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Changing Tides in HR Antitrust: What Employers Need to Know

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Human resources ("HR") departments have historically had little reason to hold antitrust law top of mind, as there was little in the way of enforcement activity concerning personnel issues.[1] In recent years, however, agreements between employers not to "poach" each other's highly skilled employees resulted in a number of serious civil enforcement actions by the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), the most significant of which involved an extensive no-poaching agreement between the titans of Silicon Valley.[2] In a series of policy pronouncements beginning in 2016, DOJ and FTC announced a new focus on no-poach and other illegal agreements in employment, and they issued extensive guidance to HR professionals and managers.[3] In it, the agencies warned that no-poach agreements are per se illegal and could subject perpetrators to criminal prosecution, a warning DOJ officials have since repeated, promising visible action in the coming months.[4]

DOJ has begun to deliver on its promises of aggressive enforcement, and in a way that suggests it means business. On April 3, 2018, DOJ announced that two rail industry equipment suppliers had agreed to a consent decree not to renew no-poach agreements that dated from 2009 and terminated prior to 2016.[5] Although DOJ pursued the case as a civil, rather than criminal, matter, it ascribed this solely to its previously announced policy of pursuing criminal prosecutions only for agreements that began or continued after the 2016 policy was announced.[6] Having run up the colors on no-poach agreements in publishing its 2016 guidance and promising criminal prosecutions, DOJ's publishing of the April consent decree was the proverbial shot across the bow.

Not surprisingly—and likely as intended by DOJ—the 2016 guidance, coupled with a conduct-only consent decree announced just prior to the ABA Antitrust Section's annual Spring Meeting, was a lively topic of discussion for the bar. In-house lawyers on a Spring Meeting panel dedicated to the topic noted that the in-house community was surprised

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[1] Prior to 2010, only a handful of anti-competitive employment agreements resulted in enforcement actions. *See* Final Judgment, *United States v. Ariz. Hosp. & Healthcare Ass'n*, No. CV 07-1030-PHX (D. Ariz. 2007), *available at* https://www.justice.gov/atr/case-document/final-judgment-17; *United States v. Ass'n of Family Practice Residency Dirs.*, No. 95-0575-CV-W-2, 1996 U.S. Dist. LEXIS 14681 (W.D. Mo. Aug. 15, 1996); *In the Matter of The Council of Fashion Designers of Am.*, Dkt. No. C-3621, 1995 FTC LEXIS 349 (1995); *United States v. Utah Soc'y for Healthcare Human Res. Admin.*, No. 94C282G, 1994 U.S. Dist. LEXIS 17531 (D. Utah Oct. 27, 1994); *In the Matter of Debes Corp.*, Dkt. No. C-3390, 1992 FTC LEXIS 202 (1992).

[2] *See* Competitive Impact Statement, *United States v. Lucasfilm Ltd.*, 75 Fed. Reg. 81651, 81655 (D.D.C. Dec. 28, 2010); Competitive Impact Statement, *United States v. Adobe Sys., Inc.*, 75 Fed. Reg. 60820 (D.D.C. Oct. 1, 2010); Competitive Impact Statement, *United States v. eBay, Inc.*, 79 Fed. Reg. 27639 (N.D. Cal. May 14, 2014).

[3] United States Dep't of Justice and Federal Trade Comm'n, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), *available at* https://www.justice.gov/atr/file/903511/download.

[4] Andrew C. Finch, Principal Deputy Asst. Att'y Gen., Dep't of Justice, Antitrust Division, Remarks Delivered at The Heritage Foundation: "Trump Antitrust Policy After One Year" (Jan. 23, 2018), *available at* https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-c-finch-delivers-remarks-heritage.

[5] Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees, Dep't of Justice Press Release (April 3, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[6] *See* Proposed Final Judgment and Competitive Impact Statement, *United States v. Knorr-Bremse AG*, 83 Fed. Reg. 16382 (D.D.C. Apr. 16, 2018).

by the guidance when it was first announced.[7] April's consent decree has only heightened expectations about what may come, and government officials are actively encouraging increased attention to this topic. Most recently, at a CLE panel held on April 17, 2018, Deputy Assistant Attorney General Barry Nigro, Jr. stated, "Going forward, we intend to … investigate those [no-poach agreements] and, if appropriate, pursue them criminally … This is an area that is active [at DOJ] … I've personally been surprised at how many of these agreements I've stumbled across … many more than I expected … including companies whose names you all know … There is more activity in this area than you realize."

What Does This Mean for Employers?

Although the 2016 guidance and recent enforcement action may be startling to HR professionals unfamiliar with antitrust law, employers should not panic. The increased activity surrounding HR antitrust enforcement signals no change in the law or even the agencies' interpretation of the law. The law remains as it has for years and can be summarized in one sentence:

Naked agreements to fix prices (even among purchasers of services) or output are illegal per se, but agreements that are ancillary to a legitimate business arrangement are evaluated for whether they are reasonable under the circumstances.

From this follow several important principles for HR professionals and employers in general:

- No-poach agreements, wage-fixing agreements and agreements not to cold call are considered naked restraints on competition and are per se unlawful. Those who have begun or continued such agreements after the 2016 guidance was issued *will likely* be criminally prosecuted.[8] With DOJ having issued a clear warning through its April 2018 consent decree, there should be no doubt about that.
- Agreements affecting markets for highly skilled or specialized employees will continue to be a particular focus of scrutiny. An agreement between relatively few employers—even just a couple—can dramatically affect these employees' choices and wages, whereas the same is probably not true for employees possessing more fungible and general skills. Although employers should always remember that no-poach agreements will be considered illegal no matter what their market effect may be, agreements not to poach rocket scientists, cancer researchers and software developers are likely to land with particularly heavy thuds on the antitrust desks at DOJ.
- Liability extends to both the companies and the individuals responsible for entering into such agreements. Specifically, HR professionals, in-house employees responsible for recruitment and hiring, and high-ranking executives could now face criminal charges if they enter into (or continue to enforce preexisting) no-poach, non-solicit or no-cold-call agreements with competitors.
- Agreements and actions ancillary to a legitimate procompetitive business purpose should continue to be judged for their reasonableness.[9] Information exchanges on salaries and benefits in the course of due diligence for mergers or acquisitions are permissible if they are limited to what is reasonably necessary to value the transaction, and if appropriate screens are in place. The same is true for non-solicitation agreements in connection with the retention of consultants, auditors, recruiting agencies or businesses that provide temporary employees; the settlement of legal disputes; some supply or sales agreements, or as part of legitimate collaboration agreements. These are all assessed for reasonableness and should not be subject to per se condemnation.[10]

[7] Matthew Perlman, *No-Poach Guidance Caught In-House Counsel Off Guard*, LAW360, Apr. 12, 2018, *available at* https://www.law360.com/competition/articles/1033109/no-poach-guidance-caught-in-house-counsel-off-guard (paywall).
[8] We qualify with "likely" because per se categorization is reserved for agreements that have historically been broadly recognized as always harmful to competition, limited as yet to a narrow set of actions. The possibility of differentiating circumstances should never be discounted.
[9] *See* Competitive Impact Statement, *United States v. Lucasfilm Ltd.*, 75 Fed. Reg. 81651, 81655 (D.D.C. Dec. 28, 2010).
[10] *Id.*

What Should Employers Do In Light of Recent Events?

Employers and HR professionals should consider the following best practices:

- Employees responsible for the recruitment or hiring of company personnel, including HR professionals and company executives, should not discuss their company's internal employment practices with competitors.
- Employers should refresh or adopt company-wide policies to curb unlawful conduct from occurring. Ensure that all antitrust training materials explicitly ban *all* employees from engaging in no-poach, non-solicitation, non-recruitment, wage fixing or similarly restrictive agreements or discussions with a competitor for employee services. Require employees to attend an annual antitrust training seminar addressing issues that may arise in the context of recruitment, hiring and wage fixing. Consider implementing a company-wide zero-tolerance policy for employees who engage in conduct that could potentially give rise to antitrust violations.
- Any settlement of a legitimate dispute with a competitor, e.g., for enforcement of restrictive covenants, trade secrets, and other intellectual property rights, should be reviewed with experienced antitrust counsel if the proposed settlement includes any restraints on future solicitation or hiring of a competitor's current or former employees.
- Because DOJ has announced that it will pursue no-poach agreements criminally, companies that become aware of such an agreement to which they may be a party should *immediately* consult an antitrust attorney about the possibility of self-reporting to DOJ in order to claim leniency. Because corporate leniency is extended only to the first conspirator to report, time is of the essence in such situations; the extension or denial of leniency has, at times, been determined by only a few hours' delay in reporting.[11]
- Even if DOJ or FTC concludes that a restrictive agreement among competitors does not run afoul of federal antitrust laws, the agreement could still violate the individual laws or regulations of a specific state. As such, employers should consult with an attorney to ensure that the company's employment practices are in full compliance with all relevant laws and regulations.

If you have any questions concerning the joint antitrust guidance published by DOJ and FTC, or would like to review any of your relevant agreements, please contact **Brian K. McCalmon** at +1 (202) 312-3334, **Haley P. Tynes** at +1 (212) 407-6997, or the Vedder Price attorney with whom you have previously worked.

[11] *See* United States Dep't of Justice, FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM, AND MODEL LENIENCY LETTERS (2017), *available at* https://www.justice.gov/atr/page/file/926521/download.