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Limiting Antitrust Exposure in the Employment Setting

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In what has commonly been referred to as the "Great Resignation," nearly 50 million people voluntarily resigned from their jobs in 2021.[1] The majority of those resigning sought a higher paying or better opportunity with another employer.[2] Well before the impacts of the COVID-19 pandemic, millennials – the largest generation in the workforce[3] – garnered a reputation for job-hopping.[4]

In an era of unprecedented employee mobility, employers face increasing challenges retaining top talent. Compounding the social challenges with retaining talent is the increased scrutiny on non-compete agreements between employers and employees by courts, legislators, and regulators.[5] As a result, employers may seek other means to protect their interests and avoid the disruption and costs associated with employee departures, such as an agreement with their competitors not to poach each other's employees or an agreement to set a cap on wages. Employers tempted to proceed along these lines must be aware of the significant antitrust exposure that can result from these types of arrangements.

No-Poaching and Wage-Fixing Agreements

"No-poach agreements" are any agreement between competitors not to hire, solicit, recruit, or cold-call each other's employees, while "wage-fixing agreements" are any agreement between competitors to: (1) fix a particular salary, set salaries at a certain level or within a certain range, or follow certain guidelines; (2) increase salaries by an agreed percentage; and/or (3) maintain or lower salaries.

Are these types of agreements illegal? The answer is, not surprisingly, it depends.

The Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." The Supreme Court has long interpreted this section to prohibit only *unreasonable* restraints on trade.[6]

To determine whether a restraint on trade is unreasonable, courts apply one of two rules: the *per se* rule or the rule of reason.[7] Restraints can be unreasonable *per se* because they almost always tend to restrict competition.[8] Whether no-poaching or wage-fixing agreements are illegal largely turns on which rule applies. Historically, the *per se* rule has applied to agreements between direct competitors to fix prices, allocate markets or customers, restrict output, or boycott competitors. Restraints that are not unreasonable *per se* are judged under the rule of reason. The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition.[9]

The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison.[10] Additionally, an employer can be held liable for civil damages, including treble damages and attorneys' fees.[11]

The Initial DOJ Civil Actions

In 2010, the Antitrust Division of the Department of Justice (DOJ) began bringing civil actions against several Silicon Valley companies, alleging "no cold-call" agreements violated the Sherman Act.[12] Soon thereafter, private plaintiff class action suits followed on similar theories,[13] which resulted in headline-grabbing settlements for hundreds of millions of dollars.[14]

The DOJ Guidance

In 2016, the DOJ and FTC issued "Antitrust Guidance for Human Resources Professionals" (the Guidance).[15] The Guidance addressed no-poaching and wage-fixing agreements.[16] The Guidance's stated purpose was to "alert human resource (HR) professionals and others involved in the hiring and compensation decisions to potential violations of the antitrust laws."[17]

The Guidance claimed that "naked" wage-fixing or no-poaching agreements among employers are *per se* illegal.[18] The DOJ explained that a naked agreement is one that is "separate from or not reasonably necessary to a larger legitimate collaboration between the employers."[19]

Notably, the Guidance announced a significant enforcement policy shift. The DOJ stated, "going forward, [it] intends to proceed criminally against naked wage fixing or no-poaching agreements."[20] The Guidance explained that such 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."[21]

The DOJ Criminal Enforcement Actions

More than four years after the Guidance came out, the DOJ began following through on its stated intention to pursue criminal charges for naked no-poaching and wage-fixing agreements.[22] As was the case with the DOJ's first civil enforcement actions, private litigants have tacked on class action suits mirroring the indictments.[23]

In these cases, the DOJ contends that the arrangements at issue are *per se* unlawful under the Sherman Act. In both *United States v. Jindal*, the first criminal wage-fixing case brought by the DOJ, and *United States v. DaVita Inc.*, the first criminal no-poaching case brought by the DOJ, the court denied the defendants' motions to dismiss.[24] However, the jury recently returned verdicts for the defense in each case.[25]

Avoiding Liability: Best Practices

These types of cases often arise because HR professionals or executives enter into agreements with competitors, unaware of the antitrust implications. While the initial wave of cases involved large Silicon Valley tech companies, three of the most recent indictments involve relatively small health care companies.[26] Notwithstanding the recent defense verdicts in the criminal proceedings, employers – regardless of size or industry[27] – should ensure they have procedures and policies in place to mitigate their antitrust exposure.

Employers may want to provide training for their employees and executives involved in hiring and compensation decisions to educate them about the potential consequences of no-poaching and wage-fixing agreements.

1. The DOJ Interprets Agreement, Competitors, and Compensation Broadly

Employers should be cognizant of three important facts. First, agreements not to hire or solicit a competitor's employees or to fix wages can run afoul of the antitrust laws no matter if the agreement is informal or formal, written or unwritten, or spoken or unspoken.[28] Second, these agreements can violate the antitrust laws regardless of whether the companies subject to the agreement make the same products or compete to provide the same services. If the companies compete to hire or retain employees, they are considered competitors in the employment marketplace.[29] Third, specifically with regard to wage-fixing agreements, the DOJ interprets wages broadly to include any element of compensation, including, for example, gym memberships, parking, transit subsidies, meals or meal subsidies and similar benefits of employment.[30]

2. Caution Against Sharing Information with Competitors

Employers should also be careful to train their employees about the risks associated with sharing information with competitors. Even if there is not an explicit agreement to fix compensation, exchanging competitively-sensitive information could serve as evidence of an implicit illegal agreement.[31] Similarly, while sharing information is not *per se* illegal on its own, an agreement to share information may lead to civil liability under the rule of reason if it is likely to have an anti-competitive effect.[32]

If employers do need to share such information with competitors, the information should be: exchanged through a neutral third party (*e.g.*, a trade association); historical (more than three months old); and aggregated from a large group of reporting employers (as least five) so competitors cannot link particular data to an individual source.[33]

3. Any Agreement Must Be Ancillary To a Legitimate Joint Venture or the Sale of a Business

If a no-poaching or wage-fixing agreement must be entered into, employers should ensure it is part of a larger legitimate joint venture or a merger or acquisition.[34] FTC officials Debbie Feinstein, Geoffrey Green, and Tara Koslov have identified "consulting services, outsourcing vendors, and mergers or acquisitions" as part of a non-exhaustive list of circumstances in which no-poaching agreements might not violate the antitrust laws.[35]

Generally, if the parties are in a vertical relationship (*e.g.*, manufacturers and resellers) or the agreement is otherwise ancillary to a larger legitimate collaboration, then courts will apply the rule of reason. On the other hand, courts will likely apply the *per se* rule to purely horizontal agreements (*i.e.*, those between direct competitors).[36] Courts have long recognized that the rule of reason applies to restrictive agreements ancillary to a merger or acquisition.[37] Currently, the issue federal courts are commonly grappling with is no-poaching provisions contained in franchise agreements. Courts have not come to a consensus on whether the rule of reason applies or the *per se* rule,[38] or even whether a franchise and its franchisees are separate actors for purposes of antitrust analyses.[39]

Even if an employer is confident the no-poaching provision is ancillary to a legitimate joint venture, the agreement should: (1) specifically identify the ancillary joint venture; (2) be narrowly tailored in scope (regarding both the employees covered and geographically) and duration; (3) to the extent possible, identify with reasonable specificity the employees who are subject to the restrictions; and (4) provide a legitimate pro-competitive basis for why the non-compete is necessary (a mere desire to be free from competition is not sufficient).

4. Consider the Applicable Law

While the United States has taken the lead in investigating and taking enforcement action against wage-fixing and no-poaching agreements, indications are that Europe is not far behind. On October 19, 2021, Executive Vice-President and Commissioner for Competition of the European Commission, Margrethe Vestager, delivered a speech that addressed no-poach agreements.[40] Most notably, Vestager stated "some buyer cartels do have a very direct effect on individuals, as well as on competition, when companies collude to fix the wages they pay; or when they use so-called 'no-poach' agreements as an indirect way to keep wages down, restricting talent from moving where it serves the economy best."

While some national competition authorities in Europe have taken enforcement action against no-poach and wage-fixing agreements, no enforcement action has been taken yet by authorities in the United Kingdom or by the European Commission. Vestager's comments signal that could be changing.

5. Consider Taking Advantage of the DOJ's Leniency Policy

Employers may wish to review any current arrangements they have with competitors and, to the extent there are any potentially illegal agreements, consider reporting that to the DOJ to take advantage of its leniency policy.[41] The European Commission has a similar leniency program.[42]

Conclusion

Employers should be wary of placing too much reliance on the recent jury verdicts for the defendants in *Jindal* and *DaVita*. The DOJ shows no signs of slowing its enforcement initiative against labor agreements.

ENDNOTES

[1] https://www.cnbc.com/2022/02/01/roughly-47-million-people-quit-their-job-last-year.html

[2] https://www.pewresearch.org/fact-tank/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected/

[3] https://www.pewresearch.org/fact-tank/2018/04/11/millennials-largest-generation-us-labor-force/

[4] https://www.gallup.com/workplace/231587/millennials-job-hopping-generation.aspx ("Unattached to organizations and institutions, people from this generation — born between 1980 and 1996 — are said to move freely from company to company, more so than any other generation.").

[5] *See, e.g.*, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ (July 9, 2021 Executive Order issued by President Biden directing the Federal Trade Commission (FTC) to "consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority … to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."); https://www.reuters.com/legal/transactional/restrictive-covenants-evolve-common-law-statutory-regulation-2022-watershed-2022-02-22/ (stating 30 states (including Washington, D.C.) now have laws affecting restrictive covenants).

[6] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)

[7] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)

[8] *Id.*

[9] *Id.*

[10] 15 U.S.C. § 1.

[11] 15 U.S.C. § 15.

[12] *See* https://www.justice.gov/atr/case-document/complaint-0 (complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar related to five "no cold call" agreements), https://www.justice.gov/atr/case-document/complaint-146 (complaint against Lucasfilm related to a "no cold call" agreement with Pixar), and https://www.justice.gov/atr/case-document/complaint-88 (complaint against eBay related to no poach agreement with Intuit); *see also* https://www.justice.gov/opa/pr/justice-department-requires-lucasfilm-stop-entering-anticompetitive-employee-solicitation.

[13] *See In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167 (N.D. Cal. 2013); *In re Animation Workers Antitrust Litig.*,123 F. Supp. 3d 1175 (N.D. Cal. 2015); *Garrison v. Oracle Corp.*, 159 F. Supp. 3d 1044 (N.D. Cal. 2016).

[14] *See, e.g.*, *In re High-Tech Employee Antitrust Litigation*, 2015 U.S. Dist. LEXIS 118051, at *12-13, *22-23 (N.D. Cal. Sept. 2, 2015) ($435 million settlement).

[15] *See* Department of Justice and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals, October 2016, available at *https://www.justice.gov/atr/file/903511/download*

[16] *Id.* at 3.

[17] *Id.* at 1.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 4.

[21] *Id.*

[22] *See, e.g.*, Press Release, Department of Justice Office of Public Affairs, Former Owner of Health Care Staffing Company Indicted for Wage Fixing (Dec. 10, 2020), available at https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing; Press

Release, Department of Justice Office of Public Affairs, Health Care Company Indicted for Labor Market Collusion (Jan. 7, 2021), available at https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion; Press Release, Department of Justice Office of Public Affairs, Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses (Mar. 30, 2021), available at https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses; Press Release, Former Aerospace Outsourcing Executive Charged for Key Role in a Long-Running Antitrust Conspiracy (Dec. 9, 2021), available at https://www.justice.gov/opa/pr/former-aerospace-outsourcing-executive-charged-key-role-long-running-antitrust-conspiracy.

[23] *See, e.g.*, *Pena v. Surgical Affiliates, LLC, et al.*, 1:21-cv-03803 (N.D. Ill. July 16, 2021).

[24] *United States v. Jindal*, 2021 WL 5578687, at *5 (E.D. Tex. Nov. 29, 2021); *United States v. DaVita Inc.*, 2022 WL 266759, at *8 (D. Colo. Jan. 28, 2022)

[25] *United States v. Jindal, et al*., No. 4:20-cr-00358 (April 14, 2022 E.D. Tex.) (ECF No. 112) (finding defendants not guilty of violating the Sherman Act, while finding one defendant guilty on a single count of obstruction of Federal Trade Commission proceedings); *United States v. DaVita Inc. et al*., 1:21-CR-00229 (April 15, 2022 D. Col.) (ECF No. 264) (returning not guilty verdict for defendants on all counts).

[26] *See supra* note 22.

[27] *See Seaman v. Duke University*, 1:15-CV-462 (M.D.N.C. Sept. 25, 2019), ECF No. 388 (No-poaching agreement between Duke University and the University of North Carolina resulted in a $54 million settlement).

[28] *See* Department of Justice and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals, October 2016, at 3, available at *https://www.justice.gov/atr/file/903511/download*

[29] *Id.* at 2.

[30] *Id.* at 9.

[31] *Id.* at 4.

[32] *Id.* at 8.

[33] *Id.* at 5.

[34] *Id.* at 3.

[35] https://www.ftc.gov/enforcement/competition-matters/2016/10/competitive-job-markets-offer-more-just-fringe-benefits

[36] *See AYA Healthcare v. AMN Healthcare*, Civ. Action No. 17-205-MMA, 2018 WL 3032552, at *16 (S.D. Cal. June 19, 2018); *United States v. eBay, Inc.*, 968 F.Supp.2d 1030 (N.D. Cal. 2013)

[37] *See, e.g.*, *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144 (3d Cir. 2001)

[38] Compare *DeSlandes v. McDonald's USA, LLC*, No. 17-C-4857, 2021 WL 3187668 (N.D. Ill. Jul. 28, 2021) and *Conrad v. Jimmy John's Franchise, LLC,* No. 18-cv-00133, 2021 WL 3268339 (S.D. Ill. Jul. 30, 2021) *with Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) and *In re Papa John's Employee and Franchisee Employee Antitrust Litig.*, No. 18-cv-00825, 2019 WL 5386484, at *9 (W.D. Ky. Oct. 21, 2019).

[39] *See, e.g.*, *Arrington v. Burger King Worldwide, Inc.*, 448 F. Supp. 3d 1322, 1332 (S.D. Fla. 2020)

[40] Margrethe Vestager, A new era of cartel enforcement, Speech at the Italian Antitrust Association Annual Conference (Oct. 22, 2021), available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en.

[41] *See* Department of Justice and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals, October 2016, at 8, available at *https://www.justice.gov/atr/file/903511/download* (the first corporation to report the antitrust offense and cooperate with any investigation will not be criminally charged).

[42] https://ec.europa.eu/competition-policy/cartels/leniency_en

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