At Issue:
Federal antitrust enforcers issued guidelines for human resources departments in October 2016 warning that agreements among companies—including hospitals and health care organizations—that limit competition for employees violate the antitrust laws. Since then, both federal and state enforcers have filed lawsuits against health care organizations and other companies that underscore the importance of adopting guidelines to ensure antitrust compliance in this area. Earlier this summer, for example, the Federal Trade Commission (FTC) sued a therapist staffing company, its owner, and the owner of a competing company charging they conspired to fix wages of physical, occupational, and speech therapists. The parties settled the case, agreeing to entry of a consent decree requiring, among other things, that the staffing company submit periodic compliance reports to the FTC.

Our Take:
The recent FTC enforcement action comes on the heels of an announcement by the Department of Justice (DOJ) earlier this year that it is conducting criminal investigations into agreements between companies not to hire each other’s employees—so-called “no-poach” agreements. DOJ settled a civil no-poach case in April 2018, but said it treated the matter as a civil violation because the agreement was entered into (and ended) before the October 2016 guidance was issued. DOJ warned it will consider criminally prosecuting companies and individuals who enter into such agreements after October 2016.

At the same time, state antitrust enforcers are stepping their activities in this area: the Attorneys General in a dozen states sued (and settled) cases this summer against fast-food restaurants for agreeing not to poach each other’s employees.

Because the federal and state enforcers have long shown a particular interest in the health care field, hospitals and health systems should ensure their human resources departments, and others involved in recruiting and setting compensation and benefits for employees and contractors, understand and comply with the antitrust laws in this area.

What You Can Do:
Share this advisory with your human resources department, legal counsel, and others engaged in recruiting and/or setting compensation and benefits. Review the guidance for human resources professionals issued by the FTC and DOJ and consider its application to your organization and activities. Adopt an antitrust compliance program for your organization to lessen risk.

Further Questions:
Please contact Mindy Hatton, AHA General Counsel, at (202) 626-2336 or mhatton@aha.org.
Increased Antitrust Enforcement Targets Human Resources Practices

**Background**

In October 2016, the Federal Trade Commission (FTC) and Department of Justice (DOJ) issued formal guidance for human resources professionals and others involved in hiring, compensation, and benefits decisions. The guidelines signaled that the antitrust enforcers were intending to investigate and seek criminal and/or civil sanctions for violations of the antitrust laws in connection with human resources (HR) practices. The guidelines focus largely on three categories of conduct that run afoul of the antitrust laws:

1. no-poach agreements;
2. agreements to fix compensation and/or benefits; and
3. disclosures of non-public compensation or benefits information between companies competing for employees.

The guidelines do not mark a change or clarification of the law. They broadcast generally recognized antitrust principles as applied to hiring and compensation decisions. After such a clear signal of enforcement policy from the federal authorities, the guidelines should be required reading for all HR professionals and others with a meaningful role in compensation, hiring, and benefits. At a minimum, companies should distribute to all HR personnel the quick reference card that the FTC and DOJ issued along with the more detailed guidelines.

For ease of reference, the quick reference card states that antitrust concerns may arise if individuals or companies:

- 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.
- 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.

The more detailed guidelines include specific examples of conduct that is illegal under the antitrust laws. These examples indicate that the enforcers plan to police more than just wage fixing. For instance, one of the examples indicates it would be illegal to ask other companies competing for employees to stop offering certain benefits. Another example indicates that agreements to cap raises at a certain percentage are illegal, even if not tethered to a specific compensation amount.

The guidelines should be a helpful resource for HR personnel and others involved in hiring, compensation, and benefits. Individuals and companies should be mindful of these guidelines when participating in conferences, recruiting activities, or social events involving HR professionals from other companies. While the guidelines are targeted to HR personnel, these issues can arise at many levels of a business. For instance, private litigation by former employees of Apple, Google, and Adobe challenged an alleged no-poaching agreement made by Steve Jobs and executives at Google and Adobe. The case settled for $415 million.

The guidelines reiterate that companies compete for employees even when they do not compete in their provision of products or services. For hospitals and health systems, this means sharing non-public information about wages and benefits is impermissible even between providers in different areas and between providers offering different services. Market data on compensation and benefits should not be gathered directly from other providers; it should be gathered from survey companies and other third parties that aggregate, analyze, and publish market data in compliance with earlier guidance issued by the antitrust enforcers that provide a “safety zone” for properly designed and conducted surveys.

### Prior Litigation

The 2016 guidelines were a wakeup call to many industries that their HR professionals need antitrust training. But it wasn’t the first warning to the health care field that agreements among hospitals to avoid competing for employees can violate the antitrust laws.
Class Actions Regarding Nurse Wages:
In 2006, nurses, with the financial support of the Service Employees International Union (SEIU), filed class action wage-fixing cases against hospitals in five cities: Albany, Chicago, Memphis, San Antonio, and Detroit. These suits alleged that hospitals in each market: (1) engaged in a per se violation of Section 1 of the Sherman Act by conspiring to suppress the wages of their nurse employees; and (2) engaged in a rule of reason violation of Section 1 through their exchange of nonpublic information regarding nurse wages. In the decade that followed, these cases were resolved in large part via settlements.

For instance, nurses in the Albany case named five hospital systems as defendants. The court certified a class of approximately 2,300 employees for the purpose of determining whether the defendants had violated the antitrust laws. Ultimately, all defendants settled and agreed to pay the class more than $14 million.

The case in Detroit was more protracted and the total settlement amount much larger. Eight hospitals and health systems in the greater Detroit area were named as defendants and paid approximately $90 million to settle.

And in separate litigation filed in 2007, DOJ and the State of Arizona sued the Arizona Hospital and Healthcare Association for suppressing competition in the hiring of temporary nurses. A class action on behalf of aggrieved nurses followed the government case and was settled by the payment of substantial sums to the plaintiffs.

RECENT ENFORCEMENT ACTIVITY

The enforcers have stepped up both the number of cases they've brought and their rhetoric on the evils of wage-fixing and no-poach agreements. In January 2018, the head of the DOJ’s Antitrust Division, Makan Delrahim, announced that DOJ was actively investigating a number of no-poach matters and remained committed to pursuing criminal sanctions where appropriate: “If the activity has not been stopped and continued from the time when the DOJ's policy was made [in October 2016] … we'll treat that as criminal.”

Shortly thereafter, in April 2018, DOJ announced a civil settlement of a no-poach case against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), two of the world’s largest rail equipment suppliers. The complaint alleges the two companies, along with a third competitor acquired by one of them before the investigation began, agreed not to solicit, recruit, or hire senior executives from the others without approval. The conduct identified in the complaint predated the October 2016 guidance from the enforcers so DOJ was willing to reach a civil settlement. However, in doing this, DOJ reiterated that it would pursue criminal penalties for violations after the October 2016 guidance was issued.
The FTC recently made its first public announcement since the guidelines were issued regarding an enforcement action regarding human resources practices. On July 31, 2018, the FTC made public a complaint and consent order resolving wage-fixing agreements among therapist staffing companies in Texas. The complaint alleges that the companies, which staff physical, occupational, and speech therapists, agreed to pay lower rates. The consent order requires the company to cease and desist from all agreements and information sharing regarding pay rates and to submit periodic compliance reports to the FTC.

In addition to the federal antitrust enforcers, many states have active antitrust enforcement divisions in their attorney generals’ (AGs) offices. Some of those state enforcers have been involved in the HR space. The FTC’s press release regarding the therapist staffing wage-fixing case states that the Texas Attorney General’s office reached a similar settlement. A number of state AGs recently announced they had collectively secured an agreement among fast-food chains to discontinue all no-poaching agreements. That settlement by the state enforcers has prompted private litigation against some of the fast-food companies.

It is reasonable to expect that the antitrust enforcers will continue their increased focus on human resources practices across a broad range of industries. Given the history of wage-fixing litigation regarding nurses, it is especially important that health care providers educate their HR professionals about the antitrust laws and what is required to comply with them.

FURTHER QUESTIONS

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