Employers Beware: Avoid Antitrust Hot Water and Stay Away from Unlawful Non-Poach Agreements

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As we have detailed many times before in this space (see, for example, here), Non-Compete agreements are not only legal, but they are valuable tools for a company to use to protect its legitimate business interests. Among those interests are a company's trade secrets and customer goodwill. Companies do and should continue to use tools such as non-competes and non-solicit agreements where appropriate.

But as will be noted below, there is a difference between a "vertical" restraint, such as in agreements with employees or with companies with whom you do business, and "horizontal" restraints between competitors at the same level. The former is, as noted, defensible. The latter, however, is much more problematic. These troublesome types of agreements often take the form of a "no-poach" agreement.

Companies must be careful not to cross the line from a legal non-compete/non-solicit to a potentially improper "no-poach" agreement with other employers in the same industry. Such agreements are perhaps even more tempting today given the currently tight labor market, increasing salaries, the "Great Resignation," and how competitive it is to hire good help. But companies must be careful not to fall into such traps. Doing so could bring unwanted attention from the U.S. Department of Justice and others.

A "no-poach" agreement is defined by the Society for Human Resource Management as "illegal deals made between competitors not to hire or pursue each other's employees." Such agreements can be informal and verbal, and others are official written contracts. Still, sometimes, they are somewhere in between, with companies agreeing via email or via other such mediums not to take one another's employees.

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Such agreements initially gained notoriety in the early 2010s when a number of Silicon Valley companies entered into such agreements. At that time, Lucasfilm and Pixar instructed their recruiting managers to enter into a "no cold-call" agreement by which the employers would agree not to initiate contact with one another's employees, particularly digital animators. That sector at the time faced strong demand for such employees. By agreeing not to solicit one another's employees, the Department of Justice alleged that the companies were reducing the ability of employees to compete for jobs, to use new job offers as negotiating leverage, and ultimately suppressing wages. The Department of Justice ultimately pressed charges, resulting in settlements with those companies.

A similar situation arose when Apple, Google, Intel, and Adobe settled with the Department of Justice in 2014. There, emails between the companies' executives laid the groundwork for antitrust claims. The sophisticated mega-companies made bringing charges easy by setting out in black and white exactly what they planned to do over emails. Emails from executives—including the late Steve Jobs—showed that the executives conferred on hiring plans and agreed with one another not to poach the other companies' employees. Humorously, one executive even sent an email—in writing, obviously—telling others only to confer about agreements not to recruit from other companies "verbally, since I don't want to create a paper trail over which we can be sued later." As the Wall Street Journal reported at the time, the companies settled their suit for a reported $325 million. A federal court judge, however, rejected that settlement offer as too low, and the companies ultimately paid approximately $415 million.

These tales from the past decade are again relevant with news that the Department of Justice has again recently indicted employers who agreed to not poach one another's customers. On January 28, 2022, the Department of Justice reported that four individuals—all owners and/or managers of home health care agencies—conspired to eliminate competition for the services of Personal Support Specialists—workers who assist patients—by agreeing to fix the rates paid to these workers and by agreeing not to hire each other's workers. The DOJ pointed out that the penalties for such conspiracies to restrain trade include up to 10 years of imprisonment and a fine up to $1 million dollars, to say nothing of potential damages if those impacted file suit. It is clear that the DOJ is on the look for such agreements.

Not *every* non-solicitation agreement, however, is illegal. It is common in employment agreements (including those with post-employment restrictive covenants) to have non-solicit agreements, particularly those restricting former employees from picking off a company's current employees—particularly when the former employees only know about those current employees because of their employment with the company. The 9th Circuit Court of Appeals, however, recently clarified that even non-solicit agreements between different companies *may* be permissible, in certain situations.

In *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102 (9th Cir. 2021), the federal appellate court started by distinguishing between a "horizontal restraint"—which is "an agreement among competitors on the way in which they will compete with one another"—and "vertical restraints"—which are "restraints imposed by agreement between firms at different levels of distribution." *Id.* The court—in a thorough and detailed opinion that is too dense and academic to give justice to in this short space—

differentiated between “naked” restraints that have “no purpose except stifling of competition” and “ancillary agreements” that “may contribute to the success of a cooperative venture that promises greater productivity and output.” *Id*. The Ninth Circuit held that a non-solicitation agreement in a business-to-business collaboration agreement is not automatically a violation of the antitrust laws. Because in that case the non-solicitation agreement in question was between two parties who had contracted together, entered staffing arrangements together, and provided one another services to further their respective companies, the agreement was not automatically illegal. It is only when such agreements are blatantly carried out simply to keep wages down and to suppress competition that they are unlawful.

All of this is to warn employers everywhere: be careful about entering into agreements with other companies in your market or industry that may suppress wages or be construed as anti-competitive. This is even more important today given how competitive it is to hire good employees. While the difficulty to find and retain good help is very real, companies must be careful not to wade into hot waters by entering into agreements with others in their industry that have an unlawful impact on hiring.

If you have entered into such agreements or are approached to do so, think twice. And as always, Butzel Long is happy to advise you on this topic.

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