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Department of Justice Puts 'No Cold Call' Solicitation Agreements on Ice

After a lengthy investigation, the Antitrust Division of the U.S. Department of Justice (DOJ) recently filed suit against six high-tech companies, Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., and Pixar Animation Studios (the defendants) alleging that their agreements not to solicit each other's employees through a practice known as "cold calling" violated federal antitrust law. Along with the suit, the DOJ filed a proposed settlement, which if approved by the court, will bar the defendants from entering into such agreements and will compel the defendants to implement other compliance procedures. This client advisory discusses the suit, *United States v. Adobe Systems*, and its ramifications.

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Solicitation Practice in Question

The DOJ alleges that beginning in May 2005, senior executives of the defendants agreed not to "cold call" each others employees. "Cold calling" is defined as any solicitation for employment (by phone, email, letter or otherwise) directed to an employee who has not applied for an open position. Bilateral agreements between Apple and Google, Apple and Adobe, Apple and Pixar, and Google and Intel prevented the companies from cold calling each other's employees. The agreements were allegedly not tied to any specific collaboration agreement between the defendant companies. They covered all employees in all offices in all jobs. Employees of the defendants were not made aware of these agreements.

Alleged Violation of Federal Law

By allegedly agreeing not to compete for talented high-tech employees through cold-calling, the DOJ charges that the agreements were *per se* violations of Section 1 of the Sherman Act, 15 U.S.C. §1, which outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce… ." According to the government, the agreements distorted competition by reducing the ability of the companies to compete for workers, deprived employees access to better job opportunities, and interfered with salary and benefits competition that otherwise would have existed in the market for these skilled workers.

Significantly, none of the agreements were limited by job function, product group, geographic scope, or time period. Thus, the DOJ charges, the agreements were broader than reasonably necessary for any legitimate collaboration between the defendants. The DOJ noted that the defendants had successfully collaborated with many other high-tech companies without entering into no cold calling agreements. Thus, there was no competitive justification for the agreements.

Proper Recruiting Procedures

Importantly, the proposed settlement specifically outlines under what circumstances non-solicitation agreements are legal and appropriate. The settlement does not prohibit non-solicitation agreements that are:

1. contained within existing and future employment or severance agreements with a defendant's own employees;
2. reasonably necessary for consummated or unconsummated mergers, acquisitions, investments, and divestitures, and due diligence related thereto;

3. reasonably necessary for contracts with consultants, auditors, recruiting agencies, and similar entities;
4. reasonably necessary for the settlement of legal disputes;
5. reasonably necessary contracts with resellers or OEMs;
6. reasonably necessary for contracts with providers or recipients of services other than those listed above; and
7. reasonably necessary for the proper functioning of a legitimate collaboration agreement such as a joint development, joint venture, teaming agreement, joint project, and the shared use of facilities.

The settlement also outlines more specific information that the defendants must include in any future non-solicitation provision relating to agreements falling within categories 5, 6, and 7 in the above list. While these requirements are only imposed on the specific defendants involved in the case, they are good business practice for all companies entering into non-solicitation agreements:

For all written agreements in categories 5, 6 and 7, the defendants must ensure that the non-solicitation provision:

1. specifically identifies the agreement to which the provision relates;
2. is narrowly tailored to affect only employees who are anticipated to be directly involved in the agreement;
3. identifies with reasonable specificity the employees who are subject to the agreement;
4. has a specific termination date or event; and
5. is signed by all parties to the agreement; these signatures must also accompany any modifications to the agreement.

If the non-solicitation agreement is part of an unwritten agreement, then the defendants must maintain documents sufficient to illustrate:

1. the specific agreement to which the provision relates;
2. the employees, identified with reasonable specificity, who are subject to the provision; and
3. the provision's specific termination date or event.

A Call to Vigilance

While the defendants involved in this suit will neither have to admit wrongdoing nor pay fines, they may face liability under Section 4 of the Clayton Act, 15 U.S.C. § 15, which allows aggrieved employees to file their own lawsuits seeking treble damages, costs, and attorneys' fees.

The DOJ indicated in its press release that this case arose out of a larger investigation which began last year, and that the division would continue to investigate other similar agreements. Although this suit pertained to the high tech industry, examples used in the DOJ's competitive impact statement referenced other fields. The suit and proposed settlement serve as a reminder for employers to review their employee recruiting policies and procedures regarding no solicitation agreements to ensure legal compliance.

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