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DOJ Now Targeting HR Professionals for Criminal Antitrust Violations

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Human capital (i.e. skilled labor) has become increasingly vital to the success of business enterprises. But such invaluable capital can also be extremely difficult to attract and retain, as corporate loyalty has become less of a two-way street and the gold ring of opportunity swings by. Most companies have witnessed critical employees jump ship to join competitors or newly-trained understudies put their expensive training to work for rivals who offer not only better and fairer financial rewards but often a more comfortable and civilized safe haven. Where permitted by state law, agreements between employers and employees can mitigate these inevitable disruptive and sometimes irreparably damaging contingencies. But some companies, finding such "vertical" non-compete agreements ineffective or inadequate, have resorted to "horizontal" arrangements with competitors to essentially hobble opportunistic employees. Aptly labeled no-poach and wage-fixing agreements, the most perilous of these agreements (a) inhibit companies from recruiting or hiring employees from competitors or (b) collectively set employee wages and terms of employment. Although tempting additions or alternatives to sometimes problematic non-compete agreements, these collusive arrangements may soon carry federal criminal penalties.

On January 19th, speaking at a conference hosted by the Antitrust Research Foundation, newly appointed Assistant Attorney General for the Antitrust Division Makan Delrahim declared that the DOJ will be pursuing criminal charges for no-poach and wage-fixing arrangements. Delrahim commented: "We have been very active in [investigating no-poach and wage-fixing agreements]. I think over the coming couple of months, you will see some announcements. And to be honest with you, I've been shocked how many of these there are. But they're real … [W]e are treating those … in certain circumstances as criminal." So how do the antitrust laws apply to these arrangements and what can human resource professionals expect?

Labor Markets and the Antitrust Laws

Just as the Sherman and Clayton Antitrust Acts regulate anticompetitive conduct in product and service markets, they also apply to anticompetitive conduct in labor markets. As early as 1926, the Supreme Court read § 1 of the Sherman Act to prohibit agreements to collectively set wages. In *Anderson v. Shipowners' Association of Pacific Coast*, the Court struck down an agreement, implemented by membership in "shipowners associations," to fix prices among "substantially all" the owners of merchant vessels "engaged in … commerce among the ports of the Pacific Coast and with foreign countries." Justice Sutherland, writing for the Court, held: "The associations fix the wages which shall be paid the seamen … If the restraint … had related to the carriage of goods in interstate and foreign commerce … the unlawful restraint would be clear. But ships and those who operate them are instrumentalities of commerce … no less than cargoes."

Since the *Anderson* case, courts have refined the framework for analyzing no-poach and wage-fixing cases. They come in two flavors: naked restraints and ancillary restraints. Naked restraints are separate from or not reasonably necessary to a larger legitimate collaboration between employers. Ancillary restraints, on the other hand, are restrictions that are related to and reasonably necessary for a legitimate, procompetitive collaboration between employers. For example, an agreement not to recruit employees for a limited period after the sale of a subsidiary would be an ancillary restraint. The DOJ's criminal enforcement initiative appears to focus on naked, not ancillary, restraints.

Naked Restraints: Wage-Fixing

In 2007, the DOJ filed a civil complaint against a healthcare association that operated a nursing registry for conspiring to fix nurse wages. While originally established to monitor the quality of temporary nursing services, the DOJ alleged that the association went a bridge too far and used the registry to impose a uniform wage structure on participating staffing agencies. The association purportedly set wages by soliciting desired rate schedules from its member hospitals and averaging them to formulate a standard schedule. To ensure participation, member hospitals were required to use the registry whenever possible. Any hospital that purchased less than less than 50% of its temporary nursing requirements through the registry would be expelled from the association. The case ultimately settled when the parties signed a consent decree (a) requiring the association's member hospitals to individually negotiate nursing rates and (b) prohibiting the association from mandating use of the registry. The consent decree also required the association to establish an antitrust compliance office and annually file an antitrust compliance report for 10 years from the date of execution of the consent decree. Further, it allowed for DOJ compliance inspections and interviews with the "officers, employees, agents, or other representatives [of the association]" upon written request.

In addition to such explicit wage fixing agreements, the DOJ and FTC have brought civil enforcement actions against companies for sharing competitively sensitive employment information. In 1994, the DOJ filed an antitrust case against a professional association of HR directors, a trade association of hospitals, and a number of member hospitals under § 1 of the Sherman Act for sharing employee compensation information about acute-care registered nurses. Using the professional and trade associations as conduits, the hospitals purportedly exchanged nonpublic, current and prospective information about nursing budgets, entry-level RN wages, and raise schedules in an attempt to counteract rising wages resulting from a labor shortage. Each hospital member purportedly used that information to set entry-level RN wages and to schedule raises. The parties settled by entering a consent decree with DOJ oversight prohibiting the sharing of compensation information except when (a) collected by a third party, (b) historic or current (not prospective) in nature, (c) limited to average compensation, (d) and aggregated to prevent identification of its origin. The decree also required that no single hospital's data comprise more than 25% of the aggregate data.

Naked Restraints: No-Poach Agreements

In 2010 and again in 2012, the DOJ filed civil complaints against technology companies for no-poach agreements. In the 2010 case, two film studios allegedly agreed not to "cold call" each other's digital animators or to make counteroffers when the other studio made an offer to a candidate. Similarly, in the 2012 case, executives of an online retailer allegedly verbally agreed with executives of a software developer not to proactively recruit each other's computer engineers and scientists, despite internal correspondence purportedly indicating the companies were desperate to fill positions and identifying the other party to the agreement as having the most competent candidates. The DOJ filed Sherman Act § 1 claims against the parties to both agreements. The cases settled when the parties entered five-year consent decrees prohibiting further such agreements, requiring the companies to establish internal compliance programs with annual certification requirements, and allowing for DOJ inspections and interviews upon request.

Ancillary Restraints

Although there are potentially numerous types of ancillary restraints, a 2001 group boycott case decided by the Third Circuit provides an example of an ancillary restraint and demonstrates why they are unlikely to face criminal prosecution as new *per se* antitrust violations. In that case, a parent wireless services provider company agreed to sell its subsidiary telecommunications equipment manufacturer. As a part of the spinoff, the parent company agreed not to hire any employees of the subsidiary for eight months after the sale. The agreement was purportedly necessary to make the sale viable because "one of [the subsidiary's] most marketable assets was its skilled employees." Applying the rule of reason to determine whether the hiring restraint was reasonable, the Third Circuit noted "covenants not to compete executed upon the sale of a business to a third party are generally not recognized as antitrust violations" so long as they "are reasonable in scope." Because the agreement's "primary purpose … was to ensure the successful sale … which required workforce continuity," the Third Circuit held the agreement was reasonable and dismissed the antitrust claim.

Down the Winding Road

Delrahim's comments to the Antitrust Research Foundation are noteworthy because they signal a continuation by the Trump Administration of an Obama-era criminal enforcement policy targeting anticompetitive employment agreements. In 2016, the DOJ and FTC jointly issued "guidance for human resource professionals" that warned HR professionals that the DOJ could in its discretion file criminal charges for no-poach and wage-fixing agreements: "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."

Until now it was unclear whether the Trump-era DOJ would adopt the Obama-era policy embodied in the 2016 guidance. Delrahim has now clarified that no-poach and wage-fixing collusive agreements will remain a top priority at the Trump DOJ and will be prosecuted under both the civil and criminal antitrust laws. Further, Delrahim apparently intends to treat the Obama-era's 2016 joint agency guidance as a safe harbor. In Delrahim's words: "If [wage-fixing and no-poach] activity has not been stopped or continues from the time the [2016 guidance was issued], we will treat that as criminal." Stay tuned.

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