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Noncompete News: Justice Department: Non-solicit Agreements Among High-Tech Employers Violate Antitrust Law

3/28/2011

The Department of Justice's (DOJ) Antitrust Division recently filed two complaints, along with proposed settlement agreements, in D.C. federal court alleging that no-solicit agreements among high-tech employers constituted unlawful restraints on trade in the market for highly-skilled employees in the technology sector. In *United States v. Adobe Systems, Inc.*, DOJ alleged that do-not-call agreements among Google, Apple, Adobe, Intel, Intuit and Pixar were formed and managed via communications between company executives to prohibit recruiters from contacting employees of cooperating firms to fill open positions. In *United States v. Lucasfilm, Ltd.*, DOJ alleged that, in addition to a do-not-call agreement, Lucasfilm and Pixar agreed to notify each other when making offers to each others' employees and to not make counteroffers to their own employees offered a position by the other company. In the Competitive Impact Statements filed in both cases, DOJ argued that such agreements reduce competition for highly-skilled employees such as engineers and digital animators, comparing the do-not-call lists for employees to the no-call lists for customers or suppliers previously found by courts to be "per se" unlawful restraints on competition. Alternatively, DOJ argued that the employers' agreements were too overbroad to be "reasonably necessary" for achieving competitive benefits. DOJ's filings suggest that the agreements were created and enforced, at least in part, through e-mail communications between company executives and HR personnel. While the settlements proposed in both cases prohibit all no-solicit agreements between the defendant companies (not just the do-not-call lists described in the complaints), they exempt the kind of no-solicit provisions typically executed in separation agreements, settlement agreements, mergers or acquisitions, consultant agreements, or joint ventures – provided they are sufficiently narrow in scope. The proposed settlements also allow for unilateral no-solicit policies, so long as defendant companies refrain from pressuring outsiders to adopt or enforce them. The settlement proposed in *Lucasfilm* also prohibits agreements to notify competing firms of offers made to their employees and agreements to refrain from making counteroffers to employees. If approved by the court, the settlements will bind the defendant companies to their terms (which require cooperation with random compliance audits) for five years. DOJ petitioned the *Adobe Systems* court to enter a final judgment in January 2011. The filings in *Lucasfilm* refer to DOJ's previous challenges to employment restraints in *Adobe Systems* as well as the medical residency assignment program in *United States v. Association of Family Practice Residency Doctors* (also resolved by a settlement agreed upon by the parties). In a press release, DOJ stated "it continues to investigate" similar no-solicit agreements between employers. The *Adobe Systems* defendants have denied any wrongdoing in agreeing to settle with DOJ. Even though a court has yet to rule on whether employee no-solicit agreements constitute "per se" unlawful restraints on

trade, *Adobe Systems* and *Lucasfilm* signal increased scrutiny by DOJ of mutual agreements affecting employee hiring. ***No-hire v. No-solicit Agreements.*** Employers have routinely executed no-hire or no-solicit agreements when executing separation agreements for executives or when negotiating the terms for the sale of a company. But *Adobe Systems* and *Lucasfilm* seem to indicate that a no-solicit agreement has the same kind of impact as a no-hire agreement: by entering into an agreement that keeps the price of labor down, employers impede competition for highly-skilled employees. Under the DOJ's reasoning, employees affected by no-solicit agreements may suffer an antitrust injury. Until now, courts have only addressed the antitrust implications of no-hire agreements. The leading case, *Eichorn v. AT&T Corp.*, suggest that an agreement must (i) directly impede employees' ability to sell labor to more than one company within the relevant competitive market and (ii) have a negative impact on the value of the labor in order to be actionable by affected employees on antitrust grounds. 248 F.3d 131, 146-47 (3d Cir. 2001). In *Eichorn*, AT&T instituted a no-hire agreement as a condition for the sale of a subsidiary corporation, prohibiting highly skilled technical employees from being hired by AT&T affiliates for eight months following the sale. The Third Circuit rejected the plaintiff-employees' arguments that the agreement amounted to a "per se unlawful" boycott of their services because they could have been hired by employers in the market besides the AT&T affiliates subject to the no-hire agreement. The court also rejected the argument that the employers had conspired to fix the price of labor because the primary purpose of the no-hire agreement was to facilitate the sale of the corporation (unlike the no-solicit agreements in *Adobe Systems* and *Lucasfilm*, which the DOJ alleges had no competitive purpose). Even if the district court approves the proposed settlements in *Adobe Systems* and *Lucasfilm*, it is unclear whether no-solicit agreements will be vulnerable to antitrust challenges by employees given *Eichorn* and its progeny. Common law noncompete agreements have long been held to **not** run afoul of antitrust laws when reasonably limited in scope and duration. Moreover, it is unclear how the no-solicit agreements prohibited under the settlement terms give rise to an antitrust violation. Unlike the *Eichorn* employees, the employees of the defendants in *Adobe Systems* were never "directly impeded" from selling their labor to other companies; they were simply not actively solicited – or "cold called" – to sell their labor to a few select companies in Silicon Valley (however, some digital animators at *Lucasfilm* and *Pixar* may have also been deprived of counteroffers). Although the DOJ did not explain any specific impact on the price of labor resulting from the do-not-call lists, one could argue that such practices operate to keep the price of retaining highly-skilled employees down by preventing the employees from learning the "value" of their services and negotiating higher compensation arrangements. ***Impact on Employers.*** The terms of any noncompete agreement may be guided by the scope, duration and geographic area requirements of state law, but any impact on the labor market will vary on the unique factual circumstances in each case. Any no-hire or no-solicit provisions included in routine employment or settlement agreements should be drafted (or reviewed) with antitrust implications in mind. For example, some considerations for reviewing a no-hire or non-solicit agreement may be:

• whether it impacts a class of skilled employees, or involves more than one employer competing for those employees;

• whether it will operate with other laws or agreements to impact employee compensation; and

• whether the business decision motivating the agreement is clear. Employers in industries that commonly use no-solicit policies to deter employee "poaching" should seek guidance on revising these policies for possible antitrust implications. If you have any questions regarding the issues addressed in this article, please contact the author, Naveen Kabir, nkabir@fordharrison.com, the editor of the *Noncompete News,* Jeff

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