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CLIENT MEMORANDUM

FTC and DOJ Issue Joint Guidance to Human Resource Professionals

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Following a series of high-profile enforcement actions alleging anticompetitive coordination of employment practices among competitors, the Federal Trade Commission (the "FTC") and Department of Justice Antitrust Division (the "DOJ") have jointly issued *Antitrust Guidance For Human Resource Professionals* (the "Guidance"), found here, "to alert human resource professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws."[1] The Guidance is the DOJ's and FTC's first such joint advisory memorandum on antitrust compliance in the employment context, and the document makes clear that enforcement in this area is a priority for both agencies.

Significantly, while signaling that both agencies will vigorously pursue civil enforcement against anticompetitive employment practices, the Guidance also declares that "the DOJ intends to proceed criminally against naked wage fixing or no poaching agreements." The specter of costly investigations and potential criminal penalties makes it all the more important for companies to implement effective antitrust compliance programs that specifically address antitrust risk associated with the hiring and compensation of employees.

[1] *Antitrust Guidance for Human Resource Professionals*, Dep't of J. and Fed. Tr. Comm. (2016), *available at* https://www.justice.gov/atr/file/903511/download (last visited Nov. 7, 2016 7:37 PM EST).

Background to Guidance. Section One of the Sherman Act prohibits contracts, combinations or conspiracies in restraint of trade.[2] Thus, any agreement among competitors to coordinate business activity that is the subject of competition – *e.g.*, the price or quality of goods sold or of key inputs purchased – may be the subject of private or governmental antitrust enforcement. Because competing firms commonly compete for employees, any agreement among employers that restricts such competition – *e.g.*, by aligning compensation levels – may result in antitrust liability.[3]

As the Guidance highlights, antitrust enforcement in the employment context is not new. In 1992, for example, the FTC pursued an enforcement action against various healthcare facilities for allegedly agreeing to boycott certain registries through which nurses could be hired.[4] That case was resolved through a consent order in which the facilities agreed to avoid similar agreements in the future.[5]

More recently, in September 2010, the DOJ filed a civil enforcement action, found here, against six high-profile technology companies – Adobe, Apple, Google, Intel, Intuit and Pixar – alleging a conspiracy to constrain competition for the hiring and retention of key categories of employees, such as software engineers.[6] The DOJ's complaint alleged that, beginning with a 2005 agreement between Apple and Adobe, the companies reached explicit bilateral agreements not to "cold call" each other's employees about the possibility of employment.[7] A putative class of high-tech employees subsequently filed suit seeking damages based on the same alleged conduct.[8] The high-tech defendants resolved the DOJ investigation via a consent decree requiring them to discontinue the challenged practices, and they subsequently agreed to pay more than $400 million dollars to resolve the class actions.[9]

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2 15 U.S.C. § 1.

3 *See e.g. Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544-45 (10th Cir. 1995) (finding that employee plausibly alleged antitrust injury based on an agreement not to compete for employees); *see also Anderson v. Shipowners' Ass'n of Pacific Coast*, 272 U.S. 359, 364-65 (1926) (agreement among shipowners and operators not to hire sailors who were not members of certain associations violated the Sherman Act).

4 *Debes Corporation, et al.*, 115 F.T.C. 701 (1992).

5 *Id.* at 707.

6 Complaint, *U.S. v. Adobe Systems, Inc., et al.*, No. 10-cv-1629 (D.D.C. Sept. 24, 2010) [hereinafter *Adobe Complaint*.]

7 *Id.*

8 *In re High-Tech Empls. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012).

9 Dan Levine, *U.S. Judge Approves $415 mln Settlement in Tech Worker Lawsuit*, REUTERS.COM, Sept. 2, 2015, http://www.reuters.com/article/apple-google-ruling-idUSL1N11908520150903.

The Guidance. Drawing on this litigation history, the Guidance outlines broad categories of employment practices that potentially violate the U.S. antitrust laws. And the Guidance specifically charges HR professionals, who are "in the best position to ensure that their companies' hiring practices comply with the antitrust laws," with leading their companies' antitrust compliance efforts in this regard.

The Guidance focuses on two specific types of employment practices that it characterizes as per se violations of the antitrust laws: wage-fixing agreements (*i.e.,* not to lure employees via compensation bidding wars) and "no-poaching" agreements (*i.e.*, not to target a competitor's employees for recruitment). The Guidance seems intent on advising the business community that the DOJ is prepared to pursue criminal prosecution of companies and individuals who participate in naked competitive restraints in the employment sector. And both agencies will pursue civil enforcement actions with respect to agreements that may not give rise to criminal liability.

The Guidance also urges companies to use caution when sharing competitively sensitive information, such as compensation data, with competitors either directly or through third-party entities. The Guidance warns that, even outside an agreement, "evidence of periodic exchange of current wage information in an industry with few employees could establish an antitrust violation because, for example, the data exchange has decreased or is likely to decrease compensation." In some circumstances the Guidance acknowledges that competing employers may exchange wage information if (i) the exchange is administered by a third party, (ii) the information is "relatively old" and (iii) the data is sufficiently aggregated to prevent participating companies from tracing the underlying sources. The Guidance also acknowledges that parties to a proposed merger may need to exchange sensitive employment information as part of the due diligence process, but the Guidance nonetheless urges use of "appropriate precautions" in connection with such exchanges.

Best Practices Following the Guidance. While many employers may already provide antitrust compliance training specifically addressing the employment context, the Guidance warrants a close review of existing compliance programs. As a starting point, companies should identify all categories of employees who participate in employee hiring. While the Guidance emphasizes the critical role of HR professionals, other employees commonly participate in recruiting talent. Indeed, the "no poaching" agreement among Silicon Valley high-tech firms allegedly was developed at the CEO level, not in the companies' HR departments.

Once the appropriate target audience is identified, a compliance segment should be developed that specifically addresses the antitrust risk associated with hiring and compensation. While the Guidance provides useful compliance hypotheticals, an effective compliance program will focus on the recruiting dynamic of an employer's particular industry.

Given the Guidance's emphasis on data sharing risks, companies should specifically address this issue in their compliance programs and designate one or more individuals in their HR or legal departments who must review proposed exchanges of compensation data before they occur. And, finally, companies should establish clear procedures for employees to report conduct that may violate the antitrust laws and state that serious consequences for failing to do so

may follow. As noted in the Guidance, a company that discovers that an employee has coordinated with a competitor on compensation issues, or has been invited to do so, may be eligible for leniency if it is the first to report the conduct to the DOJ. Thus, early detection is critical.

If you have any questions regarding this memorandum, please contact Wesley R. Powell (212-728-8264, wpowell@willkie.com), Timothy G. Fleming (212-728-8538, tfleming@willkie.com) or the Willkie attorney with whom you regularly work.

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