DOJ and FTC Set Possible Criminal Liability Trap for HR Professionals

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In an October surprise, the DOJ and FTC (collectively, the "Agencies") released guidance for HR professionals on the application of the antitrust laws to employee hiring and compensation. The Agencies' October 20, 2016 release, Antitrust Guidance for Human Resource Professionals, announced that "naked" agreements among employers not to poach each other's employees and to fix wages and other terms of employment are *per se* illegal. Critically, for the first time, the Agencies warn that such agreements could result in *criminal* prosecution against individual HR professionals, other company executives, as well as the company. This Guidance, coupled with repeated requests to approach the Agencies to report such agreements, signals a significant shift in enforcement focus for the Agencies, including a further move to individual prosecutions, particularly when taken together with last year's DOJ Yates Memorandum calling for more emphasis on individual executive liability.

While the Agencies have put HR professionals on notice regarding their enforcement intentions, they have also set a trap for unwary HR professionals who fail to successfully navigate the ambiguous line between lawful and unlawful hiring restrictions.

Look Back and Look Forward

Under the new Guidance, HR professionals now have a duty both to look backward to ferret out any existing anticompetitive conduct and forward to implement compliance programs to ward off future problems. If the HR professional discovers the company has been a member of a naked wage-fixing or no poach agreement, the Agencies urge the company to report the agreement to the DOJ under its Corporate Leniency Policy"–which provides that the first qualifying corporation to report the offense will not be criminally charged. Looking forward, HR professionals should implement effective compliance programs (if they have not already done so) designed to prevent employees from entering into anticompetitive hiring agreements.

Agencies: Competition to Hire and Pay Employees More Is Good for Consumers

According to the Agencies, competition among employers to hire and retain employees "gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation." Employees also benefit through "higher wages, better benefits, or other terms of employment." Consumers and employees are denied these benefits when employers agree: (1) to fix employee salaries or other terms of compensation, either at a specific level or within a range ("wage-fixing" agreements), or (2) not to cold call, solicit or hire employees (collectively, "no poach" agreements). Additionally, merely inviting another employer to enter into an illegal hiring agreement may be an antitrust or unfair competition violation"–an "invitation to collude"–even if the invitation does not result in an agreement.[1]

The Guidance Addresses Only Joint Conduct Among Competitors in Labor Markets

In the employment context, Section 1 of the Sherman Act and the Agencies' Guidance is limited to agreements among competitors in the labor market. Labor is an input to a company's downstream products or services. The focus of the Agencies' concern is on competition for the services of particular employees and the effect of unlawful wage-fixing and no poach agreements on employees' mobility and compensation. In the labor market context, employers may compete for the same kinds of workers whether or not they compete to provide the same goods or services. For example, two technology companies may not offer the same product, but they are direct competitors for skilled engineers and scientists.

Companies are free to unilaterally adopt policies and make decisions regarding hiring, salaries and benefits, soliciting employees, and recruiting employees. For example, a company is free to decide on its own not to solicit another company's employees for fear of starting a "poaching" war. No antitrust liability attaches to such a policy, as long as it is adopted unilaterally. That is true even if the other company unilaterally adopts the same policy. A company, however, should take care that its policy is not communicated to its competitors in the labor market or suggest that other competitors go along with their policies. Such communications could lead to a tacit or express agreement.

Under Section 1 of the Sherman Act, certain agreements such as price fixing and customer allocations are so plainly anticompetitive that courts conclusively presume they are unlawful without any inquiry into the precise harm the agreement may have caused. Such agreements are referred to as "naked" agreements and are judged illegal *per se*. The Guidance makes clear that the Agencies view some wage-fixing and no poach agreements as naked restraints that should be deemed illegal *per se*. Because no inquiry into competitive effects is necessary, the Guidance rejects arguments that wage-fixing and no poach agreements may be justified, for example, by a desire to reduce costs, become more efficient, or to provide more employment opportunities. Under certain circumstances, and in the exercise of its prosecutorial discretion, DOJ may criminally prosecute *per se* wage-fixing and no poach agreement.

Not all wage-fixing and no poach agreements are condemned as *per se* illegal and subject to possible criminal prosecution. Wage-fixing and no poach agreements are not *per se* illegal if the agreement is ancillary to a legitimate procompetitive employer collaboration and the hiring restraint is "reasonably necessary" to achieve the procompetitive benefits of the collaboration. HR professionals should proceed with particular caution before entering into wage-fixing agreements even where the agreement is ancillary to a legitimate employer collaboration. Wage-fixing agreements will raise a red flag with the Agencies, are rarely necessary for the success of a legitimate employer collaboration, and can be considered a serious violation of the antitrust laws.

No poach agreements are more common and often are necessary for the success of a legitimate employer collaboration. For example, often companies will dedicate employees to work on a project that benefits both of them. In that situation, limitations on soliciting each other's employees may pass muster under the antitrust laws. Similarly, if a company hires temporary employees from an agency, a limited non-solicitation agreement may be lawful. These sorts of "ancillary restraints" are not *per se* unlawful, but rather are evaluated under the rule of reason which balances a restraint's procompetitive benefits against its anticompetitive effects. To maximize the odds of being considered a lawful ancillary restraint, the restraint should be tied to a specific employer collaboration and be tailored to the scope of the collaboration.

There Is Little Support for the Agencies' Radical Shift in Policy

An agreement among labor market competitors to fix wages can be viewed as a potential *per se*violation. Not so with no poach agreements. In recent years, courts have been reluctant to extend the application of the *per se* rule beyond hardcore price-fixing and customer allocation agreements. And the DOJ generally pursues *per se* agreements as a civil violation, not a criminal violation, where there is uncertainty whether the courts will view the agreement as a *per se* violation. No court has every held that a no poach agreement is a *per se* violation of the Sherman Act. All courts that have decided the issue have applied a rule of reason analysis. Acknowledging the uncertain state of the law, the Agencies cite to only *U.S. v. Adobe, U.S. v. Lucasfilm and Pixar*, and *U.S. v. eBay* to support their position that no poach agreements are *per se* unlawful. Taken together, these cases challenged agreements not to solicit employees, hire employees, or make counteroffers to employees. Although not explained by the Agencies, in denying eBay's motion to dismiss the DOJ's *per se* Section 1 claim, the court emphasized that its decision "does not in and of itself indicate that *per se* treatment is imminent" because the court was unable to assess the nature of the restraint without discovery. *U.S. v. eBay*, 968 F. Supp.2d 1030 (E.D. Cal. 2013). With little judicial experience applying the *per se* rule to no poach agreements, the Agencies now take the position that no poach agreements will be pursued criminally. A few settled cases and a motion to dismiss ruling that points out that *per se* treatment may not apply are thin support for such a dramatic change in policy.

Check Your Employment Policies; Review Your Conduct

In any event, HR professionals and in-house counsel who support them are now on notice that individual HR employees, and their companies, may be held criminally responsible for anticompetitive wage-fixing and no poach agreements, so they should take steps to avoid running afoul of the antitrust laws. The Agencies provided a list of "red flags" that HR professionals should look out for in their day-to-day work. But the Agencies provided little specific guidance for HR Professionals, other than to note that terms contained in contracts between an employer and employee, including non-compete clauses, do not raise issues under the antitrust laws, although they may raise issues under certain state laws.

More useful guidance can be found in the consent decrees and competitive impact statements filed in the *Adobe*, *Lucasfilm* and *eBay* cases. These consent decrees permit no poach agreements that are reasonably necessary for, and thus ancillary to, employee severance agreements and employer collaboration agreements related to joint ventures, shared use of facilities, consulting services, outsourcing agreements, OEM agreements, recruiting agreements, and mergers and acquisitions. Note that no poach restraints contained in these types of agreements are not presumptively legal. As explained above, they remain subject to scrutiny under the rule of reason and can be challenged by the agencies as a civil matter and by private treble damages suits.

In light of this new change in enforcement philosophy at the DOJ and FTC, HR professionals, working with in-house or outside counsel, should assess whether the company is currently a member of any wage-fixing or no poach agreement with a competing employer. Particular attention should be paid to possible oral agreements or understandings, “handshake agreements,” and “gentlemen’s agreements” that are not embodied in a written contract. Any such agreement must be carefully analyzed to determine whether it exposes the company and its employees to criminal liability. In addition, companies should review their various contractual relationships with suppliers, vendors and others. The Agencies will most likely analyze any wage-fixing or no poaching restraints contained in these types of agreements under the rule of reason as ancillary restraints to a legitimate joint activity. With respect to no poach agreements, HR professionals and their counsel should review these agreements to determine whether the restraint is overbroad in terms of geography, job function, product group, or time period.

The trap has been set; prudent professionals should be particularly vigilant lest they be caught in it.

[1] The Agencies also provided guidance regarding the sharing of competitive sensitive information such as compensation rates and other terms of employment. The Agencies confirmed that the specific guidance provided to the healthcare industry in the joint DOJ/FTC Statements of Antitrust Enforcement Policy in Healthcare are equally applicable to employers. The sharing of competitive sensitive information may be legal if employers adopt proper safeguards to prevent harm to competition. For example, an information exchange may be lawful if a neutral third party manages the exchange.