Alert

April 15, 2020

COZEN O'CONNOR

Employers, Staffers, and Recruiters Now on Notice of Antitrust Enforcement During COVID-19

On April 13, 2020, the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission (antitrust agencies) released a joint statement affirming that they will protect competition for workers on the frontlines during the COVID-19 crisis by enforcing the antitrust laws against companies that seek to exploit the pandemic to engage in anticompetitive conduct.

The antitrust agencies specifically put employers, staffing companies, and recruiters on notice that they are on alert for anyone who might engage in forms of collusion that harm workers, including agreements to suppress wages or eliminate competition with respect to benefits, hours worked, or other terms of employment, as well as agreements on hiring, soliciting, recruiting, or retention of workers.

The joint statement refers to previous guidance issued in October 2016 for human resource professionals on how the U.S. antitrust laws apply to employee hiring and compensation practices. The essence of those guidelines is that all HR professionals should take the necessary steps to ensure that their interactions with other employers competing with them for employees do not result in any unlawful agreements on terms of employment (e.g., salaries and benefits). The 2016 guidelines address topics such as wage-fixing agreements, no-poaching agreements, and agreements to share sensitive information. Importantly, those guidelines made clear that the DOJ could proceed **criminally** against certain anti-competitive employment agreements.

Wage Fixing Agreements are a form of price fixing, which the guidelines make clear are *per se* illegal. They include agreements with individual(s) at other companies about employee salaries or other terms of compensation, either at a specific level **or** within a range. Such agreements could include:

- Fixing a particular salary
- Setting salaries at a certain level or within a certain range
- Increasing/decreasing salaries by an agreed percentage
- Maintaining salaries at current levels

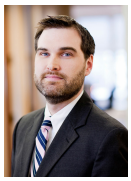
No-Poaching Agreements are agreements not to recruit or hire another company's employees, which the guidelines also say are *per se* illegal.

On **information exchange**, the DOJ guidelines note that an exchange among companies may be lawful if: (1) a neutral third party manages the exchange, (2) the exchange involves historical information (i.e., at least three months old), (3) the information is aggregated to protect the identity of the underlying sources, and (4) enough sources are aggregated to prevent competitors from linking particular data to an individual source.

In light of the antitrust agencies' recent warning, below are some other useful tips that all employers should keep in mind when communicating with other companies on matters relating to COVID-19 issues or any general employment matters:

Compliance with the U.S. antitrust laws is not just a general counsel's job anymore. The 2016 guidelines clearly state: "HR professionals often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws."

***Your* Competitor is Different Than *Your* Company's Competitor**. From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment market even if they make different products or provide different services.



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- Antitrust & Competition

Wages … And More. Agreements on all employment terms (not just wages) are subject to the antitrust laws. This means agreements on benefits or other terms could potentially be covered (e.g., 401(k) match, company car, vacation/PTO). This is even the case if you consider the employment terms to be generous, above market, or eminently fair.

Don't Ignore Questionable Communications. Unsolicited receipt of information about another company's compensation information should not be ignored. Forward information to your legal department so that they can assist in drafting an appropriate response, which should clearly and unequivocally refuse the information and explain that this type of exchange could violate the antitrust laws.

Finally, it is worth noting that this is not the first warning the antitrust agencies have given to cooperating businesses during COVID-19. As previously reported, in mid-March the antitrust agencies provided guidance for collaborations of businesses working to protect the health and safety of Americans during COVID-19, but at the same time said:

> While many individuals and businesses have and will demonstrate extraordinary compassion and flexibility in responding to COVID-19, others may use it as an opportunity to subvert competition or prey on vulnerable Americans. The Division and the Bureau will not hesitate to seek to hold accountable those who do so.