REPRINT FINANCIER WORLDWIDE

AUGUST 2018

FINANCIER WORLDWIDE corporatefinanceintelligence

FRAUD & CORRUPTION

Employment agreements subject to criminal penalties – DOJ targets no-poach and wage-fixing deals

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In October 2016, the antitrust division of the US Department of Justice (DOJ) and the Federal Trade Commission issued joint guidance announcing the DOJ's intention to thereafter, and for the first time, criminally prosecute 'naked' no-poach and wage-fixing agreements. A no-poach agreement is where companies agree not to compete for each other's employees by soliciting or hiring, whereas a wage-fixing agreement concerns setting employees' terms of compensation, either at a specific level or within a range. The potential for antitrust liability may not be obvious to many employers since most antitrust compliance programmes do not focus on HR professionals and warn against agreements between competitors, but companies that compete for employees do not necessarily compete in the marketplace for sales of products or services. The DOJ's recent remarks promising forthcoming criminal cases indicate that the DOJ fully intends to prosecute such agreements as hardcore cartel offences just like classic price-fixing. While the full reach of the guidance remains untested, companies should take measures to reduce the risk of liability.

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Agreements between companies that limit employees' mobility have drawn increasing attention from the DOJ in recent years. With employment mobility at its peak, several companies have attempted to reach agreements with their competitors not to hire or solicit each other's employees. The Justice Department has investigated such agreements and, in several cases, has brought civil suits against the companies involved. For example, in 2010, the DOJ filed a high-profile civil suit against several high-tech companies, including Apple, Adobe, Google, Intel, Intuit and Pixar, which had reached understandings not to solicit each other's employees. Similar suits followed against Lucasfilm and eBay, as well as follow-on civil class actions filed on behalf of the affected employees.

The DOJ determined that the companies reached "facially anticompetitive" or 'naked' agreements that eliminated a significant form of competition to the detriment of employees who lost access to information about salary levels and better job opportunities. It concluded that the non-solicit agreements between the companies were naked restraints of trade that were unlawful under federal antitrust laws. In the government's view, the impact of these agreements was to depress salaries artificially, as employees could not leverage competing employers against each other. Notably, these agreements were not "ancillary to any legitimate collaboration", such as a joint venture or research project.

The DOJ civil suits ended in settlements 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. The companies also were required to implement compliance measures to guard against these practices in the future. Based on the DOJ's recent guidance, however, no-poaching agreements will now be investigated as criminal antitrust violations with serious monetary penalties and the possibility of jail time. Although DOJ scrutiny of this area is not new, its announcement of criminal enforcement is a major development.

'Naked' no-poach and wage-fixing agreements to be treated as hardcore criminal cartels

The DOJ has staked out its position that 'naked' no-poach and wage-fixing agreements, like classic price-fixing and customer allocation, are illegal, meaning that the DOJ may prosecute these agreements without considering their justifications or competitive effects.

While the DOJ has not yet brought any criminal charges involving these agreements, in January 2018, assistant attorney general Makan Delrahim announced that the antitrust division had criminal cases in the works involving no-poach agreements. Then, in April 2018, the DOJ announced the settlement of its first case involving no-poach agreements since the issuance of the guidance.

In *United States v. Knorr-Bremse*, two leading rail equipment manufacturers settled charges by the DOJ that they had entered into a series of unlawful no-poach agreements between 2009 and 2016. The DOJ alleged that the companies competed with one another to attract, hire and retain skilled employees, including engineers, project managers, business unit heads, sales executives and corporate officers. According to the complaint, the companies agreed not to solicit one another's employees and, in some instances, not to hire one another's employees without approval. Noting the "high demand

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for and limited supply of skilled employees who have rail industry experience", the DOJ asserted that the agreements restrained competition to attract workers and "denied employees access to better job opportunities, restricted their mobility, and deprived them of competitively significant information that they could have used to negotiate for better terms of employment". The DOJ alleged the agreements constituted violations of Section 1 of the Sherman Act, but did not bring criminal charges, instead citing prosecutorial discretion because the no-poach agreements were both discovered by the DOJ and terminated by the parties before the issuance of the October 2016 guidance. The DOJ stressed, however: "The department has made clear that it intends to bring criminal, felony charges against culpable companies and individuals who enter into naked no-poach agreements...where the underlying no-poach agreements began or continued after October 2016." DOJ officials have publicly reiterated that the DOJ is actively investigating these types of agreements as criminal offences, stating that charges may be brought in the coming months. The potential consequences of criminal prosecution are severe. Both companies and individuals may be prosecuted and punished by fines of up to $100m for corporations and $1m for individuals. The maximum jail sentence is 10 years. Any agreement limiting competition for employees risks criminal prosecution, whether it is formal or informal, spoken or unspoken, written or unwritten. Moreover, an agreement can be inferred from evidence of discussions and parallel behaviour. If an agreement is "separate from or not reasonably necessary to a larger legitimate collaboration between employers, the agreement is deemed illegal without any inquiry into its competitive effects".

Uncertain times for franchises and joint ventures in the wake of no-poach guidance

In the wake of the guidance, class action plaintiffs filed a series of complaints against fast-food franchisors alleging that the defendants violated Section 1 of the Sherman Act by imposing no-poach agreements on their franchisees. Relying, in part, on the guidance, each of these lawsuits alleges unlawful restraints of trade.

Until recently, the string of class action lawsuits appeared to be a harbinger of more to come, particularly in light of a finding that "fully 58 percent of the 156 largest franchisors operating around 340,000 franchise units used some form of... 'no-poach' agreements", according Barbara T. Sicalides & Benjamin J. Eichel. In May 2018, however, the Supreme Court may have delivered a severe blow to no-poach class actions by ruling in *Epic Systems Corp. v. Lewis* that companies may enforce arbitration clauses in employment contracts to prevent employees from bringing class action suits relating to employment issues.

Criminal liability still poses a threat, although it is unclear how franchise no-poach agreements will fare under the DOJ's new policy. The guidance indicates that ancillary restraints in the labour market, which are "[related to and] reasonably necessary to a larger legitimate business collaboration between the employers", are entitled to rule of reason analysis. Franchisee no-hire arrangements arguably fit within this category, given franchisees' joint interest in promoting the brand and providing a uniform customer experience.

Likewise, no-poach enforcement brings joint ventures into the realm of legal uncertainty. The DOJ maintains

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that "legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws". The guidance does not elaborate. The DOJ will likely scrutinise relevant no-poach agreements in terms of factors bearing on the reasonableness of the agreements' duration and scope, including geography, job function, and product group, but the acceptable parameters of what will be deemed a "reasonably necessary" restriction on poaching between firms participating in a research, marketing or other collaboration remains unclear.

Avoiding liability: employment practices relating to hiring and retention

An effective compliance programme and careful drafting of agreements relating to employment competition are critical means for a company to avoid, deter and detect potential violations. To the extent that a potentially unlawful agreement is uncovered, companies may have the opportunity to self-report the existence of the agreement in return for immunity from prosecution. The antitrust division of the DOJ offers a leniency programme, which allows companies and individuals to report their own violations and cooperate with the division's investigation of the reported violations. As recent enforcement actions demonstrate, a company that is the first to report an antitrust conspiracy and meets other conditions of the division's leniency programme can qualify for full immunity from fines and prosecution, as well as the potential mitigation of civil damages.

In drafting and administering compliance programmes and employment-related agreements, companies should keep the below points in mind to reduce the risk of liability.

Ancillary restraints are not criminal. The DOJ will not criminally prosecute ancillary restraints made in pursuit of legitimate commercial interests and tailored in terms of geography, job function, product group and duration. For example, the DOJ would not criminally prosecute no-poach agreements necessary to the settlement of theft of trade secrets disputes. By contrast, a shared desire among competitors to hold down costs or safeguard the benefits of their employee training would not be legitimate reasons for no-poach agreements.

Limit information exchange about wages. Even in the context of a joint venture or potential acquisition or merger, companies must limit what information they share. Although not subject to criminal liability, an exchange of sensitive information between employers falling short of an agreement could place a company at risk of civil antitrust liability. "[E]vidence of periodic exchange of current wage information in an industry with few employers could establish an antitrust violation" when the exchange of information decreases, or is likely to decrease compensation. For example, the DOJ filed a civil suit against the Utah Society for Healthcare Human Resources Administration for conspiring to exchange non-public prospective and current wage information about registered nurses. The complaint charged that hospitals matched each other's wages, keeping nurses' pay artificially low.

Limit information exchange about other conditions of employment. Information exchanges about conditions of employment made within the framework of a merger or acquisition, joint venture or other collaborative agreement may also pose antitrust risks. To avoid those risks, the exchange of sensitive

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information should be limited to the purpose of the proposed transaction. In general, an information exchange may be lawful if: (i) the exchange is managed by a neutral third party; (ii) the exchange involves relatively old information; (iii) the information is aggregated to protect the identity of the underlying sources; and (iv) enough sources are aggregated to prevent competitors from linking particular data to an individual source.

Exercise caution in sharing sensitive information with a common third party. Companies should also be wary of sharing information about the terms and conditions of employment with a common third party, like a recruiter or trade association, which can facilitate or create the appearance of collusion.

Consider entering into agreements directly with employees instead. Although state law on this subject varies, under federal antitrust law, individual employees may still consensually enter into 'non-compete agreements' not to work for a competitor, as long as the agreements are reasonable in terms of scope and duration and narrowly tailored to address legitimate employer concerns, such as loss of trade secrets. The employees must also receive consideration for their agreement not to compete. This is also an area of increased enforcement, however, and legal counsel should be consulted when drafting these agreements.

Conclusion

While the guidance sounds a warning shot, it may not be heard by many employers, even those which have undertaken significant antitrust compliance efforts already. Assistant attorney general Delrahim recently warned that if a no-poach agreement continued after the October 2016 guidance was issued "we'll treat that as criminal". As the DOJ's policy to pursue civilly only agreements terminated prior to its 2016 guidance approaches expiry, many employers may face criminal liability, and we should expect to see cases testing the reach of criminal liability for no-poach and wage-fixing agreements in the near future.

In the wake of these developments, employers should review and, if necessary, strengthen their existing antitrust compliance programmes and their existing and future non-compete and non-solicitation agreements. It is particularly important that HR professionals are educated on these issues and ensure that their companies' hiring practices comply with the antitrust laws. Given the extraterritorial reach of US antitrust law, this policy shift presents a risk to companies and individuals located outside of the US as well. ■

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