March 22, 2017

Employment Law 2016 Year in Review

This memorandum highlights what we believe were the most significant legal developments and trends from 2016 affecting employers and the employment relationship. In 2016, the Securities and Exchange Commission ("SEC") and the National Labor Relations Board ("NLRB") continued their focus on workplace policies and whether those policies, in their view, inhibit whistleblower protections. The question of whether employers may require employees to agree to class action arbitration waivers also came to a head, with the Supreme Court accepting for argument in its 2017 Term three petitions on the question. We expect continued focus on these areas in 2017, as well as increased lawmaking at state and local levels in light of the Trump Administration's stated priorities and proposed budget cuts at the federal level.

This memorandum is aimed at keeping our clients and practitioners informed of key regulatory and other legal developments in areas affecting the employment relationship. We encourage you to contact us if you have any questions about the information and analysis presented in this memorandum or how the developments and trends we highlight may be relevant to your organization. Please follow our BLOG for developments in this space.

I. WHISTLEBLOWER/RETALIATION LAW

Bottom Line: The SEC continues its focus on workplace policies vis-à-vis the Dodd-Frank Whistleblower Provision; circuit courts of appeal remain divided over whether Dodd-Frank protects whistleblowers who only report internally; and new whistleblower provision in federal Defend Trade Secrets Act of 2016 may counsel in favor of modifying employment documentation.

A. SEC 2016 ANNUAL WHISTLEBLOWER REPORT

The SEC's 2016 Annual Report on the Dodd-Frank Whistleblower Program highlights that in fiscal year 2016 the SEC:

- Received over 4,200 whistleblower tips, the largest number in the program's history.
- Issued awards totaling over $57 million to 13 whistleblowers, a larger dollar amount than all awards made in previous years combined. Six of the awards were among the ten largest whistleblower awards made under the program.
- Initiated its first stand-alone whistleblower retaliation case against an employer for terminating an employee for reporting a potential securities violation.
- Brought multiple enforcement actions based on an employer's use of separation agreements that potentially stifled whistleblowing. Those agreements, among other things, imposed a financial penalty for the violation of a strict non-disclosure provision, or required employees to waive their rights to monetary recovery in the event that they filed a complaint with the SEC.

The 2016 Report reflects that 65% of the 34 individuals who have received whistleblower awards under the program since its inception were insiders of the entity as to which they reported wrongdoing. Moreover, 80% of those insiders either raised their concerns internally to supervisors or compliance personnel, or understood that such personnel were aware of the violations, prior to their making a report to the SEC. Thus, many of the regulated companies that were the subject of successful whistleblower claims had an opportunity to address those claims prior to a report having been made to the SEC.

B. SEC ANNOUNCES REVIEW OF FINANCIAL FIRMS' EMPLOYMENT DOCUMENTATION CONCERNING WHISTLEBLOWER RIGHTS (OCTOBER 2016)

On October 24, 2016, the SEC's Office of Compliance Inspections and Examinations ("OCIE") issued a Risk Alert notifying registered investment advisers and broker-dealers that OCIE staff intends to review those entities' compliance with the rules implementing the Dodd-Frank Act's whistleblower provisions. The reviews will include an assessment of whether employment documents—such as employment offer letters, handbooks and severance agreements—adequately inform employees of their rights to make whistleblower disclosures in light of confidentiality and other provisions limiting employees' disclosure of employers' information. The Risk Alert states that the OCIE may report potential violations to the SEC's Division of Enforcement. Although the OCIE review is specific to registered investment advisers and broker-dealers, the Dodd-Frank whistleblower provisions apply to all publicly traded companies (and their private subsidiaries) and the OCIE review is only one facet of the SEC's continued focus on workplace policies that it considers undermine the purpose of these provisions. Our memorandum on the Risk Alert may be found here.

As part of implementing the Dodd-Frank whistleblower provision, the SEC adopted Rule 21F-17, which provides that "[n]o person may take any action to impede an individual from communicating directly with [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." The SEC has brought several enforcement actions charging employers with violating Rule 21F-17 by including in employment documents language that the SEC believes deters employees from communication with SEC staff regarding possible securities law violations.

The Risk Alert notifies investment advisers and broker-dealers that OCIE staff will examine compliance with Rule 21F-17 when they consider such examination to be appropriate. The examination will include a review of employment documents, including, but not limited to, compliance manuals, codes of ethics and employment and severance agreements. Staff will analyze these employment documents for "provisions that may contribute to violations of Rule 21F-17 in circumstances where their use impedes employees or former employees from communication with the [SEC]." The Risk Alert specifically identifies certain provisions which the SEC has already found to be violative of Rule 21F-17 or potentially problematic, including provisions that:

- purport to limit the types of information that an employee may convey to the SEC or other authorities;
- require departing employees to waive their rights to any individual monetary recovery in connection with reporting information to the government;
- require an employee to represent that he or she has not assisted in any investigation involving the registrant; or
- prohibit disclosures of confidential information, or require an employee to notify and/or obtain consent from the registrant prior to disclosing confidential information, without any exception for *voluntary* communications with the SEC concerning possible securities laws violations.

C. COURTS SPLIT ON DODD-FRANK'S WHISTLEBLOWER PROTECTIONS

The disagreement among courts as to whether a purported whistleblower must report wrongdoing to the SEC in order to be entitled to protection under Dodd-Frank's anti-retaliation provision persists. To date, the Fifth Circuit and certain district courts have held that a whistleblower must report the alleged misconduct directly to the SEC to be entitled to protection under the provision, while the Second Circuit, the Ninth Circuit and a majority of district courts have held that Dodd-Frank's anti-retaliation provision can be invoked not just by individuals who report concerns to the SEC but also by individuals who complain to their employers internally. Currently, an appeal is pending in the Sixth Circuit on this issue. The SEC's Rule 21F-17 takes the position that the anti-retaliation provision applies to employees who report potential securities law violations internally to their employers. The issue seems ripe for Supreme Court review.

Whether internal reports (or reports to agencies other than the SEC) qualify for protection under Dodd-Frank is important because Dodd-Frank gives additional rights and remedies to whistleblowers than those available under the Sarbanes-Oxley Act ("SOX"). As a result, acceptance of the broad interpretation of the Dodd-Frank anti-retaliation provision would render the SOX cause of action a dead letter to a significant extent, as the Dodd-Frank cause of action is far more enticing for individuals given its procedural and substantive advantages.

D. FEDERAL DEFEND TRADE SECRETS ACT CREATES WHISTLEBLOWER IMMUNITY (MAY 2016)

The Defend Trade Secrets Act of 2016 (the "DTSA") creates for the first time a federal civil cause of action for theft of trade secrets of U.S.-based individuals and companies, which may be of value to companies who were previously limited to state courts for protection. The DTSA authorizes federal district courts to award damages, injunctive relief and attorneys' fees to private plaintiffs proving theft of trade secrets and, in extraordinary circumstances, to order ex parte seizure of property where necessary to prevent the dissemination of trade secrets.

The DTSA grants immunity from criminal and civil charges "under any Federal or State trade secret law" to individuals who disclose trade secrets in two circumstances: (1) whistleblowers who disclose information containing trade secrets to a federal, state, or local government for the purpose of reporting a suspected violation of the law; and (2) individuals who "file a lawsuit for retaliation by an employer for reporting a suspected violation of law" provided that the document containing the trade secret is filed under seal.

To obtain the full benefits of the law, employers must include specific notice of the DTSA's immunity provision in "any contract or agreement with an employee that governs the use of a trade secret or other confidential information." "Employee" is defined to "include[] any individual performing work as a contractor or consultant for an employer." An employer's compliance with the notice requirement is satisfied "if the employer provides a cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law." Thus, it appears that the provision in the employee agreement can be quite brief, provided the employer adopts a policy in its handbook to which it could refer. If an employer does not comply with the notice requirement, it may not recover exemplary damages or attorney fees in an action against an employee to whom notice was not provided, but may still recover other damages the DTSA authorizes. The notice provision applies to "contracts and agreements that are entered into or updated after the date of the enactment of" the DTSA – *i.e.*, after May 11, 2016. Our memorandum on the DTSA may be found here.

II. STATUTORY AND REGULATORY DEVELOPMENTS

***Bottom Line*:** Federal overtime regulations that substantially increased salary thresholds for the white-collar exemption are in limbo, but New York State moves ahead with similar increases; EEOC issues final rules regarding employer wellness programs and regulates pay data reporting to close gender "wage gap"; U.S. DOL joins NLRB in seeking to expand joint-employer liability and issued final "persuader rule." But the incoming administration and Congress may well reverse or alter many of these developments on the federal level. Locally, New York State's Achieve Pay Equity bill forbids employers from prohibiting employees from discussing their compensation with each other.

A. FEDERAL OVERTIME REGULATIONS

1. DOL Finalizes New Overtime Regulations. (May 2016)

On May 18, 2016, the U.S. Department of Labor ("DOL") released its final rule revising overtime regulations. The final rule—which had been scheduled to take effect on December 1, but is now in limbo due to a nationwide injunction against its implementation issued in November, *see* discussion below—included the following significant changes:

- A substantial increase to salary thresholds for the "white collar" exemptions under the Fair Labor Standards Act (the "FLSA")—*i.e.*, executive, administrative, professional, computer, and outside sales employees—from $455 per week ($23,660 per year) to $913 per week ($47,476 per year). The new rate was established based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, currently the South. The DOL estimates that this change will impact 4.2 million white collar workers in fiscal year 2017.
- Employers may satisfy up to 10 percent of the standard salary requirement with nondiscretionary bonuses, incentive payments, and commissions, provided that these forms of compensation are paid at least quarterly.
- A significant increase to the salary thresholds for the highly compensated employee exemption from $100,000 per year to $134,004. The DOL estimates that this change will impact 65,000 workers in fiscal year 2017.
- The minimum salary thresholds for both the "white collar" and highly compensated exemptions will automatically update every three years on January 1 (beginning in 2020) using a fixed percentile of wages.

The DOL did not change any of the existing job duty requirements to qualify for exemption (the so-called "duties test"), even though it had requested comments on the same. Our memorandum on the regulations may be found here.

2. Federal District Court Judge Issues Nationwide Preliminary Injunction Blocking New Overtime Regulations. (November 2016)

On November 22, in *Nevada* v. *U.S. Department of Labor*, the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction preventing the DOL from enforcing its new overtime rules, which were scheduled to go into effect on December 1. As noted above, the new regulations provide that employees earning less than $47,476 per year will not qualify for the white-collar exemption to the minimum-wage and overtime requirements of the FLSA, and therefore will be eligible for overtime, irrespective of their job duties. The district court held that the DOL likely exceeded its statutory authorization because Congress did not intend categorically to exclude employees with white-collar duties from the exemption based solely on their salary levels. The court therefore enjoined the DOL's regulations nationwide, concluding that the costs of compliance with the regulations constituted irreparable harm.

This decision means that employers are not required to pay overtime in accordance with the new federal overtime rules by December 1, but the injunction is only temporary and it is uncertain how long it will remain in effect. The prior administration appealed the ruling – at the request of the new administration, the briefing schedule has been delayed. The district court still must consider whether to issue a permanent injunction, and the new administration may decide not to proceed with the appeal. If the preliminary injunction were subsequently lifted, employers could theoretically face retroactive liability for failure to pay overtime in accordance with the new regulations. Accordingly, employers should weigh the legal and business risks in not complying with the new regulations unless and until there is a final resolution of the matter. To the extent that employers elect not to comply at this time and have already announced or implemented pay changes, they should be mindful of applicable state and local requirements, including those such as in New York State, which independently of the federal government mandates minimum-salary levels as a condition to exemption from overtime for certain employees, and those relating to notices in changes to pay, which may prevent employers from immediately rolling back changes. Our memorandum on the *Nevada* decision may be found here.

B. NEW YORK STATE OVERTIME REGULATIONS (DECEMBER 2016)

On December 28, 2016, the New York State Department of Labor issued notices of adoption of new rules, effective December 31, 2016, substantially increasing the minimum required weekly salary thresholds for qualification for the executive and administrative overtime exemptions. In New York City, for employers with 11 or more employees, the New York rules increase the 2017 minimum weekly salary threshold for the executive and administrative exemptions from $675 per week ($35,100 annually) to $825 per week ($42,952 annually). New York's regulations confirm that employers in that State must comport with the new rules notwithstanding the federal developments. Our memorandum on the regulations may be found here.

C. EEOC DEVELOPMENTS

1. EEOC Issues Final Rules on Employer-Sponsored Wellness Programs. (May 2016)

On May 16, 2016, the Equal Employment Opportunity Commission (the "EEOC") issued final rules regarding how employer-sponsored wellness programs can comply with the Americans with Disabilities Act and other relevant anti-discrimination statutes. The important components of the rules address two elements of a wellness program: the contours of what makes a program "voluntary" and the role of the health information collected as part of the program.

An employer cannot outright require participation in a wellness program nor retaliate for nonparticipation. Conditioning health care coverage on participation in a wellness program also renders the program involuntary and impermissible. The EEOC concludes that awarding financial incentives up to 30% of the cost of self-coverage in exchange for plan participation does not render a wellness plan involuntary. The incentives can take many forms, including reductions to premiums, avoidance of a penalty, or in-kind rewards. This percentage mirrors the percentage applicable to wellness programs regulated by the Affordable Care Act. Thus, the EEOC's position is that attaching wellness-program incentives to a health factor—such as meeting a target weight loss goal—does not constitute discrimination if the incentives do not exceed 30% of the cost of an employee's health care coverage.

The rules also place notification and confidentiality restrictions on disability-related or genetic information collected as part of a wellness program. The employer must only be able to access information gathered in connection with a wellness program in aggregate and in a way that is designed to ensure that the identity of a particular employee is not disclosed. The rules require employers to notify employees what information will be gathered, how it will be used, who will have access to it and how the employer will ensure the confidentiality of the information.

2. EEOC Revises Pay Data Reporting Requirements in Employer Information Report (EEO-1). (September 2016)

In September, the EEOC finalized a rule that will require employers with 100 or more employees to collect and submit pay data by gender, race and ethnicity on their employer information report, known as the EEO-1. The current EEO-1 only collects data about race, gender and job category. The revised form will ask employers to provide that information with (i) summary pay data, as to which employers must report the total number of full and part-time employees by demographic categories in each of 12 pay bands listed for each EEO-1 job category based on W-2 wages; and (ii) the number of hours worked by employees in each pay band. The form will go live in 2017 and the deadline for the 2017 report will be March 31, 2018. According to the EEOC, the additional data will improve its investigations in pay discrimination based on gender, race and ethnicity. This rule may well be subject to revocation as the EEOC changes composition. As of March, 2017, Victoria Lipnic, a Republican, has been named Acting Chair. The other commissioners are former Chair Jenny Yang, whose term ends this July; Chai Feldblum, whose term ends on July 1, 2018; and Charlotte Burrows, whose term ends July 1, 2019. There is one vacancy and, thus, after former Chair Yang's departure this Summer, the President will have the opportunity to appoint a Republican majority.

3. EEOC Issues Five-Year Strategic Enforcement Plan. (October 2016)

In October, the EEOC issued a Strategic Enforcement Plan for Fiscal Years 2017-2021. The Strategic Enforcement Plan continues to prioritize the areas identified in the EEOC's previous Strategic Enforcement Plan, which include "eliminating barriers in recruitment and hiring"; "protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination"; "ensuring equal pay protections for all workers"; and "preventing systemic harassment." The 2017-2021 Strategic Enforcement Plan added two areas as emerging issues of priority: "issues related to complex employment relationships in the 21st century workplace"; and "backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, as tragic events in the United States and abroad have increased the likelihood of discrimination against these communities."

D. OTHER U.S. DEPARTMENT OF LABOR DEVELOPMENTS

1. DOL Issues Administrative Interpretation on Joint-Employer Liability. (January 2016)

On January 20, 2016, the DOL issued an Administrative Interpretation (the "Guidance") setting forth its position on joint-employer status for purposes of liability under the FLSA. The Guidance states that the analysis of whether a "vertical joint employment" relationship exists—in which case, the worker should be considered an employee of both the employer of record (e.g., a staffing agency, vendor or subcontractor) and the company that contracts with the employer to provide services—should turn on "the broader economic realities of the working relationship" between the worker and the company and not the company's "control over the employee," which is the traditional test applied by the DOL and courts. Although not legally binding, the Guidance is intended as a model for courts to consider and follow and makes clear the DOL's motivation for an expansive joint-employer test: the joint employer under an "economic realities" test may "be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance." Our memorandum on the subject may be found here.

The DOL's position on joint-employer status aligns with that of the NLRB, which decided in August 2015 that its new standard for assessing a joint-employer relationship is based on the putative joint employer's *right* to control terms and conditions of employment, irrespective of whether such control is directly exercised or exercised at all. The NLRB's decision is of interest to any company that uses the services of vendor employees on its premises, pursuant to agreements that give the company at least some control over the selection of vendor employees or the manner in which the vendor employees work. Our memorandum on the subject may be found here.

2. DOL "Persuader Rule" Adopted and Then Permanently Enjoined. (November 2016)

On April 25, 2016, the DOL's so-called Persuader Final Rule went into effect. The rule concerns the reporting obligations of employers under the Labor-Management Reporting and Disclosure Act of 1959 in connection with their use of labor relations consultants to develop and implement their message in response to union organizing campaigns. The rule requires that employers and the consultants they hire file reports not only for direct persuader activities–*i.e.,* when labor consultants talk directly to workers on behalf of management—but also for indirect persuader activities, such as when the consultants retained by the employer script what managers and supervisors say to workers. Indirect persuasive activities that must be reported under the rule include when consultants plan, direct or coordinate managers to persuade workers, provide persuader materials to employers to disseminate to workers, conduct union avoidance seminars, or develop or implement personnel policies or actions to persuade workers.

On November 16, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide permanent injunction against the persuader rule. An interlocutory appeal of the district court's June 2016 preliminary injunction of the rule is pending before the Fifth Circuit. But it is likely that the Trump

Administration will withdraw the appeal of the preliminary injunction and allow the permanent injunction to stand.

E. NEW YORK STATE LABOR LAW AMENDMENTS AFFECT EMPLOYER POLICIES CONCERNING WAGE DISCLOSURE (JANUARY 2016)

The Achieve Pay Equity Bill amended Sections 194 and 198 of the New York State Labor Law and became effective on January 19, 2016. The law forbids employers from prohibiting an employee from "inquiring about, discussing, or disclosing the wages of [an] employee or another employee." An employer may, however, in a written policy provided to all employees, establish reasonable limitations on employees' communications concerning their wages, including prohibiting an employee from discussing a co-worker's wages without prior permission. The Act also modifies the burden of proof for plaintiffs alleging discriminatory wage differentials and increases liquidated damages available. Our memorandum on the law may be found here.

The NLRB has long taken the position that employers may not forbid employees covered by the National Labor Relations Act ("NLRA") from discussing their compensation. The new law appears to nullify any distinction New York employers may have once drawn between supervisory personnel—who are not eligible to join a union—and ordinary employees with respect to prohibitions on discussing wages.

III. CLASS AND COLLECTIVE ACTIONS

***Bottom Line*:** The Supreme Court has granted certiorari to decide whether class-action and collective-action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act.

A. SUPREME COURT GRANTS REVIEW OF ENFORCEABILITY OF CLASS ARBITRATION WAIVERS

In January 2017, the Supreme Court granted and consolidated three cert petitions that present the question of whether class-action and collective-action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (the "FAA"). The Supreme Court announced on February 8, 2017 that it would delay hearing the consolidated cases until its October 2017 Term, with the implication that, by that point, Judge Gorsuch will have been confirmed as the ninth justice. The three cases on appeal are *Murphy Oil USA* v. *N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015); *Morris* v. *Ernst & Young*, 834 F.3d 975 (9th Cir. 2016); and *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).

In *Murphy Oil*, the Fifth Circuit held that a mandatory class and collective-action waiver in an employer's arbitration agreement did not violate the NLRA because the use of class action procedures is not a substantive right under the NLRA. The NLRB argued that such waivers violate the NLRA because they deprive employees of their statutory right to engage in "concerted activities" in pursuit of their "mutual aid or protection." In the Board's view, Sections 7 and 8 of the NLRA prohibit an employer from "requir[ing] employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or their working conditions against the employer in any forum, arbitral or judicial." *See D.R. Horton*, 2012 WL 36274, at *1 (NLRB Jan. 3, 2012).

The Second and Eighth circuits have also rejected the board's reasoning. *See Sutherland* v *Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *Cellular Sales of Missouri* v. *N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016). In *Sutherland*, the Second Circuit held that the FLSA "does not preclude the waiver of collective action claims." 726 F.3d at 296. The Second Circuit reasoned that the FLSA's opt-in requirement for collective actions meant that Congress also gave employees the power to waive their right to participate in collective actions. In *Cellular Sales*, the Eighth Circuit reaffirmed its holding in *Owen* v. *Bristol Care, Inc.* that, "given the absence of any contrary congressional command from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, "arbitration agreements containing class waivers are enforceable in claims brought under the FLSA." 702 F.3d 1050, 1055 (8th Cir. 2013).

The Seventh and Ninth circuits, however, have adopted the Board's position. In *Morris* v. *Ernst & Young*, the Ninth Circuit held that the "Board's interpretation of § 7 and § 8 is correct. Section 7's 'mutual aid or protection clause' includes the substantive right to collectively seek to improve working conditions through resort to administrative and judicial forums. Under § 8, an employer may not defeat the right by requiring employees to pursue all work-related legal claims individually." And in *Lewis* v. *Epic Systems Corp*., the Seventh Circuit held that Sections 7 and 8 of the NLRA rendered Epic's arbitration provision unenforceable. Epic required employees to agree to bring any wage-and-hour claims against the company only through individual arbitration and the agreement did not permit collective arbitration or collective action in any other forum.

In its petition for certiorari, the NLRB framed the question presented as: "Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in 'concerted activities' in pursuit of their 'mutual aid or protection,' 29 U.S.C. § 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. § 2."

IV. HIRING ISSUES

Bottom Line: Hiring practices remain an active area of lawmaking for state and local governments; DOJ and FTC issue joint Guidance directed at HR professionals concerning application of antitrust laws to hiring practices.

A. NEW YORK CITY CRIMINAL BACKGROUND CHECK GUIDANCE (MARCH 2016)

On March 6, 2016, the New York City Commission on Human Rights released an updated Legal Enforcement Guidance regarding the Fair Chance Act (the "FCA"). The FCA amended the New York City Human Rights Law to prohibit employers from inquiring into the arrest or criminal conviction record of an applicant for employment prior to extending a conditional offer to the applicant. The law permits employers to examine applicants' criminal records after making such conditional offers. An employer that rejects an applicant on the basis of a post-offer criminal record inquiry must provide a written explanation of the decision and allow the applicant at least three business days to respond to the explanation, while holding open the position sought by the applicant. The act exempts employers from compliance in situations where applicable federal, state, or local laws or regulations require consideration of applicants' criminal background information in connection with hiring decisions.

Significantly, the FCA Guidance provides that "employment applications cannot ask whether an applicant has a criminal history or a pending criminal case or authorize a background check." However, the FCA Guidance takes the position that inadvertent disclosures of criminal record information before a conditional offer of employment do not create employer liability.

The FCA Guidance further states that the following are per se violations of the FCA: "Declaring, printing, or circulating – or causing the declaration, printing, or circulation of – any solicitation, advertisement, or publication for employment that states any limitation or specification regarding criminal history, even if no adverse action follows. This includes, without limitation, advertisements and employment applications containing phrases such as: "no felonies," "background check required," and "must have clean record."

B. FTC AND DOJ GUIDANCE ON ANTITRUST LAW APPLICATION TO HIRING (OCTOBER 2016)

The Federal Trade Commission and Department of Justice Antitrust Division jointly issued an Antitrust Guidance for Human Resource Professionals in October 2016. The Antitrust Guidance states that it "is intended to alert human resources (HR) professionals and others involved in hiring and compensation decisions to potential violations of antitrust laws." The Antitrust Guidance is written in casual language and conveys two principal points: "Agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal"; and "Avoid sharing sensitive information [*i.e.*, salary or other terms of employment] with competitors."

The Antitrust Guidance concludes with a series of questions and answers. The questions are presented as queries by HR professionals and include, for example, the question: "I am an HR professional who serves on the board of our industry's professional society. We are interested in determining current and future trends in industry wages. Can we distribute a survey asking companies within the industry about current and future wages?" The Antitrust Guidance answered: "It may be unlawful for you, a member of the industry, to solicit a competitor's company-specific response to a wage survey that asks about current or future wages, or to respond to a competitor's request to provide such information. In addition, it may be unlawful for the professional society to distribute company-specific information about past, current, and future wages. Competitors' exchange of nonpublic, company-specific information about current and future wages may violate antitrust law, unless certain survey procedures are followed to mitigate the risk of competitive harm."

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