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THE EMPLOYER'S LEGAL RESOURCE: WAIT – WHAT DOES ANTITRUST LAW HAVE TO DO WITH HR? FTC AND DOJ ISSUE GUIDANCE FOR HR PROFESSIONALS.

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We all think about giant companies vying in the marketplace when we think antitrust laws. For example, can the two largest companies in the marketplace combine forces or will that be an antitrust violation because it kills competition? Well, the antitrust laws are much broader than that. Over the years, there have been cases involving employer groups or industry groups which have worked together in ways the government has alleged resulted in an unfair anticompetitive effect.

Think of employment antitrust cases like price fixing cases. Let's say the government sues a group of gas station operators in a town alleging that they got together weekly to set the price of their gas. If true, that would be price fixing and illegal. If those same gas station operators got together and agreed on the exact hourly wage they would pay their attendants, the government might also prosecute that as an antitrust violation.

The employment violations have not, until now, appeared to be the government's focus.

October 20, the Federal Trade Commission and the Department of Justice issued **joint guidance** and a **news release** announcing their stance on, and intent to pursue, antitrust violations in the employment arena.

Two main areas of focus are:

- Agreements among employers not to compete on terms of compensation (wage-fixing agreements), and

- Agreements among employers not to recruit certain employees (no poaching agreements)

The guidance advises that these types of agreements, if not related to a larger legitimate agreement or collaboration between employers (referred to by the DOJ as "naked" agreements), are per se illegal – without regard to whether it even has an anti-competitive effect. The DOJ has stated its intent to criminally investigate and prosecute naked agreements. Interpretation, if the DOJ finds naked agreements which they can prove are violations of the antitrust laws without having to prove any anticompetitive effect, those are easier cases for the government to win.

These same types of agreements, when found as part of a larger, robust agreement (e.g. an asset purchase agreement, etc.) may be lawful if the employer can prove the agreement is more pro-competitive than anti-competitive.

The guidance also discusses the *sharing of your own information with others*, particularly sensitive compensation and benefits data. The guidance discusses the government's concern with sharing *current* information as that can serve to fix or even compress compensation in a market – an illegal anticompetitive effect. The guidance does state that certain information exchanges are permissible and may not violate the antitrust laws. [Please note the guidance says "may" meaning that it does not guarantee you can escape liability even if you follow its four suggestions which is why they are not repeated in this article.]

Recommendation: Every business owner and HR professional should read the joint guidance linked in this article. At the conclusion of the guidance is a series of Questions and Answers. This article and the guidance are designed to alert you to the issues. This article cannot possibly address every specific situation. Antitrust laws are complicated. You should seek legal counsel before entering into any of the types of agreements or situations described herein.

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