

Before You Cut Your Employees' Wages— Antitrust for Employers in the Age of COVID-19

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As employers struggle with the poor economic conditions associated with the COVID-19 crisis, many are considering pay cuts. Naturally, in making this decision, many companies will consider what their peers are doing in order to determine how their actions will be received in the marketplace. But as a business owner or executive, before you call one of your industry peers to see how they are handling employee compensation, you should stop and think twice about the potential antitrust implications of your actions.

The United States Department of Justice (DOJ) and the Federal Trade Commission (FTC), the federal agencies that share U.S. antitrust enforcement, **reminded** employers just last week that the agencies will aggressively enforce antitrust laws against employers that use the pandemic as an opportunity to reach agreements that could harm employees by reducing wages, salaries, and benefits.

Reaching out to your colleagues who know your issues firsthand—your friendly competitors—may seem compelling. You get together at trade shows, serve together on industry committees, and give back to your community together through civic and charitable work. And to make your life even more complicated, from an antitrust perspective your competitors are not limited to the businesses with which you compete for customers. In this context, they also include the businesses with which you compete for *employees*, whether they are local to your town or county or located anywhere across the country.

While it seems logical to discuss with them the best ways to deal with the burdens of employee

compensation, that instinct is the polar opposite of antitrust law's core principle that competing businesses must make their own decisions on issues that affect how they compete with each other. Deciding these issues together reduces the risk to each business by ensuring they all act the in the same way. It's handy to think of antitrust law as prohibiting that kind of risk reduction; antitrust laws work by increasing the risks that each company faces from acting independently.

Last week's reminder reinforced the warning from the DOJ and FTC in their 2016 joint **Antitrust Guidance for Human Resource Professionals**:

Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. . . . Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.

Contrary to what you may think, criminal antitrust prosecutions are not limited to international cartels of the biggest companies. Some agreements—on prices, for example—are illegal in and of themselves, and these “per se” violations can be and are prosecuted as federal felonies regardless of the size of the companies involved or the overall impact on the economy. Agreements of this type may be illegal not only

when the parties agree to charge a specific price but also, for example, when they agree on a formula by which they will set price, a percentage by which they will raise prices, or a percentage by which they will limit discounts.

These examples from the history of price-fixing prosecutions are easily translated into the issues you face today in reducing employee costs, as the DOJ and FTC reminded us in their 2016 guidance document. You and your company may face antitrust risk if you agree with any of your competitors, for example, to pay a particular lower hourly rate for certain categories of your employees, to cut salaries by a certain percentage, to reclassify some jobs as part time, or to coordinate in any other way on how to reduce employee costs.

So before you discuss with colleagues outside your own company how to deal with reducing employee costs, take a moment to think about the risks and consult with legal counsel.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).

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