

Even Gym Memberships Are Not Safe: Why Your HR Manager Needs to Know Something About Antitrust Law

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HR professionals take note: U.S. antitrust enforcers are watching. On October 20, 2016, the U.S. Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) jointly issued guidance alerting HR professionals and others involved in hiring and compensation decisions about the risks of antitrust violations associated with their work. In the enforcement cross-hairs are agreements – formal or informal, written or un-written, explicit or implicit – between competing employers to limit or fix the terms of employment; to set wages, benefits and other compensation; or to refrain from soliciting or recruiting one another's employees (so-called "no-poaching" agreements).

The employment and benefits context may not seem a likely candidate for antitrust scrutiny, but many companies have gotten in trouble because they reached agreements – or attempted to reach agreements – with one or more competitors where all of the companies would agree to cap salaries. But it is not just discussions about salaries that can get companies in trouble. The recently issued guidance explains that an illegal wage-fixing agreement could be as simple as two or more employers in a particular industry agreeing to stop offering employees free gym memberships. Agreeing with another company not to solicit, recruit or hire one another's employees can also invite scrutiny from the DOJ. "No-poaching" agreements have been the subject of multiple enforcement actions and consent decrees in the past couple of years, including some high-profile cases in the tech industry.

While "agreements" between competitors are likely to draw the most scrutiny, employers can also get into trouble by sharing sensitive information with competitors. The mere exchange of confidential, non-public information can be considered evidence of an implicit agreement and prosecuted accordingly. Industry and trade conferences – where HR professionals gather to discuss industry trends and best practices – may be particularly ripe for discussions with competitors that cross the line.

Antitrust violations carry the risk of serious consequences, including criminal prosecution by the DOJ, civil enforcement actions by DOJ or the Federal Trade Commission, and private suits by employees or other employers harmed by the violation. In light of this new guidance, companies should consider providing training regarding these issues to HR professionals – particularly involved in the recruiting, hiring and compensation of new employees – in order to educate them regarding potential pitfalls and consequences of violations.