

FP Weekly Checklist: Spotting Antitrust Risks in the Workplace

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Each week, FP Weekly members receive a practical and cutting-edge checklist of issues to consider, action steps to take, and goals to accomplish to ensure you remain on the top of your game when it comes to workplace relations and employment law compliance. This week we provide you a checklist of red flags that could land your organization (and you) in antitrust trouble, and a companion checklist of best practices to keep you compliant.

Why the Renewed Focus on Antitrust Compliance

In today's economy, H.R. professionals and in-house counsel are faced with numerous challenges, including providing competitive wages and working conditions while at the same time trying to control costs and reduce turnover. Now you need to add avoiding employment-related antitrust violations to the list of issues that require your in-depth attention.

As highlighted in recent Insight articles we have recently published, federal antitrust authorities have stepped up their enforcement activities against restraints in the labor market, including wage fixing and no-poach agreements.

- <u>6 Antitrust Compliance Steps Employers Should Consider After First-Ever Federal Criminal Prosecution in Wage Fixing Case</u> (Nov 22)
- FTC Sends Strong Antitrust Warning to Gig Economy Businesses (Sep 20)
- New Collaboration Between Federal Agencies Spells Antitrust Trouble for Gig Economy or Any
 Business with Independent Contractors (July 26)

Employers that compete to attract and retain employees are "competitors" from an antitrust perspective, even if they do not offer the same products or services. It is unlawful for competing employers to agree to limit or fix the terms of employment – and recent events have placed a greater spotlight on such behavior.

Following the successful criminal prosecution of a staffing company, U.S. Attorney Jason Frierson for the District of Nevada recently stated that "protecting workers from antitrust schemes – such as wage-fixing and employee allocation – remains a priority." He also noted 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." Depending on the facts of the case, the

Department of Justice (DOJ) could criminally prosecute individuals, the company, or both. Additionally, because the Sherman Act provides for treble damages for injured parties, there is an active plaintiffs' antitrust bar that is seeking to file lucrative class action lawsuits immediately after any DOJ indictment.

In light of this new enforcement reality, business professionals of all types should exercise caution to ensure that their companies are not engaging in any conduct which could be deemed in violation of antitrust laws. The risks can emanate from your staffing teams as well any other manager who might impact a hiring or compensation decision. Here is a checklist of red flags to be on the lookout for throughout your organization.

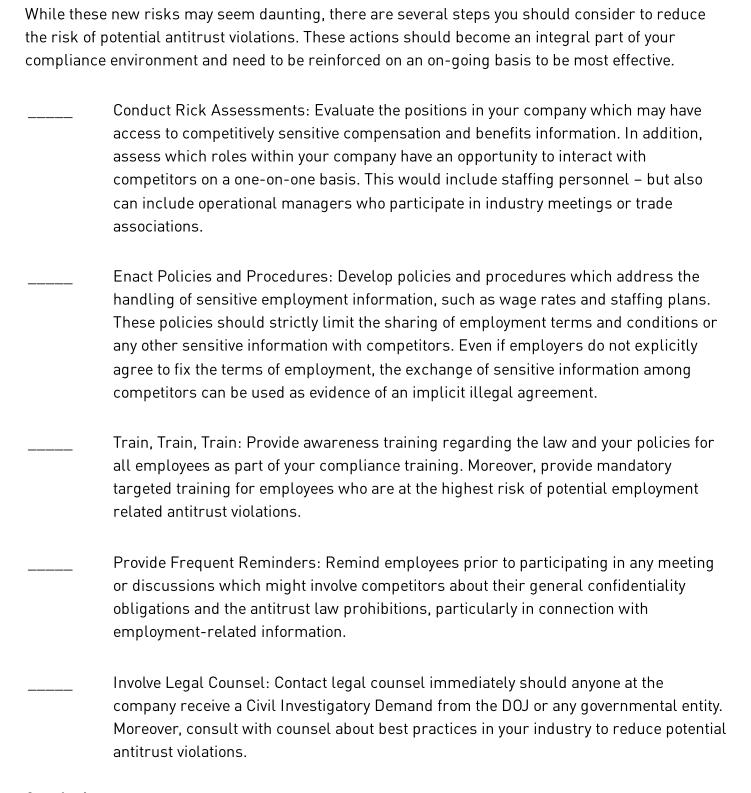
Red Flags Discussions by anyone at your company with a competitor about salary, benefits, or other elements of compensation, either at a specific level or within a range. Communications with another company about refusing to solicit or hire that other company's employees. So-called "no-poach" agreements may be permissible in rare circumstances, but only when such agreements are limited in scope and "ancillary" to a larger transaction. This typically includes a joint venture, business collaboration, or settlement of litigation. Because of the narrow scope of permissibility, you should consult with your legal counsel with each such action to determine viability. Any direct or indirect message to your competitors that your companies should not compete too aggressively for employees. The exchange of company-specific information about employee compensation, benefits, or terms of employment with another company. Participation in a meeting, such as a trade association meeting, where the above topics are discussed – unless key safeguards have been implemented. Discussions about any of the above topics with former colleagues, family members, and friends employed by a competitor, including during social events or in other non-

Best Practices

professional settings.

compensation.

Receiving documents that contain another company's internal data about employee



Conclusion

We will continue to monitor developments regarding the impact of antitrust laws in the employment arena. Make sure you are subscribed to <u>Fisher Phillips' Insight System</u> to get the most up-to-date information. For further information, contact the author of this Insight or your Fisher Phillips attorney.



Melissa A. Dials Partner 440.740.2108 Email

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