

FP WEEKLY CHECKLIST: SPOTTING ANTITRUST RISKS IN THE WORKPLACE

Insights

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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.

- [6 Antitrust Compliance Steps Employers Should Consider After First-Ever Federal Criminal Prosecution in Wage Fixing Case](#) (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](#)

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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 narrow 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' 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 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 professional settings.
- _____ Receiving documents that contain another company's internal data about employee compensation.

Best Practices

While these new risks may seem daunting, there are several steps you should consider to reduce the risk of potential antitrust violations. These actions should become an integral part of your compliance environment and need to be reinforced on an on-going basis to be most effective.

- _____ **Conduct Risk Assessments:** Evaluate the positions within your company which may have access to competitively sensitive compensation and benefits information. In addition, identify which roles within your company have an opportunity to interact with competitors on a one-on-one basis. This may include staffing personnel – but also can include operations managers who participate in industry meetings or trade associations.
- _____ **Enact Policies and Procedures:** Develop policies and procedures which address the handling of sensitive employment information, such as wage rates and staffing plans. These policies should strictly limit the sharing of employment terms and conditions or any other sensitive information with competitors. Even if employers do not explicitly agree to fix the terms of employment, the

of sensitive information among competitors can be evidence of an implicit illegal agreement.

- _____ Train, Train, Train: Provide awareness training regarding antitrust law and your policies for all employees as part of your compliance training. Moreover, provide mandatory training for employees who are at the highest risk of potential employment related antitrust violations.

- _____ Provide Frequent Reminders: Remind employees participating in any meeting or discussions which may involve competitors about their general confidential obligations and the antitrust law prohibitions, particularly the connection with employment-related information.

- _____ Involve Legal Counsel: Contact legal counsel immediately should anyone at the company receive a Civil Investigative Demand from the DOJ or any governmental entity. Immediately consult with counsel about best practices in your industry to reduce potential antitrust violations.

Conclusion

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