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DOJ/FTC Issue Antitrust Guidance on Hiring Practices: Insurance Industry Spotlight

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On October 20, the DOJ Antitrust Division and the Federal Trade Commission issued joint guidance for human resources ("HR") professionals regarding the potential antitrust dangers created when competitors make joint decisions regarding employee hiring and compensation issues. The guidance follows a considerable uptick in interest in the subject over the last several years, both by regulators and the private plaintiff bar. As the guidance explains, "an 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." In addition, the guidance makes clear that, in some circumstances, *criminal* penalties may even arise from such conduct.

The DOJ/FTC guidance includes specific instruction to HR professionals on how to avoid antitrust risk. While the guidance makes clear that the following conduct is not necessarily unlawful in all circumstances, the DOJ/FTC recommends that HR professionals avoid:

- Agreeing with another company about employee salary or other terms of compensation, either at a specific level or a range;
- Agreeing with another company to refuse to solicit or hire that other company's employees (so-called "no poaching agreements");
- Agreeing with another company about employee benefits;
- Agreeing with another company on other terms of employment;
- Expressing to competitors that the companies should not compete too aggressively for employees;
- Exchanging company-specific information about employee compensation or terms of employment with a competitor; and
- Discussing the above topics with representatives of competitor companies at social events and other non-professional settings.

While the insurance industry enjoys a limited exemption from the federal antitrust laws by virtue of the McCarran Ferguson Act (15 USC 1051 *et seq*.), the applicability of the exemption to agreements concerning employee wages or hiring decisions is tenuous, at best. The exemption applies only to the "business of insurance," and the Supreme Court has held that the "business of insurance" is limited to conduct that (1) involves the "spreading and underwriting of policyholder risk;" (2) has a direct connection with the contractual relationship between the insurer and insured; and (3) are arrangements limited to entities within the insurance industry. *Group Life & Health Insurance v. Royal Drug,* 440 U.S. 205, 214-15 (1979). Accordingly, an agreement among insurance industry HR professionals that suppressed insurance employee wages or hiring could raise significant antitrust concerns. For this reason, insurers would be well advised to consider whether their HR departments are fully aware of their antitrust obligations and in full compliance with the law.