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Antitrust Group Client Alert:
Ensuring Antitrust Compliance in Employee Recruitment and Compensation:
New Guidance Issued by the U.S. Department of Justice and Federal Trade Commission

On October 20, 2016, the Department of Justice Antitrust Division ("DOJ") and Federal Trade Commission ("FTC") (the "Antitrust Agencies") jointly issued guidance on the application of U.S. antitrust laws to human resource functions related to employee recruitment and compensation (the "Guidance"). Emphasizing the importance of maintaining a competitive work force, the antitrust agencies highlighted specific agreements and practices that are typically unlawful:

- agreeing with other employer(s) on the level or range of salaries or other terms of compensation
- agreeing not to solicit or hire each other's employees (so-called "no-poaching agreements")
- exchanging information on compensation or other terms of employment where it has, or is likely to result in lower compensation or fewer employment opportunities.

Violations of U.S. antitrust laws create significant liability for companies and individuals involved, including criminal prosecution by the DOJ in appropriate cases. Federal and state antitrust enforcers also can bring civil enforcement actions and affected employees can bring class actions seeking treble damages and other remedies. While the Guidance is issued by the U.S. Antitrust Agencies, the same principles should apply in the EU and other jurisdictions with effective competition law regimes.

KEY COMPLIANCE POINTS

- **Do not reach any agreement or understanding** with competing employers regarding recruitment policies or compensation.
- **Make independent decisions** regarding recruitment and compensation policies and practices affecting your company's employees.
- **Implement safeguards** before sharing compensation and recruitment information with other employers to ensure that the exchange is compliant with antitrust laws.

From a compliance perspective, it is important to recognize that firms may compete to recruit and retain employees even if they do not compete in the same industry or business segment.[1] Therefore, a company may have a broader set of competitors in recruiting and retaining employees, including firms they do not regard as competitors in their day-to-day business.

A summary of the Guidance is below, and you can read it in its entirety here. The DOJ and FTC also released a quick reference card that provides a list of "antitrust red flags" for companies and their HR departments to watch out for.

AGREEMENTS TO RESTRICT COMPENSATION OR RECRUITMENT

The Guidance highlights two types of agreements that typically raise serious concerns under the antitrust laws:

Compensation-Related Agreements: such as agreements to offer the same level or range of salaries, benefits, bonuses or severance; and agreements not to increase compensation or to limit increases to certain employees or categories of employees.

No-Poaching Agreements: *i.e.*, agreements not to solicit or recruit another company's employees (which should be distinguished from a limited non-solicitation restriction that is related to a specific JV, merger or other collaboration).

These agreements need not be formal, written or even spoken to create liability. Circumstantial evidence such as parallel behavior (*e.g.*, parallel movements in salaries/bonuses), coupled with inter-company communications, can lead to an

[1] For instance, in 2010 the DOJ sued a variety of tech companies—Adobe, Apple, Google, Intel, Intuit, and Pixar—for agreeing not to solicit one another's software engineers. Even though these companies did not necessarily compete in the same business lines, the DOJ took the view that they competed for the same pool of employees. *United States v. Adobe Systems, Inc.*, https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al.

inference of an unlawful agreement. The fact that employers are seeking to reduce costs or retain valued employees does not justify these practices under the antitrust laws. Indeed, in the Guidance, the DOJ warns that it may take criminal action against companies and culpable individuals that engage in agreements to restrict compensation or recruitment that are not connected to a legitimate collaboration (*e.g.*, a joint venture or a merger).

SURVEYS, BENCHMARKING AND OTHER EMPLOYEE-RELATED INFORMATION SHARING

Information exchanges between competitors have been a focus of U.S. antitrust enforcement activity and private litigation. Recently the DOJ challenged alleged exchanges of information between DIRECTV, Cox, Charter and AT&T during their ongoing negotiations to telecast the LA Dodgers Channel.[2] The DOJ's complaint alleges that DIRECTV and the cable companies exchanged non-public information about their negotiations, as well as future plans to carry – or not to carry – the channel, which the DOJ alleges was a material factor in their decisions not to carry the Dodgers Channel.

Likewise, employers exchanging compensation and recruitment-related information also may raise antitrust risks. Even if they do not actually reach an agreement on salaries or bonuses they intend to pay, exchanging non-public information on salaries, bonuses or other elements of compensation or recruitment may violate antitrust laws if they result in lower compensation or fewer employment opportunities.

Information-Sharing Safeguards: The DOJ and FTC have developed safeguards that employers may use to ensure that compensation or recruitment related surveys, benchmarking exercises or similar activities are antitrust compliant.[3]

Key safeguards include:

- Use a **neutral third-party** to manage sensitive information (*e.g.*, current or future salaries, bonuses, benefits, incentives, severance etc.). Do not share individual companies' data directly.
- Share only **historic information** (at least three months old is typically safe).

[2] *United States v. DIRECTV Group Holdings, LLC*, https://www.justice.gov/opa/press-release/file/907636/download (complaint).

[3] The Guidance also made reference to the DOJ and FTC's prior guidance related to the healthcare industry. That guidance specifically recommends that any information shared be more than three months old, and that at least five companies provide data in any survey that involves sharing cost- or price- (including compensation) related data.

- Include **sufficient participants** (at least five) so that data can be aggregated and not linked to an individual company.
- Distribute only **aggregated information** to participants so that a company's individual data cannot be determined.

Joint Ventures and Mergers: Parties to a proposed merger or joint venture also should take appropriate precautions, such as use of "**clean teams**," to ensure that competitively sensitive information on employees is restricted to deal team members who are not involved in compensation-related decisions in areas where the companies may compete for employees.

WHAT YOU SHOULD BE DOING TO ENSURE COMPLIANCE

- **Verify** that any **surveys, benchmarking studies** or similar activities are antitrust compliant.
- **Identify** other **forums** in which company employees participate where sensitive compensation or recruitment information may be exchanged, *e.g.*, **industry roundtables and trade associations**.
- Ensure that HR and other personnel who are involved in compensation or recruitment activities and forums receive **antitrust training** tailored to these issues.
- **Maintain periodic training** to ensure that new hires and personnel in the "hiring lines" understand the need to maintain confidentiality of sensitive information and not to reach understandings with competitors on compensation or recruitment issues.
- **Do not limit your compliance efforts to the U.S**. Most countries have similar competition law prohibitions that likely would apply to agreements and information exchanges on compensation and recruitment practices. No doubt competition agencies around the globe have taken note of the U.S. Antitrust Agencies' tough enforcement stance against these practices and may well follow suit.

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