

No Poaching Allowed: The DOJ's Long-Promised Criminal Enforcement of No Poach Agreements and Wage Fixing Is Here

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Introduction

The Antitrust Division of the Department of Justice has long worked to promote free-market competition in the labor market by investigating and challenging no-poach agreements (i.e., agreements between two or more companies not to solicit and/or hire each other's employees) and wage-fixing agreements between employers. The Antitrust Division's interest in no-poach agreements became a priority with the discovery of no-poach agreements in the tech industry in the early 2010s. Historically, the Antitrust Division had regarded no-poach agreements as civil violations of the antitrust laws, but, in 2016, the Antitrust Division announced that it would consider "naked" wage-fixing and no-poach agreements to be *per se* violations of the antitrust laws subject to criminal prosecution when it published joint "Antitrust Guidance for Human Resource Professionals" with the Federal Trade Commission.^[1] In 2019, at a public workshop to discuss competition in labor markets, Assistant Attorney General Makan Delrahim reiterated that "criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division."^[2]

Despite those signals, the Antitrust Division's enforcement efforts remained limited to civil enforcement until December 2020, when it announced it had brought charges against the former owner of a therapist staffing company for conspiring with his competitors to fix wages by lowering the wages of physical therapists and physical therapist assistants.^[3] Less than a month later, the Antitrust Division announced a second indictment against a national outpatient medical care center operator, alleging that it had agreed with competitors not to solicit senior-level

employees.[4]

This shift from civil to criminal enforcement appears likely to accelerate under President Biden's administration, which has indicated that pro-employee enforcement in the labor markets will be a key priority. Employers should be aware that antitrust enforcement in labor markets is not limited to agreements between traditional competitors who market similar goods and services, but extends to "firms that compete to hire or retain employees . . . regardless of whether the firms make the same products or compete to provide the same services." [5] The prohibition on wage-fixing applies both to agreements regarding the wages of specific employees and more general agreements about wage ranges, benefits, or terms of employment. Similarly, the no-poach prohibition applies not just to agreements not to hire another company's employees, but also agreements to refrain from actively recruiting or soliciting another company's employees.[6]

The increased attention and focus in this area by the Antitrust Division could also be aided by one of the final bills of former President Donald J. Trump's administration. On December 23, 2020, President Trump signed into law the Criminal Antitrust Anti-Retaliation Act, which prohibits employers from retaliating against certain individuals, including employees, who report criminal antitrust violations.[7] It provides an individual who faces an adverse action after reporting a suspected violation the right to seek damages, attorney fees, and costs.[8] As discussed below, an effective corporate compliance program that effectively identifies and prevents no-poaching and wage-fixing agreements (and other potential antitrust violations) can substantially mitigate an employer's risk of criminal enforcement (as well as civil exposure).

Corporate Compliance Programs

Most medium and large companies have corporate compliance programs aimed at preventing and identifying potential antitrust violations. These programs educate officers and employees about the types of conduct that can violate antitrust laws, provide reporting mechanisms for officers and employees if they become aware of a potential violation, and inform officers and employees of the significant penalties the company could face for an antitrust violation. Corporate compliance programs traditionally focus on antitrust violations like price fixing and bid rigging, but the Antitrust Division's two recent indictments make clear that companies must

evaluate their corporate compliance programs to ensure they are properly educating not just officers and employees engaged in pricing and other competitive activity, but also human resources personnel and anyone else who is engaged in recruiting or hiring employees. Effective corporate compliance programs offer companies significant benefits, but what is an effective corporate compliance program and what are those benefits?

Effective Corporate Compliance Programs

The Antitrust Division issued new guidelines regarding its “Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations” in July 2019.^[9] According to the Antitrust Division, there are three key inquiries derived from the Department of Justice’s Justice Manual:

- “Is the corporation’s compliance program well designed?”
- “Is the program being applied earnestly and in good faith?”
- “Does the corporation’s compliance program work?”^[10]

These inquiries inform the Antitrust Division’s evaluation of corporate compliance programs over the course of their investigation of potential antitrust violations. At the beginning of an investigation, prosecutors first inquire: (1) whether a company’s compliance program addresses and prohibits criminal antitrust violations, (2) whether the compliance program detects and facilitates prompt reporting of antitrust violations, and (3) whether the company’s senior management is involved in the violation.^[11] The answers to these questions focus the prosecutors’ inquiry into the compliance program.

In even more granular detail, prosecutors are told to consider the following factors when evaluating a corporate compliance program’s effectiveness:

1. The design and comprehensiveness of the program;
2. The culture of compliance within the company;
3. Responsibility for, and resources dedicated to, antitrust compliance;
4. Antitrust risk assessment techniques;
5. Compliance training and communication to employees;
6. Monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program;

7. Reporting mechanisms;
8. Compliance incentives and discipline; and
9. Remediation methods.[\[12\]](#)

These factors are not the exclusive considerations for prosecutors, but provide a lens through which they will analyze a company's compliance program. There are several themes to the Antitrust Division's guidance, which are tied together by one principal inquiry—whether the company has taken its obligations seriously and designed and implemented a program that is likely to deter and catch potential violations, as opposed to a pro forma program that is viewed within the company as an annual “check the box” type of activity. To put that into practice, the company's leadership must take the compliance program seriously, and the person responsible for overseeing the program must have real authority. Prosecutors are looking to see if compliance is a company value or not, and company values are driven by its leadership. If there is an antitrust violation by a member of a company's leadership, there must be real consequences, whether in compensation, authority, or both. In addition, the company should evaluate its business and tailor its compliance program to the areas where it is at greatest risk of violating antitrust laws. Different companies have different antitrust risk profiles, and the Antitrust Division expects companies to review those risks, adopt a targeted compliance program, and effectively train their employees about the most relevant risks. Finally, the compliance program must be a dynamic program that adapts and evolves with the company. The company should update its compliance program to reflect changes in its business and any corresponding changes to its antitrust risk profile, and if the company has observed a potential or actual antitrust violation that its compliance program might not have captured, the compliance program and related trainings should evolve to address any identified weaknesses. The compliance program should also include active participation from representatives of the human resources and IT departments to incorporate mechanisms for identifying potential violations, monitoring compliance, and ensuring an effective reporting mechanism that does not lead to retribution or retaliation.

Benefits of an Effective Corporate Compliance Program

The most obvious and significant benefit of a well-designed and implemented

corporate compliance program is that companies with such programs are less likely to be subject to the massive costs and consequences (both reputational and financial) that flow from such a violation, including the legal costs of investigating and defending civil and criminal enforcement actions, treble damages exposure, fines, and—yes—potential criminal liability.

However, even if, despite the implementation of a rigorous corporate compliance program, a company still discovers a potential antitrust violation or otherwise finds itself in the cross-hairs of a Department of Justice enforcement action, the existence of a corporate compliance program can still mitigate the consequences facing the company.

First, the Antitrust Division maintains a corporate leniency program that entitles the first company to report an antitrust violation to avoid criminal exposure.^[13] If a company has an effective corporate compliance program, it is much more likely to be able to take advantage of the leniency program, as eligibility depends on timely identifying antitrust violations and being the first company to report the violation to the Department of Justice.

Second, while a well-designed compliance program has always been a factor that the Antitrust Division considers at the sentencing stage, in its July 2019 guidelines, the Antitrust Division made clear that it will also evaluate corporate compliance programs at the charging stage, meaning that this factor could impact whether a company is criminally prosecuted at all.^[14] In the year and a half since announcing this change, the Antitrust Division has for the first time entered into a number of deferred prosecution agreements with companies instead of plea agreements.

Finally, if a company is prosecuted for an antitrust violation, an effective compliance program can result in a three-point reduction in the company's culpability score under the United States Sentencing Guidelines,^[15] it may help a company avoid probation,^[16] and it may help the company to receive a reduced fine.^[17] To be entitled to the three-point reduction, the company cannot unreasonably delay reporting the violation to the government.^[18] In addition, if the company's high-level personnel participated in, condoned, or were willfully ignorant to the antitrust violations, there is a rebuttable presumption that the compliance program was not effective.^[19]

Conclusion

The Antitrust Division's long-promised criminal enforcement of the antitrust laws in labor markets has arrived. Companies need to be aware of the prohibition on no-poach agreements and wage-fixing that extends beyond agreements with traditional competitors. This increased attention serves as a useful reminder of the substantial benefits of reviewing and improving a company's antitrust compliance programs to ensure they are designed and implemented in a way to achieve the goal of preventing and detecting violations. These programs offer a double benefit—a decreased likelihood of an antitrust violation in the first instance and a potentially softer punishment in the event of a violation.

[1] U.S. Dep't of Just., Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 3–4 (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

[2] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Div., Remarks at the Public Workshop on Competition in Labor Markets (Sept. 23, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition>.

[3] Press Release, U.S. Dep't of Just., Former Owner of Health Care Staffing Company Indicted for Wage Fixing (Dec. 10, 2020), <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>.

[4] Press Release, U.S. Dep't of Just., Health Care Company Indicted for Labor Market Collusion (Jan. 7, 2021), <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>.

[5] U.S. Dep't of Just., Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 2 (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

[6] There has also been a significant increase in recent years of civil enforcement relating to no-poach agreements in the form of class actions by the antitrust plaintiffs' bar, as well as investigations by state attorneys general. There has been particular focus on no-poach provisions in franchise agreements (i.e., agreements within a franchise system that a franchise would not poach employees of another franchisee or the franchisor). The legality of no-poach agreements within a

franchise system is still an open issue being litigated in numerous cases across the country.

[7] Criminal Antitrust Anti-Retaliation Act of 2019, Pub. L. No. 116-257, 134 Stat. 1147 (2020).

[8] *Id.*

[9] U.S. Dep't of Just., Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), <https://www.justice.gov/atr/page/file/1182001/download>.

[10] *Id.* at 2 (citing U.S. Dep't of Just., Just. Manual §9-28.800 (2019)).

[11] *Id.* at 3.

[12] *Id.* at 3–4.

[13] See Leniency Program Page, U.S. Dep't of Just., Antitrust Div., <https://www.justice.gov/atr/leniency-program> (last visited Mar. 2, 2021).

[14] U.S. Dep't of Just., Antitrust Div., Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 1 (July 2019), <https://www.justice.gov/atr/page/file/1182001/download>.

[15] U.S.S.G. § 8C2.5(f).

[16] U.S.S.G. § 8D1.1.

[17] U.S.S.G. § 8C2.8; *see also* 18 U.S.C. § 3572(a)(8).

[18] U.S.S.G. § 8C2.5(f)(2).

[19] U.S.S.G. § 8C2.5(f)(3)(A)–(C).



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