

Insights, News & Events

# 6 ANTITRUST COMPLIANCE STEPS EMPLOYERS SHOULD CONSIDER AFTER FIRST-EVER FEDERAL CRIMINAL PROSECUTION IN WAGE FIXING CASE

Insights  
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A healthcare staffing firm in Nevada just pled guilty to conspiring with a competitor to fix wages for school nurses and agreeing not to solicit each other's workers – the nation's first-ever successful criminal prosecution of a workplace-related antitrust matter. The firm was sentenced to pay \$134,000, according to an Oct 27 announcement from the U.S. Department of Justice (DOJ). While the dollar amount may not seem high, the staffing firm was fairly small and the violations occurred over less than a year – meaning larger companies could face larger fines for similar conduct over a longer period. What does this historic outcome mean for your business? Here's what you need to know about antitrust laws and recent federal actions against employers – as well as six steps should you take to stay on the right side of the law.

## No-Poaching and Wage-Fixing Agreement Lands Firm in Hot Water

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.

According to the staffing company, this no-poach agreement "involved only a single telephone conversation and one email" between its regional manager and a competitor's employee, [reported Bloomberg Law](#). The competitor's employee wrote to the regional manager, "I am

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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 responded, "If anyone threatens us for more money, we will tell them to kick rocks!"

The DOJ concluded that this agreement violated the Sherman Act, a federal antitrust law that prohibits activities that restrain interstate commerce and marketplace competition – including competition in the employment market. The staffing firm pleaded guilty on October 27.

The guilty plea "demonstrates [the DOJ's] commitment to ensuring that workers receive competitive wages and a fair chance to pursue better work and that criminals who conspire to deprive them of those rights are held accountable," said Assistant Attorney General Jonathan Kanter of the DOJ's Antitrust Division.

U.S. Attorney Jason Frierson for the District of Nevada added that "protecting workers from antitrust schemes – such as wage-fixing and employee allocation – remains a priority" and the U.S. Attorney's Office is "committed to working with the Antitrust Division and FBI to prosecute anticompetitive conduct that affects opportunities for workers and the labor market."

## **Feds' New Focus on Antitrust Issues in the Workplace**

The Sherman Act generally aims to block anticompetitive behavior, such as price fixing and monopolies. But it has been applied in the employment context to curb wage suppression and restraints on worker mobility – and federal agencies are increasingly filing criminal conspiracy charges to rein in the practice. No doubt that last week's plea deal will embolden federal officials to go after employers even more aggressively.

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. Additionally, 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 new 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.

## 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](#).