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SA employers: take heed of US warning to HR professionals

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14 Nov 2016

The United States Department of Justice (USDOJ) and the Federal Trade Commission (FTC) recently issued a warning to human resource (HR) professionals involved in employment and compensation decisions that they will look to prosecute any who seek to coordinate with other companies on the terms of employment for potential new hires.

In a guidance document issued in October 2016, the USDOJ and FTC (jointly responsible for enforcing US competition laws) point out that:

> *"Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment. Consumers can also gain from competition among employers because a more competitive workforce may create more or better goods and services."*
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> The guidance in general cautions companies against communicating its employment policies to other companies competing to hire the same types of employees, as this could lead to an agreement not to compete for employees on terms of employment.

More specifically, an agreement between employers to limit or fix the terms of employment for potential hires may violate antitrust laws if the agreement constrains an individual firm's decision making with regard to wages, salaries, benefits, terms and conditions of employment, or even job opportunities.

Thus, so-called "wage fixing" agreements or "no poaching" agreements are outlawed.

Some of the antitrust “red flags” raised by the USDOJ include:

- where there is an agreement or refusal to hire or solicit employees;
- expressing a desire to avoid competing aggressively for employees;
- participating in meetings where any of the aforementioned topics are raised or even discussing these socially; and
- receiving documents that contain another company’s internal data about employee compensation.

In principle, South African competition law is no different. Although there is a specific carve-out for collective bargaining and collective agreements as contemplated in the Labour Relations Act, significant risks apply to companies that seek to coordinate employment policy with other employers outside of the formal processes allowed under labour law.

Given the clear policy objective of the Competition Commission to protect the South African workforce, one can readily expect our authorities to take the US guidance on board in its enforcement objectives. Should this occur, there would be a reinvigorated need for South African HR professionals to consider employees as a competitively significant input, and employment related practices as an activity which may not be coordinated.

ABOUT THE AUTHOR

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