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The Stakes Are High For Those Caught In No-Poach Probes

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On Friday, June 16, 2017, the Financial Times reported that the U.S. Department of Justice is examining whether Barclays breached antitrust laws by agreeing not to hire JPMorgan Chase employees.[1]


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The stakes are higher than ever for those caught up in such probes, since the Justice Department announced in October 2016 its intention to proceed criminally against parties to "naked wage-fixing and no-poaching agreements," thus departing from its earlier practice of only pursuing this conduct civilly.[2] This significant shift in enforcement policy represents an Obama administration initiative, however, and it remains to be seen whether and how the DOJ will implement this change under the Trump administration.

Reports of Contacts between JPMorgan and Barclays and the DOJ Inquiry

In October 2016, the Financial Times reported on the departure of a number of high-level employees from JPMorgan to join Barclays,[3] which followed the move of JPMorgan's Jes Staley to Barclays as CEO in December 2015. That article noted that JPMorgan's CEO, Jamie Dimon, called Barclays's chairman, John McFarlane, to tell him to stop hiring JPMorgan employees after JPMorgan's head of equities departed for Barclays in September 2016.[4] The same report stated that Staley spoke to Daniel Pinto, the head of JPMorgan's investment bank, on the same subject, and that these conversations with Dimon and Pinto led to an "uneasy truce" between the two companies.[5]

According to the Financial Times, JPMorgan has commented that there are "no improper agreements" between it and Barclays, noting that they "continue to hire from each other."[6] The Financial Times reported that Barclays likewise has stated that it made no agreement to stop hiring JPMorgan employees.[7] Barclays has emphasized that at least six people, including some at the managing-director level, have joined Barclays from JPMorgan since the 2016 conversations.[8]

While the Financial Times noted that no formal DOJ investigation had yet been launched,[9] that will only go so far in comforting the banks and individuals involved in the inquiry, given the Justice Department's recently announced intent to pursue certain no-poaching agreements criminally.

However, if it turns out that the conduct at issue took place prior to the October announcement, the DOJ may decline to pursue the matter criminally, even if it otherwise could bring an action, on the basis that the parties were not sufficiently on notice that they could be subject to criminal prosecution.[10]

The DOJ's Recent Policy Shift to Prosecute No-Poach Agreements as Criminal Antitrust Violations

In October 2016, the Antitrust Division of the DOJ and the Federal Trade Commission issued joint guidance for human resources professionals to help educate and inform them about how the antitrust laws apply to employee hiring and compensation.[11] The guidance warns HR professionals to avoid entering into no-poach and other noncompete agreements or sharing competitively sensitive employment information with competitors. Most significantly, within this guidance, the DOJ for the first time announced that it would thereafter proceed criminally against "naked" wage-fixing and no-poaching agreements.[12]

It is highly unusual for the DOJ to pronounce that it will apply its criminal enforcement powers to conduct previously prosecuted civilly. Moreover, the policy change evidences a view that no-poaching and wage-fixing agreements should be treated in a manner on a par with price-fixing, bid-rigging, and customer or market share allocation agreements, all of which have long been regarded as per se violations of antitrust law and have been subject to criminal prosecution for decades.

There has been some criticism of this sudden policy shift in the vein that such agreements, like joint purchasing agreements, could offer some pro-competitive effects such that outright condemnation as per se anti-competitive is precipitous and inappropriate.[13] The potential criminal sanctions are severe — both companies and individuals can be prosecuted and punished by fines of up to $100 million for corporations and $1 million for individuals (or more, under certain circumstances), and the maximum jail sentence is 10 years.

Notwithstanding the Justice Department's new policy of criminal prosecution, no-poaching agreements can still be lawful when they are not a "naked" restraint on trade. A "naked" restraint is an explicitly anti-competitive agreement that has no pro-competitive justifications. Although the Justice Department has not provided comprehensive guidance about the types of conduct that it contends should fall into this category in the employment context, the "naked" restraint label would not attach to ancillary restraints made in pursuit of legitimate commercial interests and tailored in terms of geography, job function, product group, and duration. For example, the Justice Department will not criminally prosecute no-poaching agreements related or necessary to legitimate business collaborations or the settlements of theft of trade secrets disputes. By contrast, a shared desire among competitors to hold down costs or safeguard the benefits of their own employee training would not qualify as legitimate reasons for no-poaching agreements. Even when there is no criminal exposure, agreements that restrain employees' freedom of movement and the ability to bargain may still be subject to civil lawsuits.

Prior DOJ Civil Enforcement in the Technology Industry

In recent years, the Antitrust Division has increased its focus on agreements between direct industry competitors that could hinder their employees' abilities to relocate to competing companies, thereby reducing those employees' mobility in the workforce.

The Justice Department has investigated no-poach and nonsolicit agreements and, in several cases, has brought civil suits against the companies involved. For example, in 2010, the Justice Department filed a high-profile civil suit against several high-tech companies — including Apple,

Adobe, Google, Intel, Intuit and Pixar — which had entered into agreements not to solicit each other's employees. Specifically, the complaint alleged that the companies agreed not to engage in the process of "cold-calling" each other's employees about job opportunities, which was one of the key methods used by these companies to recruit employees with the necessary specialized skills.[14]

The Justice Department concluded that the companies' agreements were "facially anti-competitive," constituting naked restraints of trade that were per se unlawful under federal antitrust laws. The government emphasized that the agreements eliminated a major form of competition and harmed employees by limiting their access to information and better job opportunities. In the Justice Department's view, the principal effect of these agreements was to depress salaries artificially, as employees could not leverage offers from one company to move to another. Notably, these agreements were not "ancillary to any legitimate collaboration," such as a joint venture or research project. On the same day that the Justice Department filed the civil antitrust complaint, the parties reached a settlement that broadly prohibited the companies from entering, maintaining or enforcing any agreement that in any way prevented any person from soliciting, cold-calling, recruiting or otherwise competing for employees.[15] In addition to these restrictions, the companies were required to implement compliance measures to prevent these practices from occurring in the future.[16]

The DOJ's Policy Shift and Questions About Its Legacy in the Trump Administration

The DOJ's announcement that it will proceed against no-poach agreements criminally should be seen as part of a larger Obama administration initiative to protect workforce mobility. In March 2016, the U.S. Department of the Treasury released a report on the economic effects and policy implications of certain noncompete agreements and provided guidelines for reform.[17] The report noted that the noncompete agreements at issue often related to low-wage workers, who are unlikely to possess trade secrets that employers have a legitimate interest in protecting.[18] It also stressed that workers are often poorly informed about the existence, details and implications of the noncompete agreements into which they enter.[19]

In May 2016, the White House also released a report about noncompete agreements, suggesting that they limited job mobility, worker bargaining power, entrepreneurship and wages.[20] The White House directed executive departments and agencies to propose new ways of promoting competition and providing consumers and workers with information they need to make informed decisions. It was on the heels of this directive that the DOJ announced its new policy to pursue no-poaching and wage-fixing agreements criminally, so it remains to be seen whether criminal enforcement of no-poaching agreements will be embraced by the DOJ under the Trump administration. To date, there have been no criminal charges filed in connection with alleged no-poach agreements.

The DOJ's policy to prosecute no-poach agreements nonetheless remains in place and the potential criminal sanctions are severe; until the enforcement picture fills out over the coming months, practitioners should take heed. Companies should review and, if necessary, strengthen their existing antitrust compliance programs to ensure that hiring practices and discussions do not cross the line into naked restraints of trade.

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[1] Caroline Binham and Martin Arnold, Barclays hirings under US scrutiny, Fin. Times, June 16, 2017.

[2] Press Release, Dep't of Justice, Office of Pub. Affairs, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

[3] Harriet Agnew, Jamie Dimon: Hands off, Fin. Times, Oct. 14, 2016

[4] Id.

[5] Id.

[6] Binham and Arnold, supra note 1.

[7] Id.

[8] Id.

[9] Id.

[10] See Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (2016), https://www.justice.gov/atr/file/903511/download (Without giving further explanation, the guidance states that, "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.").

[11] Id.

[12] Press Release, Dep't of Justice, supra note 2.

[13] See John M. Taladay, Criminalization of wage-fixing and no-poaching agreements, CPI (June 2017), https://www.competitionpolicyinternational.com/wp-content/uploads/2017/05/North-America-Column-June-Full-1.pdf.

[14] Press Release, Dep't of Justice, Office of Pub. Affairs, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

[15] Id.

[16] Id.

[17] U.S. Dep't of the Treasury, Office of Econ. Policy, Non-compete Contracts: Economic Effects and Policy Implications (2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf.

[18] Id.

[19] Id.

[20] The White House, Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf.
