Simpson Thacher

Memorandum

U.S. Department of Justice and Federal Trade Commission Ratchet Up Antitrust Scrutiny of Hiring and Compensation Practices

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Introduction

On October 20, 2016, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued joint guidelines for human resources (HR) professionals on the application of antitrust laws to employee hiring and compensation (HR Guidelines). These new guidelines make clear that naked wage-fixing, "no poaching," and other similar agreements will be treated as *per se* illegal by the antitrust agencies. According to the HR Guidelines, these agreements will be subjected to criminal liability and they will be investigated and prosecuted no differently than any other hard core cartel conduct (e.g., price fixing, bid rigging). At the same time, the HR Guidelines recognize that agreements not to poach a competitor's employees that are connected to or are reasonably necessary to a larger legitimate collaboration such as a joint venture between the employers will not be considered *per se* illegal. The HR Guidelines also address potential antitrust sensitivities arising from exchanges of information, such as the terms and conditions of employment, and the circumstances under which such exchanges may result in antitrust violations.

Summary

The HR Guidelines address (i) agreements among competitors (specifically, compensation-fixing agreements and no-poaching agreements) which regulators will treat as giving rise to criminal liability, and (ii) information sharing agreements, which may give rise to civil liability.

Wage-fixing, No-poaching, and other Agreements

As noted, the HR Guidelines identify two types agreements that the regulators will treat as illegal *per se*. *Per se* illegal agreements are those that are viewed as inherently anticompetitive regardless of (and without any consideration of) their actual competitive effects (or lack thereof).

Compensation-Fixing Agreements. Employers recruiting from the same pool of employee candidates may not agree—explicitly or implicitly—on compensation terms. The agreement need not concern wages, but can relate to *any* form of compensation, including employee benefits such as transit subsidies and health memberships. As an example of this type of agreement, the HR Guidelines reference a civil enforcement action brought by the DOJ in 2007 against the Arizona Hospital & Healthcare Association because the Association established a uniform wage schedule for nurses at most Arizona hospitals.

No-Poaching Agreements. The HR Guidelines provide that employers may not agree to refrain from recruiting or hiring each other's employees. For example, the HR Guidelines discuss a number of civil actions brought by the DOJ against technology companies due to their agreement "not to cold call each other's employees." By limiting competition among employers for labor, such agreements force employees to accept less favorable employment terms.

As the HR Guidelines caution, such agreements need not be written to be unlawful:

> Even if an individual does not agree orally or in writing to limit employee compensation or recruiting, other circumstances – such as evidence of discussions and parallel behavior – may lead to an inference that the individual has agreed to do so.

According to the antitrust agencies, these *per se* illegal agreements may give rise to criminal, felony charges, subjecting the employing entity and individual participants to onerous fines. Even more, prison sentences may be imposed on the individual participants. Furthermore, these agreements may also give rise to civil penalties with treble damages through private follow-on lawsuits.

That said, employment-related agreements such as those discussed above, if justified and entered into in connection with a lawful collaboration such as a joint venture or other commercial arrangement and if reasonably necessary to such collaboration may not be treated as *per se* illegal. Instead, in this circumstance, these agreements would be judged under a rule of reason standard in which the procompetitive effects of the agreed restraint are weighed against the anticompetitive effects of the restraint. Such restraints are likely to pose only the risk of civil rather than criminal liability.

Information Sharing Agreements

Information Sharing Agreements. Agreements to share information regarding the terms and conditions of employment may be impermissible when "they have, or are likely to have, an anticompetitive effect." For example, in one case, the DOJ brought an action against a group of HR professionals and hospitals in Utah alleging that the HR professionals agreed to exchange wage information for registered nurses. The DOJ claimed that this agreement caused hospitals to match wages, thus keeping them artificially low. However, unlike agreements to fix wages or refrain from recruiting certain employees, information sharing agreements are not always illegal.

Indeed, most importantly, the HR Guidelines acknowledged that, if appropriately managed, exchanges of information (e.g., compensation data) may be justified and lawful, for example, in connection with due diligence activities relating to a merger. The HR Guidelines propose a number of safeguards to protect legitimate exchanges of information, such as use of a neutral third party to consolidate the information, and concealing the identities of the underlying sources.

Implications

In highlighting this conduct, the HR Guidelines stress the DOJ's and FTC's continuing and indeed heightened focus on antitrust violations in the employment context. Most importantly, companies should be aware that, for the first time, the DOJ is prepared to pursue criminal sanctions for certain agreements – wage fixing and no-poaching agreements. This is in stark contrast to the DOJ's civil settlements with several high tech and media companies involving conduct now alleged by the regulators to be potentially criminal in nature. Indeed, in the coming years we may see an increase in the number of criminal and civil actions brought by the DOJ and FTC against entities whose conduct implicates employee wages and working conditions. The increased focus by the DOJ and FTC may, in turn, result in a corresponding increase in follow-on private plaintiff suits.

In order to guard against these risks, the HR Guidelines underscore the importance of implementing appropriate policies, procedures and controls, which may include:

- **A Review of Current HR-related Activities by Antitrust Counsel:** Companies are encouraged to review the means by which HR personnel communicate with peers at competing entities, such as through trade associations or direct electronic contact. Companies may also review which non-HR personnel are involved in HR-related activities, and assess whether these non-HR personnel communicate with peers at competing entities.
- **Training and Oversight of HR Personnel:** Companies would benefit by including HR-related personnel in antitrust compliance training, and establishing a direct link between HR-related personnel and an in-house or outside counsel capable of analyzing antitrust-related risks.
- **Re-evaluate Trade Association Activity:** Although trade associations are useful forums that can improve product and service quality within a given sector, they are vulnerable to misuse. Companies that wish to benefit from these trade associations must ensure that their content and focus are sufficiently narrow, including only permissible exchanges of information.

In addition, the HR Guidelines are a reminder that parties engaging in legitimate information exchanges (e.g., due diligence for a merger) should implement protocols to address the disclosure of competitively sensitive information. This includes granular employee-specific wage and other compensation data as well as other sensitive information, such as pricing data and strategic planning. Exchanges of such data, even if justified, should be carefully managed, subject to appropriate safeguards and with advice from legal counsel.

Additional safeguards, such as the involvement of a neutral third-party, may also help insulate such exchanges from antitrust scrutiny.

Finally, although the HR Guidelines largely focus on HR personnel-related conduct, they also note that these forms of antitrust violations may take place at the executive level as well. In particular, the HR Guidelines contain a "Questions and Answers" section with hypotheticals providing specific examples of impermissible conduct. For example, if managers at competing companies stymie wage growth by establishing an agreed-upon wage scale, they are engaging in *per se* unlawful wage-fixing. Likewise, a CEO that attempts to contain costs by contacting competitors and proposing limits on employee benefits is similarly engaging in *per se* unlawful activity, exposing the company to criminal and civil penalties.

For further information, please contact one of the following members of the Firm's Litigation or Executive Compensation and Employee Benefits Departments.

NEW YORK CITY

Peter Guryan
+1-212-455-2750
peter.guryan@stblaw.com

Brian D. Robbins
+1-212-455-3090
brobbins@stblaw.com

Michael C. Naughton
+1-212-455-7335
mnaughton@stblaw.com

Ellen L. Frye
+1-212-455-2352
efrye@stblaw.com

WASHINGTON, D.C.

Andrew M. Lacy
+1-202-636-5505
alacy@stblaw.com

Sara Y. Razi
+1-202-636-5582
sara.razi@stblaw.com

Peter Thomas
+1-202-636-5535
pthomas@stblaw.com

LONDON

David E. Vann
+44-(0)20-7275-6550
dvann@stblaw.com

Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000