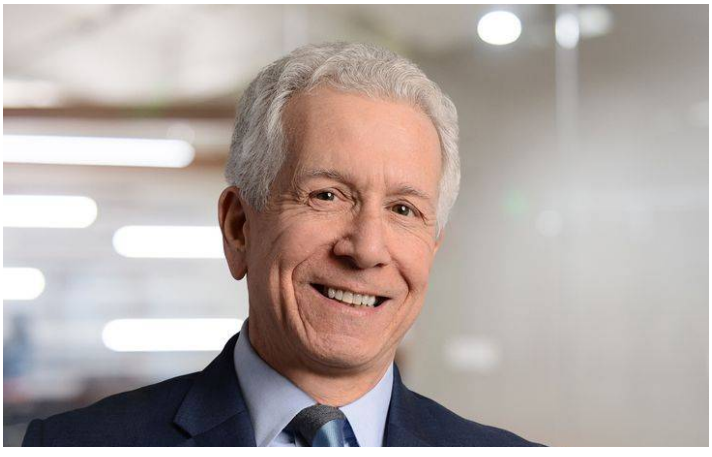

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