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No-Poach and Non-Solicitation Agreements

Naked Antirust Violations or Legitimate Business Arrangements

Lee H. Rubin
Partner, Palo Alto/San Francisco
+1 650 331 2037
lrubin@mayerbrown.com

Jessica A. Michaels
Partner, Chicago
+1 312 701 7121
jmichaels@mayerbrown.com

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Overview

- What is a “No-Poach” Agreement and What’s Wrong With Them?
- Other Types of Agreements that Impact Labor Markets
- 2016 DOJ/FTC Guidance for Human Resource Professionals
- Recent Criminal Enforcement Targeting No-Poach and Wage-Fixing Agreements
- When are Non-Solicitation Provisions OK?

What is a "No-Poach" Agreement?

- "No-Poach" agreements are promises between companies not to compete for each other's employees
  - May be a written or oral understanding
  - May restrict one or both parties to the agreement
  - May restrict recruiting, solicitation, hiring, or similar kinds of competition for workers that impact an employee's ability to move from one company to another
- May exist on their own (a "naked" agreement) or within the context of another agreement / transaction (or something in between)
  - For example, M&A transactions, NDAs, and settlement agreements resolving business disputes

Other Types of Agreements that Impact Labor Markets

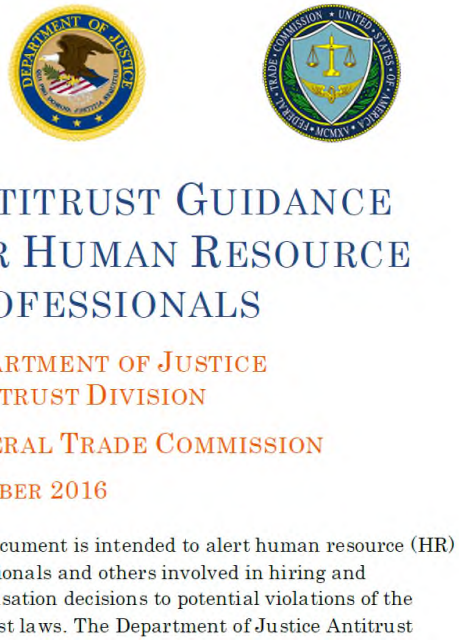
- Wage-Fixing Agreements
  - Agreeing with another company to set salaries at a certain level or within a range
  - Agreeing with a competitor not to increase salaries or to increase salaries a certain percentage
  - Agreeing on other terms of compensation
- Non-Compete Agreements
  - Agreements not to compete for certain customers, within a certain industry, or within a certain geographic area for a set duration

Antitrust & No-Poach Agreements: What's the Problem?

- Sherman Act § 1 prohibits contracts, combinations and conspiracies that unreasonably restrain trade
  - No-poach, non-solicitation, and wage-fixing agreements are considered a form of price-fixing or market allocation agreements
- Naked wage-fixing are *per se* illegal under the antitrust law; DOJ also has taken the position that naked "no poach" agreements are *per se* illegal, though lack of settled law
  - Non-solicitation agreements that are reasonably necessary to a larger legitimate collaboration (i.e., ancillary restraints) are subject to the rule of reason
- The federal antitrust agencies view companies that compete to hire or retain employees as "competitors in the employment marketplace"
  - It doesn't matter if the companies make the same products

Antitrust Guidance for Human Resources Professionals

- October 2016: FTC and DOJ jointly issued *ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS* ("HR Guidance").
- HR Guidance makes clear:
  - Government enforcers are targeting anticompetitive conduct that affects *employees*
    - Departs from traditional antitrust focus on harm to consumers
  - No-poach agreements or other agreements not to compete on terms of employment may lead to criminal prosecution



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust

HR Guidance Followed High-Profile Civil Enforcement Actions

- *U.S. v. Adobe Systems, Inc. et al.*
  - In 2011, Adobe, Apple, Google, Intel, Intuit, and Pixar settled DOJ civil charges that they had entered into illegal employee no-poach agreements.
- *U.S. v. Lucasfilm Ltd.*
  - That same year, DOJ and Lucasfilm also settled charges that Lucasfilm and Pixar entered into an agreement not to cold call employees or make counteroffers under certain circumstances, and to provide notification when making employment offers to each other's employees.
- *United States v. eBay, Inc.*
  - In 2014, eBay and the DOJ settled civil charges that eBay and Intuit had entered into an agreement that restricted their ability to actively recruit employees from each other, including at one time a complete ban on eBay's hiring of Intuit employees.

Private Litigation Followed Civil Enforcement Actions

- *In re High Tech Employee Antitrust Litigation*
  - In 2013, Lucasfilm and Pixar settled the claims against them for $9 million, while Intuit settled for $11 million.
  - In 2015, after years of additional litigation Adobe, Apple, Google, and Intel settled the claims against them for $415 million.
- *In re Animation Workers Antitrust Litigation*
  - In 2016 the parties reached a settlement resulting in Blue Sky paying $5.95 million, Sony paying $13 million, and Dreamworks paying $50 million. Additionally, Pixar, Lucasfilm, Disney, and Image Movers Digital paid a combined $100 million.

HR Guidance Provides Two General Principles

- Avoid entering into "naked" agreements regarding the terms of employment with other firms that compete to hire employees
  - Includes agreements relating to salary or other benefits/compensation or whether to hire/solicit employees at all. Agreements do not have to be in writing; can be oral or inferred by conduct
- Avoid sharing sensitive employment-related information
  - Even in a lawful M&A context antitrust risk exists if: (1) the parties share information about the terms and conditions of employment; and (2) the parties compete for employees.
  - Parties should consider using various safeguards before sharing this kind of information with competitors.

What Has Happened Since the HR Guidance Was Issued?

- The Agencies have issued numerous statements indicating a continued focus on the labor markets

- January 2019, AAG Delrahim: "Shocked" by how many of these agreements exist. "[C]riminal prosecution of naked no-poach and wage-fixing agreements remain a high priority."
- May 2018, Barry Nigro: The prevalence of abusive employment practices was "eye opening."
- Spring 2018 Antitrust Division Update: "Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets."
- January 2020 WSJ Interview, AAG Delrahim indicated that a criminal no-poach case would be filed in the first half of the year

Despite DOJ's Warnings, Most Enforcement Actions Have Been Civil

- In April 2018, Knorr and Wabtec settled DOJ (civil) allegations that the companies had a no-poach agreement
  - DOJ learned of the agreement through documents collected as part of a merger review relating to a deal between the two companies (both developed rail equipment)
  - DOJ cleared the deal but pressed the no-poach claim
  - The settlement enjoined the no-poach agreement and mandated ongoing compliance and monitoring
- Civil litigation followed the DOJ civil enforcement action, resulting in a settlement of $48.95 million.

Wabtec CORPORATION

KNORR BREMSE

DOJ Statements of Interest in Private Litigation

- In addition to its own enforcement actions, DOJ has submitted statements of interest in private no-poach litigations
- *Seaman, et. al. v. Duke University*
  - Duke and UNC entered into an agreement where lateral faculty moves were not permitted
  - The Plaintiffs and DOJ argued the *per se* rule should apply. Duke asserted rule of reason was more appropriate. Duke settled the case for almost $55 million.
- *Harris v. CJ Star, LLC*; *Richmond v. Bergey Pullman Inc.*; *Stigar v. Dough Dough, Inc.*
  - Arby's, Carl's Jr., and Auntie Anne's had franchise agreements which prohibited seeking to employ employees of the franchisor or other franchisees.
  - DOJ argued that the franchisors and franchisees are not necessarily one entity, and the pleaded facts showed they were "capable of concerted action."

DOJ Issued Its First Wage-Fixing Indictment in December 2020

- On December 9th, 2020 the DOJ indicted Neeraj Jindal, the former owner of a therapist staffing company, for conspiracy to fix prices by lowering rates paid to physical therapists and physical therapist assistants in north Texas.
- DOJ alleged that Jindal and his co-conspirators—another therapist staffing company in Dallas-Fort Worth and "various commercial entities and individuals"—shared non-public rate information, discussed and agreed to decrease pay rates, and implemented the pay rate decrease.
  - Alleged conspiracy took place from approximately March 2017 to August 2017
  - DOJ claims the actions of the co-conspirators were *per se* unlawful
  - Indictment included excerpts from text messages among the co-conspirators discussing pay rates

DOJ Filed Its First Criminal No-Poach Charges in January 2021

- On January 5th, 2021 the DOJ indicted Surgical Care Affiliates, a healthcare company that owns outpatient medical care facilities across the U.S., for entering into illegal no-poach agreements.
- The indictment alleged that SCA conspired with other health care providers to suppress competition for the "service of senior-level employees by agreeing not to solicit each other's senior-level employees."
- The indictment includes email excerpts from the CEO of SCA admitting that he met with the CEO of a competitor and they reached an agreement "that [they] would not approach each other's employees proactively."

SCA Surgical Care Affiliates®

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When Are Non-Solicitation Provisions OK?

- The DOJ recognizes that in some situations agreements related to employee solicitation and recruitment are "reasonably necessary for, and thus ancillary to, legitimate procompetitive collaborations."
- Final judgments in two of the DOJ civil no-poach cases allow non-solicitation provisions reasonably necessary for:
  - Mergers or acquisitions, investments, or divestitures;
  - Contracts with consultants, auditors, outsourcing vendors, and recruiting agencies;
  - The settlement or compromise of legal disputes; and
  - Certain contracts, including those necessary for joint ventures and projects, contracts with OEMs, and certain providers or recipients of services.
- However, certain reasonableness limitations apply
- Restrictions do not apply to independent decisions to restrict or limit hiring

Limitations on Ancillary Non-Solicitation Provisions

- Even when a non-solicitation provision is ancillary to a larger legitimate collaboration, previous DOJ consent decrees make it clear that the provision must meet certain additional requirements:
  - identify, with specificity, the agreement to which it is ancillary;
  - be narrowly tailored to affect only employees who are anticipated to be directly involved in the agreement;
  - identify with reasonable specificity the employees who are subject to the agreement;
  - contain a specific termination date or event; and
  - be signed by all parties to the agreement, including any modifications to the agreement (if written).

Non-Solicitation Provisions

- The Rule of Reason applies to non-solicitation and non-compete provisions ancillary to a larger business transaction.
- Ancillary restraint: a restraint that is reasonably necessary to a legitimate business transaction.
- There must be a legitimate reason to enter the agreement, so it is important to consider why the non-compete is necessary.
  - "A mere general desire to be free from competition is not a legitimate business interest." *In the Matter of Axon Enterprise, Inc.*
- Additionally, the agreement must be narrowly tailored in scope (employees covered and geographic scope) and duration.

Questions

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