

DOJ's No-Poach Stance Attaches Big Risk To Nuanced Issue

By **Matthew Perlman**

Law360 (February 9, 2018, 9:41 PM EST) -- Looming criminal prosecutions from the U.S. Department of Justice's Antitrust Division targeting employment issues, including agreements by companies not to hire each other's workers, show that the area is a serious concern for the new administration, meaning companies need to be on notice about the heightened risks associated with criminal charges and where to look for problems.

Assistant U.S. Attorney General Makan Delrahim, head of the Antitrust Division, recently revealed that the agency has open investigations into employment-related agreements between companies that it intends to prosecute criminally, in line with guidance given jointly by the DOJ and Federal Trade Commission under the Obama administration.

While the agency has previously gone after companies over agreements not to hire or solicit workers from each other, the cases it brought were civil. The prospect of criminal prosecution raises the stakes substantially, including the threat of imprisonment for company personnel.

Susannah P. Torpey, a partner at Winston & Strawn LLP, told Law360 that some companies may have been waiting to see if the new administration would follow up on the 2016 guidance before allocating more resources to antitrust employment issues. Now, she said, they're scrambling to catch up.

"I suspect that a lot of companies that were sort of sitting on the sidelines to see if this would go forward or not are potentially going to be quite motivated to really run, not walk, to see if they might have anything that has potential criminal implications," Torpey said. "Your executives can literally be put in jail."

Experts said that another part of the increased risk associated with criminal charges is that penalties would be based on calculations of loss attributable to the agreements, which could mount significantly if they are found to be associated with a large number of employees and could apply to benefits beyond just wages. There is also a high likelihood of follow-on litigation after a criminal case is lodged, exacerbating the costs and complications surrounding the issue.

"They might have a whole new class of plaintiffs to consider, and those are their own employees," Torpey noted.

It's also important for companies to consider the DOJ's amnesty program, which provides some

protection for parties that come forward with information about anti-competitive conduct and provides more leniency the earlier a party reports the activity. But the program won't protect a company from the risks of follow-on litigation.

"It's something you really have to weigh very delicately in terms of your overall exposure, and the nature of the restraints," Torpey said.

In addition to the heightened penalties, companies could also be in store for more persistent prosecution from the Justice Department. Adam J. Biegel, co-chair of Alston & Bird LLP's antitrust team, said the agency is less willing to negotiate on criminal cases than it is on civil cases, and that it usually seeks prison terms in order to send a message.

"In my experience in criminal cases, the DOJ takes them very seriously and rarely will want to plea bargain down to lesser included offenses," Biegel said. "When the DOJ prosecutes something criminally, they want to send people away."

The DOJ's last round of investigations targeting employment practices resulted in a settlement with tech giants including Google Inc., Apple Inc., Intel Corp. and Pixar Animation Studios in late 2010 over allegations that company executives agreed not to hire away one another's workers. The deal required the companies to put an end to the agreements, but didn't include fines or criminal charges.

Torpey said that case and others show that the conduct leading to these types of agreements can come from the very top of a company's corporate structure, a place not normally scrutinized for antitrust issues.

"A lot of them have always focused on the sales force and your more traditional price-fixing contexts, like fixing prices for products," Torpey said. "Companies are really comfortable training and investigating in that particular area, but now they'll really have to switch those resources to look at different places where these types of arrangements spring up, which is quite different."

The settlement with the tech companies highlights the fact that the DOJ is viewing the market for employees as distinct from the markets that the company's target with their products. Intel, Google and Pixar may not compete for the same customers, for example, but they could be competing for the same workers.

Elizabeth Prewitt, a partner at Hughes Hubbard & Reed LLP, said this is an important concept to get across when counseling clients on the issue.

"When practitioners are teaching compliance to companies, they have to be very clear," Prewitt said. "Make sure that the employees understand that they may be competing with another company over a workforce, yet may not, in their normal business operations, consider that company to be a competitor."

An example of the murky distinction arises in the context of franchisees, said Dina Hoffer, an associate at Hughes Hubbard. There has been a spate of private actions targeting chains like Carl's Jr., Pizza Hut and Jimmy John's alleging that they illegally suppress wages by preventing franchisees from hiring each other's workers.

The 2016 guidance warned that wage-suppressing agreements, including naked no-poach and wage-

fixing agreements, could be open to criminal investigations if they're not tied to a broader legitimate collaborations between companies. This should leave room for an argument that the chains have a broader economic justification for the agreements, and could also give cover to joint venture arrangements that include no-poach provisions, but it remains to be seen what kind of cases the DOJ will ultimately bring.

"It wouldn't necessarily be natural for someone opening a McDonald's to think of another McDonald's as a competitor from an antitrust perspective, but here we're seeing this come into question because of this newfound focus on no-poach agreements," Hoffer said.

Experts said the policy shift also signaled that the agency would treat this conduct — at least the starkest examples of it — the way it treats agreements to fix prices or allocate customers, as per se violations of antitrust law. Biegel said this was a notable pronouncement at a time when there is a more general trend toward paring down what's considered inherently illegal.

"It's pretty rare in this generation to be having additional real-life examples of new categories of criminal or per se violations," Biegel said.

Criminal cases also usually come after there's been history of successful prosecutions on an issue and considerable case law surrounding it, which Prewitt said isn't the case here. She pointed to the DOJ Antitrust Division's manual, updated in August, that acknowledges that criminal prosecution may not be appropriate where the case law is unsettled or there is confusion due to past government enforcement practices.

"Not only are we missing a court ruling that no-poach agreements are per se illegal, but there have only been a handful of enforcement actions treating such agreements as per se violations and, to date, not one resulted in a criminal charge," Prewitt said.

The manual also makes no mention of no-poach agreements or wages and only refers to employment in different contexts. Prewitt said the 2016 guidance about the potential for criminal charges was not enough to alert the business community about the risk, and should have been included in the manual.

"While it would be fair game to target individuals who were aware of the risk of criminal prosecution, there is no basis to presume that the general public is aware that entering into or enforcing such no-poach agreements could lead to criminal liability," she said. "The lack of mention of this policy change in the division's manual only undermines the DOJ's efforts to put professionals on notice."

--Additional reporting by Melissa Lipman, Braden Campbell, Emma Cueto and Hannah Meisel. Editing by Katherine Rautenberg and Jill Coffey.