

CLIENT ALERT

U.S. Antitrust Agencies Offer "Antitrust Guidance for Human Resources Professionals"

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Responding to a perceived uptick in anticompetitive agreements between companies over employment matters, the Department of Justice and Federal Trade Commission on October 20th issued its new [Antitrust Guidance for Human Resources Professionals](#).

The substance was hardly surprising: DOJ has long taken the view that it is illegal for two or more employers to agree about the hiring, pay, or benefits of employees or potential employees. The Guidance reiterated positions the agencies have taken in the past – specifically, that it is illegal to agree:

- On employee salaries or other terms of compensation.
- Not to solicit or hire one another's employees.
- To exchange information about employee compensation, where that exchange supports an agreement about the level of, or has the practical effect of decreasing, the compensation in question.

The Guidance was most noteworthy for establishing that, in the future, DOJ intends to prosecute certain agreements on hiring and compensation criminally. Such "naked" agreements, they explain, are solely designed to limit competition between companies for employees, and do not take place in the context of some broader, pro-competitive collaboration or M&A project between the companies involved. Historically, the agencies have pursued employment-related agreements only under civil law, including against the technology and entertainment industries (2010-2014); the healthcare industry (1992, 1994, 2007); and the fashion industry (1995).

Perhaps not surprisingly, given U.S. antitrust enforcers' focus on individual accountability (*see, e.g.*, DOJ's 2015 "Yates Memo" on "Individual Accountability for Corporate Wrongdoing"), the agencies emphasize that criminal and civil prosecution could involve individual employees as well as their employers.

The agencies' recent enforcement track record in the Silicon Valley "no poach" cases, together with the new, criminal focus (including several encouragements to whistleblowers) renews the premium on compliance. Crowell & Moring has developed antitrust compliance training customized specifically for HR professionals, and has litigated antitrust cases in the area.

The agencies' Guidance reminds us of useful compliance insights:

- Agreeing with another company about wages, benefits, or other terms of employment, or about whether or not to recruit or hire certain individuals, in the absence of a legitimate collaboration, is likely to be illegal and possibly criminal.
- However, companies involved in legitimate cooperation, such as a joint venture with its own employees, and companies exploring potential mergers and acquisitions, may have legitimate reasons to exchange information or agree on employment matters (but should limit such exchanges and agreements to what is strictly necessary to accomplish the underlying purpose).

- Exchanging information with other employers is risky, as it could a) provide evidence of an illegal agreement, or b) operate even without any such agreement to depress wages.
 - However, an information exchange is likely to pose a lower risk where data is a) managed by a third party; b) historic, rather than current or future-oriented; and c) aggregated to obscure individual data sources.
 - Likewise, information exchange is riskier where it involves current, non-aggregated data, and where data is directly passed between participants without the involvement of a third party.
- An invitation to reach an illegal agreement about employment issues may violate the FTC Act and trigger an agency investigation, even if the invitation is not accepted.

Now is a good time to incorporate employment issues in antitrust training and compliance efforts, whether as a refresher or for the first time. The agencies' "[Antitrust Red Flags for Employment Practices](#)" is a useful resource and means to communicate with employees. For further information, please contact the Crowell professionals listed below.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Ryan C. Tisch

Partner – Washington, D.C.

Phone: +1 202.624.2674

Email: rtisch@crowell.com

Kris D. Meade

Partner – Washington, D.C.

Phone: +1 202.624.2854

Email: kmeade@crowell.com

Astor Heaven

Counsel – Washington, D.C.

Phone: +1 202.624.2599

Email: aheaven@crowell.com