

PUBLICATION

FTC and DOJ Warn HR Professionals Against Anticompetitive Hiring and Compensation Agreements

Authors: Amelia W. Koch

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On October 20, 2016, the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ) issued a joint Antitrust Guidance for Human Resources Professionals to address antitrust issues associated with hiring and compensation decisions.

Generally, the FTC and DOJ's Guidance aims to protect against anticompetitive conduct among employers. Specifically, the Guidance discusses "no poaching" agreements and wage-fixing. Competing employers may not agree to refrain from recruiting each other's employees or to fix wages or benefits.

How Do Antitrust Laws Apply to Hiring and Other HR Tasks?

Ensuring a Competitive Workforce: Like other FTC and DOJ efforts to ensure open, competitive markets, the HR Guidance seeks to ensure competition between employers. The laws are aimed at keeping markets competitive but the Guidance notes employment competition favors employees by creating higher wages and better benefits, and helps consumers by generating better goods and services.

Who Should Take Note?

A Call to HR Professionals: The Guidance is addressed to Managers and HR Professionals who are best able to ensure that hiring practices comply with antitrust laws. HR Professionals should be aware of the antitrust warnings below and institute safeguards to avoid potential hiring pitfalls.

What Does the Joint Guidance Warn Against?

Even Informal Activity Could Be an Antitrust Violation:

1. First, the Guidance warns HR Professionals about agreements with competing employers not to recruit certain employees or to fix terms of employment. Generally, agreements between competing employers can violate antitrust laws if they limit the individual employer's decision-making on wages, salaries, benefits, terms of employment or job opportunities. An agreement between competing employers need not be in writing to violate the law. Even informal discussions in social settings or discussions at trade meetings could be problematic. Further, agreements entered into via third-party intermediaries can constitute a violation of law.
2. Second, the Guidance warns against sharing confidential information about terms of employment with competitors. For example, in an industry with fewer employers, exchanges of wage information could be considered an antitrust violation if that exchange is likely to decrease competition for employees. However, an information exchange may be lawful if:
 - a neutral third party manages it;

- it involves relatively old information;
- it protects the identity of the underlying sources;
- enough sources are used to prevent competitors from linking data to an employer; or
- the information is exchanged with appropriate safeguards in connection with a legitimate merger or acquisition proposal.

3. The Guidance has a Question and Answer segment, revealing other potential HR pitfalls in antitrust law:

- Antitrust laws apply even to non-profit organizations and employers.
- An agreement among competitors to set pay violates antitrust law even if a consultant determines the pay scale.
- An agreement with a competitor to fix employee benefits (e.g., gym memberships, parking, transit subsidies, meals or meal subsidies) is an illegal wage-fixing agreement.
- It may be illegal to survey wages with competitors.

What Can HR Professionals Do to Avoid Pitfalls?

Consulting with and Reporting to the FTC and DOJ:

4. *Consult Federal Antitrust Agencies Before Acting*

HR Professionals should avoid the types of agreements and discussions with competing employers detailed above (including no-poaching agreements, wage-fixing and sharing confidential information). HR Professionals should consult the Guidance before they act. Also, the DOJ's [business review process](#) can reveal how the DOJ may respond to a proposed business activity, as can an [advisory opinion](#) from the FTC. Your legal department or outside counsel can help with this.

5. *Improper Suggestions Made by Competitors*

First, refuse the competitor's suggestion and remember that a mere invitation to enter into an illegal agreement may be an antitrust violation. Second, consult your legal department.

6. *Past Improper Conduct*

If an HR Professional is concerned about unknowingly having participated in an illegal agreement, report that conduct to your compliance officer (or other designated representative under your compliance policy) and/or seek legal advice.

For additional information on how to avoid antitrust violations, consult the FTC and DOJ's list of [antitrust "red flags"](#) for employment practices.

For questions regarding particular conduct, HR Professionals are always best served by seeking specific legal advice.