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ANTITRUST AGENCIES' "GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS" THREATENS CRIMINAL PROSECUTION

On October 20, 2016, the Department of Justice's (DOJ) Antitrust Division and the Federal Trade Commission (FTC) published their "ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS" ("GUIDANCE").[1] The GUIDANCE is "intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws."[2] The DOJ and FTC have brought a wide variety of civil cases involving employer agreements. They now deem it necessary to ratchet up their enforcement and warn that "depending on the facts of the case":[3]

> "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct."[4]

(The FTC has no criminal prosecution power but will refer matters to the DOJ for criminal prosecution as they deem appropriate.)

The Agencies' position should not surprise antitrust practitioners. In 1996, the DOJ and the FTC released their policy statements of antitrust enforcement policy for the health care industry. With respect to exchanges of information among competitors, in 1996 the Agencies advised:

> "If an exchange among competing providers of price or cost information results in an agreement among competitors as to the prices for health care services or the wages to be paid to health care employees, that agreement will be considered unlawful per se."[5]

Antitrust practitioners understand that the per se label is attached to conduct that is subject to criminal prosecutions. Twenty years later, the Agencies have left no doubt about their intentions.

While most price fixing cases involve sellers, the antitrust laws' prohibition against price fixing applies to buyers as well. The U.S. Supreme Court clarified that issue long ago:

> "It is clear that the agreement [to fix the prices paid to purchase raw sugar cane by the refineries] is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers."[6]

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1 https://www.justice.gov/atr/file/903511/download.

2 GUIDANCE, p. 1.

3 *Id.*, p. 2.

4 *Id.*, p. 4.

5 Department of Justice and Federal Trade Commission, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, No. 6. Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information (August 1996), p. 51, https://www.justice.gov/sites/default/files/atr/legacy/2007/08/15/1791.pdf.

6 *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (footnotes omitted).

Employer conspiracies to reduce wages and benefits unfairly harm the market for employees' sale of their services. In this vein, the heart of the GUIDANCE is that

> "[a]n agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities."[7]

The civil antitrust cases that the agencies have brought involving agreements among employer-competitors affecting compensation and hiring practices reflect this principle. For example, the Agencies have brought:

(i) three separate actions against technology companies in the San Francisco Bay Area involving "no poach" agreements where the employer-competitors agreed not to cold call each other's employees or agreed to limit the hiring of employees who currently worked at an employer-competitor;

(ii) an action against an Arizona hospital association relating to an agreement to set a uniform rate schedule that the hospitals would pay for temporary and per diem nurses;

(iii) an action against a society of HR professionals at Utah hospitals for conspiring to exchange nonpublic prospective and current wage information for registered nurses;

(iv) an action challenging agreements to boycott temporary nurses' registries in order to eliminate competition among the nursing homes for the purchase of nursing services; and

(v) an action against an association of fashion designers and the organizer of the industry's two major fashion shows for their agreement to reduce fees and other terms of compensation for models.[8]

Now the prospect of criminal prosecutions increases the risk to companies and individuals significantly. Criminal violations of the antitrust laws are felonies: Individuals may be fined up to $1 million and imprisoned for up to 10 years. A company may be fined up to $100 million, or "twice the gross gain" received or "twice the gross loss" caused by the illegal conduct.[9]

In addition to criminal exposure, private civil cases inevitably follow the criminal cases and government civil cases. Losing a private civil antitrust case will result in treble damages—under the statute damages are automatically tripled—and with reasonable attorneys' fees and the costs of the suit also being awarded to the successful plaintiff.[10] Using class action procedures, the financial exposure can be substantial. The Silicon Valley "no poaching" cases settled for a total of $435 million.[11] In a subset of "no poaching" cases involving animation employees, the plaintiffs reached settlements, awaiting court approval, with Blue Sky Studios, DreamWorks

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7 GUIDANCE, p. 1.

8 *Id.*, pp. 3-5.

9 15 U.S.C. §§ 1 and 2, and 18 U.S.C. § 3571(d).

10 15 U.S.C. § 15(a).

11 *See, e.g., In re High-Tech Employee Antitrust Litigation*, Case No. 5:11-cv-02509 (Doc. 1111), Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement with Defendants Adobe Systems Incorporated, Apple, Inc., Google Inc., and Intel Corporation (N.D. Cal., Sept. 2, 2015), p. 5:3-5.

Animation, ImageMovers Digital, Pixar, Lucasfilm Ltd., LLC, Sony Pictures Animation, Sony Pictures Imageworks, The Walt Disney Company, and Two Pic MC LLC for $168.95 million which is pending approval.[12]

While criminal exposure for human resources activities may be new, it is not new for "buyer cartels" involved in non-employee related purchasing activities.[13] As a result of the recent financial crisis, many homes were put into foreclosure and offered for sale at public auctions. This generated a rash of bid rigging where real estate brokers agreed not to bid against each other to allow a designated broker to win the auction for a particular parcel at a low price. In the Spring of 2016, the number of brokers that have pled guilty, been convicted at trial or still faced charges was over 100 individuals nationally.[14] That number has grown since then, as additional brokers have been charged in Northern California and elsewhere, and as of February 6, 2017, over 64 brokers have pled, been convicted or are still facing charges.[15]

Every buyer competes to some degree with other buyers for many of the goods and services it purchases. These buyers do not have to be competitors in the goods and services that they sell for the antitrust risks to apply. For example, if a group of employers agreed to limit the pay structure for employees with a certain skill set that they hire, they would violate the antitrust law's prohibitions—even though they did not compete with each other in the sale of the goods or services they produce. The DOJ's cases against the technology companies, noted above, demonstrate this principle.[16]

Also, clarifying the limits of the threat of criminal prosecution, the Agencies warn that only "naked" agreements among employer-competitors will be prosecuted:

> "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct."[17]

Such agreements, "whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws."[18] This position is consistent with the long history of treating naked agreements among competing sellers to fix sale prices or allocate customers by territory or type as per se illegal under the antitrust laws. Such agreements are the principal subjects for criminal prosecution, "because of their pernicious effect on

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12 *In re Animation Workers Antitrust Litigation*, Notice of Motion and Motion for Preliminary Approval of Settlement With The Walt Disney Company, Pixar, Lucasfilm Ltd., LLC, and Two Pic MC LLC, Case No. 5:14-cv-04062-LHK (Doc. 358) (N.D. Cal., Jan. 31, 2017), pp. 1:6-7, 4:16-19, 5:2-3.

13 *See, e.g., United States v. Immobiliaria Samisu*, SA, No. 96-CR-189 (S.D.N.Y., filed Mar. 21, 1996), https://www.justice.gov/atr/case-document/file/499601/download (criminal information re bid rigging coin auctions); *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991) (jury convictions upheld for agreement not to bid on billboard leases); *United States v. Seville Indus Mach. Corp.*, 696 F. Supp. 986 (D.N.J. 1988) (motion to dismiss criminal charges re buyer bid rigging in bankruptcy auction).

14 U.S. Department of Justice, Antitrust Division, Prosecuting Collusion and Fraud at Real Estate Foreclosure Auctions, Update Spring 2016 (https://www.justice.gov/atr/division-operations/division-update-2016/real-estate-foreclosure-auctions).

15 U.S. Department of Justice, Office of Public Affairs, Press Release, February 6, 2017, https://www.justice.gov/opa/pr/northern-california-man-convicted-rigging-bids-public-foreclosure-auctions.

16 *See, e.g., U.S. v. Adobe Systems, Inc., Apple, Inc.; Google, Inc.; Intel Corporation; Intuit, Inc.; and Pixar*, Case No. 1:10-cv-10629, Competitive Impact Statement (D.D.C., Sept. 24, 2010), https://www.justice.gov/atr/case-document/file/483431/download.

17 GUIDANCE, p. 4.

18 GUIDANCE, p. 3.

competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[19]

What is a "naked wage-fixing or no-poaching agreement"? Fundamentally, an agreement is a meeting of the minds or a common understanding between two independent parties as to a particular course of conduct. The agreement to fix "employee salar[ies] or other terms of compensation, either at a specific level or within a range" or "to refuse to solicit or hire that other company's employees" can be "informal or formal, written or unwritten, spoken or unspoken."[20]

> "Even if an individual does not agree orally or in writing to limit employee compensation or recruiting, other circumstances—such as evidence of discussions and parallel behavior—may lead to an inference that the individual has agreed to do so."[21]

The point is to form an agreement there must be some communication between the parties. Therefore, communications among competing employers relating to employee compensation and other elements of competition create antitrust risk. The Guidance provides seven examples that illustrate how this basic principle can lead to antitrust risks:

- Friends at different companies talk over lunch on how to solve the problem of out of control wage growth in their industry.
- Senior HR manager at a nonprofit organization proposes to use a consultant to communicate a proposed new pay scale to other nonprofits.
- A university's dean has a "gentleman's agreement" not to recruit senior faculty from another university.
- To reduce costs, the CEO of a small business proposes to talk with others in the industry to stop offering free gym memberships to employees.
- The director of an HR professional society is proposing to conduct a survey themselves of current and future trends in industry wages.
- A new HR professional will be attending her first HR conference soon and wants to discuss specific compensation policies or levels with competing employers to gain competitive intelligence.[22]

In addition to the examples in the GUIDANCE, the Agencies simultaneously issued "Antitrust Red Flags for Employment Practices" which may raise antitrust concerns—some more serious than others. Antitrust risks arise if HR professionals:

- Agree with another company about employee salary or other terms of compensation, either at a specific level or within a range.
- Agree with another company to refuse to solicit or hire that other company's employees.

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19 *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *see also NCAA v. Bd. of Regents,* 468 U.S. 85, 103-04 (1984); *Nat'l Soc's of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (Per se rule applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.").

20 GUIDANCE, p. 3.

21 Ibid.

22 *Id.*, pp. 6-9.

- Agree with another company about employee benefits.
- Agree with another company on other terms of employment.
- Express to competitors that you should not compete too aggressively for employees.
- Exchange company-specific information about employee compensation or terms of employment with another company.
- Participate in a meeting, such as a trade association meeting, where the above topics are discussed.
- Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings.
- Receive documents that contain another company's internal data about employee compensation.[23]

The foregoing are examples of "naked agreements." It is a contextual matter—an agreement "separate from or not reasonably necessary to a larger legitimate collaboration [such as a joint venture] between the employers . . . ."[24] The sharing of employee compensation information may be reasonably necessary to the functioning of a legitimate joint venture or in the course of merger negotiations and, therefore, not illegal. However, there is some risk if not done with limits appropriate for the collaborative effort.

Notwithstanding the Agencies' warnings, it is possible to share information with employer-competitors outside of a legitimate joint venture activity in ways that are not illegal. Basically, this is accomplished using an independent third party following certain guidelines. The Agencies provide a brief summary of this process,[25] but refer the reader to more detailed guidance on how to exchange competitive information in a manner placing the conduct within the protection of the Agencies' "antitrust safety zone" as stated in their HEALTH CARE POLICY STATEMENTS:[26]

> "A. Antitrust Safety Zone: Exchanges Of Price And Cost Information Among Providers That Will Not Be Challenged, Absent Extraordinary Circumstances, By The Agencies
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> The Agencies will not challenge, absent extraordinary circumstances, provider participation in written surveys of (a) prices for health care services, (footnote omitted) or (b) wages, salaries, or benefits of health care personnel, if the following conditions are satisfied:
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> (1) the survey is managed by a third-party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association);
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> (2) the information provided by survey participants is based on data more than 3 months old; and

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[23] Department of Justice and Federal Trade Commission, "Antitrust Red Flags for Employment Practices" (Oct. 20, 2016), https://www.justice.gov/atr/file/903506/download.

[24] GUIDANCE, p. 3.

[25] *Id.*, p. 5)

[26] Department of Justice and Federal Trade Commission, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, No. 6. Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information (August 1996), p. 50, https://www.justice.gov/sites/default/files/atr/legacy/2007/08/15/1791.pdf, ("HEALTH CARE POLICY STATEMENTS").

> (3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider."

Even though the Agencies authorize competitor-employers to use a third party to gather and disseminate the information, the other elements are also very important.

> "[O]ther things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information. Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data."[27]

While Statement No. 6 is for health care providers, there is no reason that it would not apply to other industries as well. The GUIDANCE makes reference to them as a source "[f]or more information on information exchanges."[28] In addition, Statement No. 6 characterizes the criteria as broadly based:

> "The conditions that must be met for an information exchange among providers to fall within the antitrust safety zone ensure that an exchange of price or cost data is not used by competing providers for discussion or coordination of provider prices or costs. They represent a careful balancing of a provider's individual interest in obtaining information useful in adjusting the prices it charges or the wages it pays in response to changing market conditions against the risk that the exchange of such information may permit competing providers to communicate with each other regarding a mutually acceptable level of prices for health care services or compensation for employees."[29]

The Agencies further advise that agreements to share information that do not meet the antitrust safety zone criteria are not necessarily illegal and "generally will be evaluated to determine whether the information exchange may have an anticompetitive effect that outweighs any procompetitive justification for the exchange." However, as noted above, the Agencies warned that agreements as to wages for health care employees will be considered per se unlawful.[30] This characterization of such conduct should have foreshadowed what the Agencies have now made official policy with their new GUIDANCE—such conduct may be subjected to criminal penalties.

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[27] Federal Trade Commission and U.S. Department of Justice, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (April 2000), ¶ 3.31(b), pp. 15-16, https://www.ftc.gov/system/files/documents/public_statements/300481/000407ftcdojguidelines.pdf); *see also Todd v. Exxon Corp.*, 275 F.3d 191, 195-96 (2d Cir. 2001) (Circuit Judge Sotomayor) (Court reversed dismissal of complaint alleging defendants conducted surveys using third party consultant to share detailed information which allowed participants to be identified regarding the compensation paid and budgets to pay nonunion managerial, professional, and technical employees, and agreed to use this information as a benchmark in setting the salaries of the employees at artificially low levels).

[28] GUIDANCE, p. 5.

[29] HEALTH CARE POLICY STATEMENTS, *supra,* pp. 50-51.

[30] *Id.*, p. 51.

The conditions laid down in Statement No. 6 may be cumbersome and less timely than simply calling or emailing a competitor. However, what should be learned from the GUIDANCE is that sharing information with competitors concerning wages, salaries, benefits, terms of employment, or job opportunities creates antitrust risks. Engaging in such activity directly with competitors significantly heightens that risk.

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Companies' human resources departments and other purchasing functions have now been duly warned. It is not a defense to say I didn't know the law applied to purchasing as well as sales and marketing. Antitrust compliance guidelines and training for human resources and other purchasing functions have taken on new importance.