

# Client Alert

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## DOJ Antitrust Chief Warns That Criminal Prosecutions for Wage-Fixing and Anti-Poaching Agreements Are Forthcoming

The Department of Justice's top antitrust official announced that criminal charges against companies that agreed not to hire one another's employees will be forthcoming, with announcements to be made in the coming months.

In October 2016, a joint [guidance document](#) released by the DOJ and FTC set forth the agencies' position that naked wage-fixing and anti-poaching agreements are a violation of US antitrust laws. The guidance, which was directed toward human resources professionals, took the general position that "[a]n agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decisionmaking with regard to wages, salaries, or benefits; terms of employment; or even job opportunities." Our previous publication on the guidance can be accessed [here](#).

The guidance prohibits not only explicit wage-fixing agreements, but also implicit agreements to share information (e.g., wage-related information) with competitors when such conduct has, or is likely to have, an anticompetitive effect.

In that same guidance, the DOJ and FTC announced that certain agreements would be investigated criminally going forward. It warned that, in certain circumstances, such agreements could lead to criminal prosecution of individuals, the company or both. See Department of Justice, Antitrust Division, Federal Trade Commission, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016).

The Antitrust Division has brought civil actions as a result of such agreements in the past. For example, several technology companies have entered into consent judgments as a result of no-poach agreements in which the companies agreed not to cold call each other's employees. The Federal Trade Commission also has pursued enforcement actions related to competition for employees.

Despite the change of administration, the Antitrust Division has remained committed to the October 2016 announcement. According to the DOJ's recently confirmed antitrust chief, Makan Delrahim, if a wage-fixing or no-poach agreement has continued from the time of that announcement, the Antitrust Division will treat the agreement as criminal.

In order to ensure that any employment-related conduct does not run afoul of the antitrust laws, companies should:

- **Review agency guidance and train employees.** The October 2016 guidance issued by the Antitrust Division and the Federal Trade Commission outlines the areas of greatest risk to companies. In-house counsel and relevant employees should review that guidance and conduct training of other employees as necessary.

- **Avoid information sharing.** Employees should avoid sharing sensitive information, including wages or compensation, other terms of employment, or hiring plans or policies, with other companies.
- **Make hiring and compensation decisions independently.** Companies should make decisions related to hiring and terms of employment independently. Even a “gentleman’s agreement” or a wink and a nod with a competitor can subject the company and its employees to criminal liability.

Hunton & Williams LLP’s competition and consumer protection and labor and employment teams are prepared to help global organizations navigate the ever-changing antitrust landscape.

#### **Authors**

**Leslie W. Kostyshak**

lkostyshak@hunton.com

**Ryan M. Bates**

rbates@hunton.com

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