Employer Beware: Anti-Competitive Hiring and Compensation Agreements Remain in the Antitrust Cross-Hairs

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In 2016, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC), the two federal agencies responsible for enforcing the antitrust laws, issued "Guidance" to HR Professionals, outlining the types of compensation and hiring agreements that the enforcement agencies will challenge as violations of the antitrust laws. The Guidance does not represent a change in antitrust law, but it represented a clear signal that the agencies are placing unprecedented importance on policing such agreements. The guidance document is blunt:

> *Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.*

The Guidance was issued under the Obama administration, but the close scrutiny has continued during the Trump administration. In other words, this is not a partisan issue -- there is a broad consensus in the antitrust community that these sorts of agreements are harmful and should be policed accordingly.

What is a Naked Wage-Fixing or No-Poaching Agreement

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The types of agreements in question are agreements between competing employers, or, in antitrust lingo, "horizontal agreements." It is important to note that in employment markets your competitors are those who employ similar types of employees, regardless of whether you compete for customers. For example, aerospace companies and automotive companies are likely competitors for certain types of engineers, even though they don't compete for customers.

Horizontal agreements which directly restrict competition on salary, benefits, or other terms of employment are highly likely to violate the antitrust laws. Likewise, no-poach, non-solicitation or similar "I'll stay away from yours if you stay away from mine" agreements are likely to violate the antitrust laws. Antitrust law condemns most agreements restricting hiring or compensation as anti-competitive because they create a high likelihood of suppressing compensation and reducing employee mobility, without offsetting pro-competitive benefits.

Note that horizontal agreements are different from "vertical" agreements between an employer and employee. Vertical agreements present important, though different, antitrust risks that are beyond the scope of this alert.

Recent Enforcement Activity

The focus on hiring agreements began in 2012, when the DOJ sued a who's who of Silicon Valley companies, including Google, Apple, Intel, and others, for allegedly entering into various types of "no-poaching" agreements. Although most of the defendants immediately settled with the DOJ, the DOJ suit triggered a number of class-action lawsuits brought by employees of the defendants. The defendants ultimately paid approximately $500 million to those employees to settle the class action lawsuits.

In more recent years, similar suits have continued. For example, in 2018, the DOJ sued several manufacturers of rail equipment for such agreement. Again, the defendants immediately settled with the DOJ and, again, a series of employee class-action suits followed. Importantly, the DOJ filed a "Statement of Interest" in the private lawsuits to argue that unless the hiring agreement was an "ancillary agreement" (discussed below), such agreements were *automatically* unlawful or, in antitrust lingo, "*per-se*" illegal. The rail equipment class action lawsuit was recently settled for approximately $50 million, subject to final court approval.

The DOJ again filed a Statement of Interest in a private class action challenging an alleged agreement between two medical schools to not "poach" the other's faculty. The lawsuit was settled for approximately $55 million.

As a final example of recent activity, there are a host of recent lawsuits challenging no-hire agreements between franchisees of a single franchisor. In these sorts of agreements, the franchisor (e.g., McDonald's) prohibits its franchisees from hiring other franchisees' employees. The DOJ has indicated that these sorts of agreements are not usually *per se* unlawful, but the question is unresolved in the courts, and there remains an active and unresolved debate within the antitrust community. However, there is a recent decision from the federal court for the Eastern District of

Michigan involving Little Caesar which held that such an agreement was not per se unlawful. Although fact-specific, the opinion may be of some benefit to franchisees and franchisors facing litigation in Southeast Michigan.

The Ancillary Agreement Exception

Although horizontal agreements restricting hiring or compensation are usually unlawful, there is an important exception for "ancillary" agreements. In broad terms, an ancillary agreement is an agreement that is related to, and important to, a pro-competitive primary business agreement. More specifically, an ancillary agreement is generally lawful if: (1) The Primary Agreement is pro-competitive; (2) the Ancillary Agreement is reasonably necessary to the Primary Agreement; (3) there is not a substantially less restrictive alternative; and (4) any anti-competitive harm does not outweigh the pro-competitive benefits. For example, if two companies agree to collaborate on the development of a new product, then an agreement prohibiting one party from hiring key employees of the other involved in the collaboration for a reasonable period of time might be a lawful ancillary agreement.

Assessing whether an agreement is ancillary is among the most difficult in antitrust law. In light of the severe consequences of entering into a *per se* unlawful agreement, it is strongly urged that experienced antitrust counsel be consulted before entering into such an agreement.

Risk Management

The prudent employer can take a variety of steps to manage the antitrust risks in hiring and compensation:

- Most importantly, recognize that hiring and compensation practices are a primary area of antitrust risk that should be part of any antitrust compliance program.
- Effectively train the people on the front lines of hiring and compensation decision making.
- Do not enter into agreements with competitors concerning compensation, recruiting, or hiring without the advice of experienced antitrust counsel.

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