Feds on Verge of First-Ever Successful Criminal Prosecution in Workplace Antitrust Action: 6 Compliance Tips for Employers

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The U.S. Department of Justice appears to be close to reaching a plea deal that would result in the nation's first-ever successful criminal prosecution of a workplace-related antitrust matter – and it should send a clear message to employers across the country that certain business practices could put your organization – and you – in criminal jeopardy. The June 24 announcement from federal officials involves a healthcare staffing company and its former regional manager accused of criminal charges for allegedly conspiring with a competitor to fix wages for school nurses and agreeing not to solicit each other's workers. According to the DOJ, the alleged pact violates the Sherman Act, a federal antitrust law that prohibits activities that restrain interstate commerce and marketplace competition. The act generally aims to block monopolies and protect consumers, but it has been applied in the employment context to curb wage suppression and restraints on worker mobility. Moreover, while federal agencies have historically pursued civil actions for alleged antitrust violations in the workplace, they are increasingly filing criminal conspiracy charges. Now is the time to review your company's current practices and implement safeguards to avoid antitrust implications as you develop staffing strategies in a tight labor market. What do you need to know about antitrust laws and recent federal actions against employers – and what six steps should you take to stay on the right side of the law?

How Do Antitrust Laws Apply to Employers?

We have warned in two previous Insights (here and here) that federal antitrust authorities have stepped up their enforcement activities against restraints in the labor market, including wage fixing and no-poach agreements. The U.S. Department of Justice has filed several criminal indictments challenging workplace restraints, and it appears the agency is ready to score its first victory.

In *U.S. v. Hee*, the DOJ alleged that a private staffing company knowingly engaged in a conspiracy to suppress competition when placing contract nurses at schools. The company made a pact with a competitor not to recruit each other's nurses and to fix their wages, according to the indictment.

Why does it matter? The DOJ has said that such arrangements deprive workers of higher pay and the ability to bargain for better jobs. Broadly speaking, the goal of federal antitrust laws is to "to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up," according to

the Federal Trade Commission (FTC), the other agency that enforces federal antitrust laws. Those same standards apply to labor markets.

The *Hee* case involves the application of Section 1 of the Sherman Antitrust Act which bans "every contract, combination, or conspiracy in restraint of trade." Violating the act is a felony and carries criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. The act also provides for civil sanctions of triple (aka "treble") damages and legal fees for injured parties.

In the employment context, labor-related agreements amongst competitors have recently come under fire from the DOJ's Antitrust Division and the U.S. Department of Labor. The two agencies signed a memorandum of understanding on March 10 to "protect workers from employer collusion, ensure compliance with the labor laws and promote competitive labor markets and worker mobility."

Under this joint effort, the agencies agreed to coordinate on policy, strategy, and training and refer potential cases to each other. So, employers can now expect greater scrutiny and an increase in enforcement efforts under labor and antitrust laws.

DOJ Warns HR of Criminal Prosecutions for Violations

Historically, the DOJ brought only civil actions against companies for alleged wage fixing and overreaching "no-poach agreements" – pacts between competing companies to refrain from recruiting or hiring each other's workers.

Over the past two years, however, the department has pursued claims for criminal antitrust violations. The DOJ and FTC first announced in 2016 in their "Antitrust Guidance for Human Resource Professionals" that they would increase their efforts to criminally prosecute employers and individuals who engage in certain behaviors with competitors. The DOJ also said that "naked" no-poaching or wage-fixing agreements – pacts that are unrelated or unnecessary to a larger legitimate collaboration between employers – are "per se unlawful" because they eliminate competition.

In the *Hee* case, the DOJ brought criminal charges against the staffing company and its former regional manager. The DOJ produced email exchanges through which an employee of a competitor wrote to the regional manager, "Agreed on our end as well. I am glad we can work together through this and assure that we will not let the field employees run our businesses moving forward." The regional manager allegedly said through email, "If anyone threatens us for more money, we will tell them to kick rocks!"

The DOJ claimed that the staffing companies then refused to negotiate pay raises for nurses, which interfered with interstate trade and commerce. Although litigation over the matter is still ongoing,

the parties recently filed a joint motion asking a federal court in Nevada to delay an upcoming hearing, Law360 reported. The move indicates that the parties may be finalizing a plea deal.

"The parties are currently in the process of negotiating this case and have reached a preliminary resolution as to both defendants that now needs to be confirmed in writing," according to documents filed with the court.

Notably, even though the DOJ has pursued more criminal prosecutions and judges have generally allowed such charges, so far, juries have not been eager to side with the federal government in recent cases, according to Law360. Despite some high-profile losses, the DOJ has reaffirmed its intent to file criminal indictments for no-poach agreements or wage fixing. In addition, because the Sherman Act provides for treble damages for injured parties, there is an active plaintiffs' antitrust bar that typically files class action lawsuits immediately after a DOJ indictment.

6 Antitrust Compliance Steps to Consider

Employers and HR professionals are understandably concerned about losing good employees, particularly in a time when competition for top talent is fierce and excessive employee turnover can significantly impact a company's bottom line. But given the DOJ's and FTC's focus on labor-market antitrust investigations, you should consider taking the following six actions to ensure compliance – and to avoid criminal prosecution for you and your organization:

1. Incorporate antitrust issues into your compliance and training programs so that everyone in your organization understands the risks surrounding wage-fixing and no-poach agreements.
2. Train key employees about the risks of exchanging employment information with competitors and strategies for reducing those risks.
3. Be careful about entering into any no-poach agreements with other employers. Sometimes, such agreements may be permissible if they are limited in scope and "ancillary" to a larger transaction, such as a joint venture, business collaboration, or settlement of litigation – but you will want to consult with your legal counsel with each such action to determine viability. In general, the federal antitrust agencies are taking a more critical look at such agreements and will challenge them if they are deemed "naked" restraints on the free flow of labor markets.
4. Avoid any activity that could be deemed as an agreement to fix wage or benefit levels with another employer. Certain exchanges of wage and benefit information with other employers can lead to antitrust exposure. Pay particular attention to compensation and benefits information shared with industry and trade groups.
5. Review any applicable state laws that apply to no-poach agreements and other restrictive covenants and update agreements accordingly.
6. Finally, given the potential criminal and civil risks, you should consider reviewing your agreements with experienced legal counsel to ensure they are compliant with modern interpretations of antitrust law.

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Conclusion

We will continue to monitor developments in this area and provide updates as warranted, so make sure that you are subscribed to Fisher Phillips' Insights to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Defection and Trade Secrets Practice Group or in our Healthcare Industry Group.

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