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Does The Antitrust Guidance For Human Resource Professionals Criminalize No Poaching Agreements?

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In November 2016, I wrote in this blog about Guidance issued by the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (collectively the "Agencies"),[1] concerning the application of the antitrust laws to hiring practices. Although, often not fully appreciated by human resource professionals, the companies for whom they work may be competitors in the hiring of potential employees and, as such, their hiring practices can run afoul of the antitrust laws. This blog entry focuses on one specific and controversial aspect of the Guidance—the Agencies' declaration that "no poaching" agreements among employers henceforth may be criminally prosecuted.[2]

What are no poaching agreements? They are usually described as agreements between competitors or potential competitors in which the parties agree not to solicit, recruit or hire, i.e. not to poach, each other's employees. Such agreements may also be referred to as non-solicitation or non-interference agreements.

Why is the Guidance controversial? Because it represents a shift in criminal enforcement policy. Before the Guidance was issued, the DOJ had often challenged no hire agreements—but under the rule of reason, a test in which the anti-competitive effects of a business practice is balanced against its pro-competitive benefits.

By labeling no poaching agreements potential *per se* offenses, the DOJ was effectively finding them irredeemable and having no competitive value. In this respect, the agreements would be treated like price fixing or market allocation, conduct that is labeled illegal *per se*, i.e., conduct that is conclusively presumed to unreasonably restrain trade and is unlawful without regard to its actual effect on competition. This is significant because, as a matter of prosecutorial discretion, the DOJ typically only criminally enforces conduct that is categorized as *per se* conduct.

To my knowledge, no court has held that a no poaching agreement is illegal *per se*. The DOJ had previously taken the position in its complaint against several Silicon Valley companies in, *In re: High Tech Employee Antitrust Litigation*, 856 F.Supp. 1103 (N.D. Cal. 2012), that agreements among competitors preventing recruiters from cold-calling employees of other companies—allegedly similar in effect to no poaching—constituted a *per se* offense. However, that case was settled and the Court left open the question whether the *per se* or the rule of reason applied to the practice. *Id.* at 1122.

The Guidance was announced in the last months of the Obama administration which naturally raised the question whether the new administration would de-emphasize this policy shift. Following a speech earlier this month given by Andrew Finch, the Acting Assistant Attorney General for Antitrust in the DOJ, the answer would appear to be "no."[3] In those remarks Assistant Attorney General Finch emphasized the importance of stability and continuity in enforcement of the antitrust laws as fundamental to the rule of law. He then highlighted as a specific example of that continuity the Guidance and their *per se* treatment of no poaching agreements.

There remain at least two areas where no poaching conduct will not raise the likelihood of civil or criminal antitrust enforcement. First, a business is free unilaterally to decide that it will not poach employees from competitors. A company

might make that decision in preference to starting a potential poaching war. Such a decision does not raise any concern because single firm conduct, in the absence of monopoly power, simply presents no antitrust issue. Second, it remains the case that, when a no poaching agreement is necessary to a legitimate employer collaboration, such as legitimate procompetitive joint venture, restrictions on venturers hiring each other's employees may be permissible, if no broader than absolutely necessary.[4]

To assist H.R. professionals in conduct of their business, the Guidance linked to a resource that they should consult—a list of Red Flags that should alert employers to areas of potential antitrust concern. Those areas are:

- Agreements with another company about employee salary or other terms of compensation, either at a specific level or within a range.
- Agreements with another company to refuse to solicit or hire that other company's employees.
- Agreements with another company about employee benefits.
- Agreements with another company on other terms of employment.
- Expressions to competitors that you should not compete too aggressively for employees.
- Exchanges of company-specific information about employee compensation or terms of employment with another company.
- Participation in meetings, such as a trade association meeting, where the above topics are discussed.
- Discussions of the above topics with colleagues at other companies, including during social events or in other non-professional settings.
- Receipt of documents that contain another company's internal data about employee compensation.

[1] These agencies are charged with enforcing the antitrust laws.

[2] Although many antitrust claims are asserted in civil actions for damages, the Sherman Act is, at its most basic, a criminal law and as such, prosecutions can be brought not only against the company violating the law but also responsible employees.

[3] Given at the Global Antitrust Enforcement Forum on September 12, 2017.

[4] This will not necessarily be the case for wage fixing agreements ancillary to a joint venture.