

HR Antitrust Compliance Crucial Amid DOJ Scrutiny

By **William McEnroe, J. Clayton Everett Jr. and Siobhan Mee** (February 15, 2024, 3:57 PM EST)

At a Dec. 14, 2023, American Bar Association conference, the U.S. Department of Justice's Antitrust Division announced that antitrust compliance programs must include training for human resources professionals on issues such as wage-fixing and no-poach agreements to be considered effective.

Whether an antitrust compliance program is considered effective is important because the DOJ may decline to prosecute or reduce penalties for companies found to have effective antitrust compliance programs.

Despite a string of losses in antitrust prosecutions involving labor practices from April 2022 through the end of 2023, antitrust enforcement in labor markets continues to be an area of focus for federal antitrust enforcers.

The emphasis on compliance programs is another route for the Biden administration to pursue its labor market antitrust enforcement agenda.

Now is an opportune time for companies to evaluate annual updates to compliance programs and training to ensure that those programs prevent, detect and remediate potential antitrust violations and include training for human resources professionals.

The DOJ's Recent Comments

In evaluating whether and to what extent to bring criminal antitrust charges against a corporation, the DOJ's Justice Manual establishes that Antitrust Division prosecutors must consider (1) the Principles of Federal Prosecution, (2) the Principles of Federal Prosecution of Business Organizations and (3) the Antitrust Division's Leniency Policy.[1]

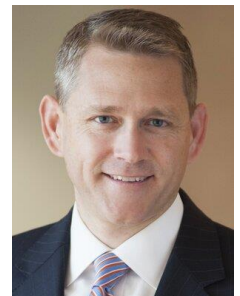
Among these considerations, an important factor is, according to the manual, "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision." [2]

In evaluating the adequacy and efficacy of antitrust compliance programs, the Antitrust Division considers the following elements:

- Design and comprehensiveness of the program;



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- Culture of compliance within the company;
- Responsibility for, and resources dedicated to, antitrust compliance;
- Antitrust risk assessment techniques;
- Compliance training and communication to employees;
- Monitoring and auditing techniques, including continued review, evaluation and revision of the antitrust compliance program;
- Reporting mechanisms;
- Compliance incentives and discipline; and
- Remediation methods.[3]

As emphasized in the DOJ's guidance specific to antitrust compliance, the effectiveness of a company's antitrust compliance program can affect the DOJ's decision to prosecute or resolve antitrust investigations.[4] Similar considerations are set forth in the DOJ's generally applicable corporate compliance guidance.[5]

During a Dec. 14, 2023, American Bar Association panel, Eric Dunn, counsel to DOJ Assistant Attorney General Jonathan Kanter, addressed the DOJ's views on effective antitrust compliance programs.

Dunn stressed that omitting HR training from a company's antitrust compliance program would raise genuine questions about whether such a program is well designed and "likely to be effective at preventing harms and potential antitrust violations." [6]

Dunn's comments follow the DOJ's largely unsuccessful efforts to prosecute alleged no-poach agreements as criminal violations of the Sherman Act. In 2023, the DOJ suffered its third and fourth consecutive antitrust labor trial losses.

In *U.S. v. Manahe*, the DOJ indicted four managers of home healthcare agencies for an alleged agreement to fix wages and not poach home health aids. Following a two-week trial in March 2023, a jury in the U.S. District Court for the District of Maine acquitted all four defendants.[7]

In the April 28, 2023, *U.S. v. Patel* decision, a subsequent no-poach prosecution relating to jet-engine engineers, U.S. District Judge Victor A. Bolden of the U.S. District Court for the District of Connecticut granted a motion for a judgment of acquittal at the close of the DOJ's case in chief.[8]

Judge Bolden concluded that the evidence presented of the alleged no-poach agreement "had so many exceptions that it could not be said to meaningfully allocate the labor market of engineers[.]" [9]

When asked about the pair of losses during an antitrust conference in April 2023, Kanter, referencing a 2018 book by Jesse Eisinger critical of the DOJ's white collar enforcement, quipped: "I'm here to declare that we're not part of the chickenshit club." [10]

Those remarks came six months before the DOJ moved to voluntarily dismiss its no-poach indictment in *United States v. Surgical Care Affiliates*. [11]

The government's Nov. 23, 2023, motion did not set forth the basis for the DOJ abandoning its case other than to say that "dismissal of this case is not contrary to manifest public interest, and it will allow the conservation of this Court's time and resources."^[12]

U.S. District Judge Sam A. Lindsay of the U.S. District Court for the Northern District of Texas granted the motion and dismissed the indictment with prejudice.^[13]

Despite these high-profile losses and the DOJ's abandonment of its indictment in Surgical Care Affiliates, the DOJ appears to be steadfast in its resolve to continue to bring additional criminal prosecutions in this area.

The DOJ may also see corporate compliance programs as a way to accomplish what it has been unable to do in the courtroom.

Incorporating HR Into Antitrust Compliance

It has now been more than seven years since the DOJ and the Federal Trade Commission issued their landmark joint antitrust guidance for HR.^[14]

The guidance highlights that competitors for labor are not necessarily just firms that produce the same products or provide the same services.^[15]

The guidance also sets forth the DOJ and the FTC's position that so-called naked no-poach and wage-fixing agreements are per se unlawful under U.S. antitrust law.^[16]

In conjunction with the 2016 guidance, the DOJ and the FTC issued a list of red flags for HR professionals to better help them spot potential antitrust violations.^[17]

While the list of red flags is not exhaustive, it provides a road map to develop a successful antitrust training program for HR professionals.

For example, HR professionals are warned to be on the lookout for agreements with other companies regarding salary or other compensation, employee benefits, or terms of employment, as well as agreements to refuse to solicit or hire another company's employees.^[18]

The list of red flags also cautions against expressing to competitors that "you should not compete too aggressively for employees."^[19]

According to the guidance, HR professionals should likewise refrain from exchanging company-specific information about employee compensation or other terms of employment with another company including internal data about employee compensation.^[20]

Finally, the red flags warn employees not to participate in any meetings where these topics are discussed, and to refrain from discussing these topics with colleagues at other companies, including during social events or in other nonprofessional settings.^[21]

As in-house and outside counsel work to design and implement corporate compliance and training programs that are effective in the eyes of federal antitrust enforcers, the DOJ and FTC's list of red flags

provides a sensible starting point for HR antitrust training.

Takeaways and Next Steps

Despite the DOJ's recent trial losses in the antitrust labor space, the costs of potential antitrust prosecutions — and follow-on civil litigation — remain high.

The proverb popularized by Benjamin Franklin that an ounce of prevention is worth a pound of cure is certainly true of antitrust compliance — doubly so if the DOJ credits a compliance program in reducing charges or declining to prosecute altogether.

As we move through February, companies are well advised to review their corporate compliance programs to ensure that those programs are effective and well designed in the eyes of state and federal enforcers.

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[1] US DOJ, Justice Manual §§ 9-27.001, 9-28.300, & 7-3.300, <https://www.justice.gov/jm/justice-manual>.

[2] Justice Manual § 9-28.800.

[3] US DOJ, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 3-4 (July 2019).

[4] See *id.* at 2.

[5] US DOJ, Evaluation of Corporate Compliance Programs (Mar. 2023).

[6] Chris May, HR Decision-makers Need Antitrust Training, Guidance, US DOJ Official Says, mLex (Dec. 14, 2023).

[7] *United States v. Manahe*, No. 2:22-cr-00013-JAW, ECF No. 247 (D. Me. Mar. 22, 2023).

[8] *United States v. Patel*, No. 3:21-cr-220 (VAB), 2023 WL 3143911 (D. Conn. Apr. 28, 2023) (granting defendants' motion for acquittal).

[9] *Id.* at *9.

[10] Jack Queen, DOJ Antitrust Head: No 'Chickenshit Club' Despite Losses (April 21, 2022), <https://www.law360.com/articles/1486196/doj-antitrust-head-no-chickenshit-club-despite->

losses.

[11] United States v. Surgical Care Affiliates LLC, No. 21-cr-00011, ECF No. 203 (N.D. Tex. Nov. 13, 2023).

[12] Id. at 1.

[13] Surgical Care Affiliates LLC, Order, ECF No. 204 (N.D. Tex. Nov. 14, 2023).

[14] DOJ & FTC, Antitrust Guidance for Human Resource Professionals (Oct. 2016).

[15] Id. at 2.

[16] Id. at 3.

[17] DOJ & FTC, Antitrust Red Flags for Employment Practices (Oct. 2016).

[18] Id.

[19] Id.

[20] Id.