

# ANTITRUST INVESTIGATIONS INTO WORKER PAY HEAT UP



**THE U.S. JUSTICE DEPARTMENT'S ANTITRUST** division has sharpened its focus on collusive actions by companies to increase profits by suppressing wages. Under the microscope are such anticompetitive actions as the sharing of wage information and no-poaching agreements, with various companies being charged with antitrust crimes under the Sherman Act. Although most of the labor market collusion cases are settled with the government, the costs and lingering reputational damage can be significant.

Risk managers need to be aware of the heightened risk of federal and state antitrust actions, which are not covered under standard employment practices liability insurance (EPLI) policies. "EPLI was developed in the 1990s to address discriminatory employment practices in hiring, job promotion and job transfers, and are not a vehicle to pass on the fines, penalties and legal expenses for crimes involving labor market collusion," said Joseph Werner, vice president of management liability and specialty insurance at Nationwide Mutual Insurance Company.

Werner added that risk managers and other executives are personally at risk of unintentionally inviting an investigation into their company's employment practices. "If you attend a trade industry conference and happen to share wage information with a competitor, you could open yourself up individually to criminal prosecution," he said. "Given the surge in recent criminal investigations by the Justice Department, extra care and caution are needed."

## Prosecutions on the Rise

In 2016, the Justice Department and the Federal Trade Commission issued an antitrust guidance indicating that the Sherman Act gave them leeway to pursue criminal prosecutions for labor antitrust

violations. Section 1 of the Sherman Act prohibits "restraint of interstate trade and commerce."<sup>1</sup>

In December 2020, the Justice Department announced its first criminal case in this regard, indicting a Dallas-based health care staffing provider for allegedly engaging in a no-poaching agreement with a competitor to suppress the pay of nurses. In September 2022, the staffing company entered a guilty plea, opening it up to a maximum penalty of \$100 million.

Other criminal antitrust indictments for labor abuses followed. In July 2021, the Justice Department charged a dialysis provider and its CEO for allegedly colluding with competitors in a no-poaching agreement, agreeing not to recruit each other's employees. In January 2022, the U.S. District Court for the District of Colorado declined to dismiss the charges.

More recent Justice Department investigations into anticompetitive employment have culminated in charges against the poultry industry. In July 2022, the department filed a civil antitrust lawsuit in the U.S. District Court for the District of Maryland against three poultry processors, alleging the companies engaged in a long-running conspiracy to exchange information about plant worker wages and benefits to suppress their pay and restrain competition. A data consulting firm that allegedly helped the companies and their executives share information on workers compensation also was charged.

The Justice Department subsequently announced a major settlement with the poultry processors. If approved by the court, the proposed consent decree would require the companies to collectively pay \$84.8 million in restitution for stifling competition and harming plant workers.

In announcing the lawsuit, the Justice Department put companies and executives on notice, stating that its antitrust division "will use all of its available legal authorities to address anticompetitive conduct that harms consumers, workers, farmers and other American producers."

The parade of employment-related antitrust lawsuits is not expected to end any time soon. In President Biden's July 2021 Executive Order on

Promoting Competition, he affirmed his commitment to enforcing the nation's antitrust laws to combat what he called "the abuses of market power and the harmful effects of monopoly... especially as these issues arise in labor markets."

## Compliance Complications

Assuming the Justice Department continues to rack up successful settlements, companies and their risk managers must look inward to ensure there is no evidence of wage suppression. Complying with the law is a complex matter, however.

A case in point is a salary transparency disclosure law passed in June 2022 by the New York state legislature. The law requires employers to disclose the compensation or a range of compensation in their advertisements for open positions, job promotions and job transfer. Other states like California are considering similar pay disclosure bills to help combat discriminatory hiring practices.

"While federal laws involving wage fixing prohibit companies from sharing their wage information with competitors, New York's pay transparency law appears to inadvertently do just that, despite its good intents," Werner said. "That makes it legally complicated and problematic for companies to do the right thing."

Moving forward, Werner advised risk managers to discuss the increase in anticompetitive employment actions by the Justice Department with colleagues in HR, legal and compliance.

"It is important to understand the uptick in investigations and enforcement, particularly in the context of executives returning to industry trade conferences and seminars," he said. "Their conversations with peers at competing companies must not in any way involve employee wages and benefits. Even a hint of impropriety could lead to an investigation and possible civil and criminal prosecution."

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<sup>1</sup> <https://www.ftc.gov/news-events/news/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how-antitrust-law-applies-employee-hiring>