

Management Alert



DOJ To Announce Criminal Enforcement Actions For “No-Poach” Agreements

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Seyfarth Synopsis: Criminal prosecution of “no-poaching/no-hire” agreements appears imminent. Employers should investigate their hiring and compensation practices to ensure compliance with recent antitrust pronouncements.

Background

In October 2016, the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) under the Obama Administration issued a joint Antitrust Guidance for Human Resource Professionals (“HR Guidance,” available [here](#)). Among other things, the HR Guidance announced that so-called “naked” agreements among employers not to recruit employees or not to compete on employee compensation would be considered *per se* violations of the antitrust laws and prosecuted criminally.

On September 12, 2017, at the Global Antitrust Enforcement Symposium, then Acting Assistant Attorney General Andrew Finch reiterated that such “naked” agreements may be prosecuted criminally. Thus, although the Trump Administration has withdrawn other Obama-era employment law policy statements (see, e.g., News Release: US Secretary Of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance, available [here](#)), it has adopted the Obama Administration’s position as stated in the HR Guidance.

Most Recent Developments

According to reported statements by current Assistant Attorney General Makan Delrahim, Finch’s comments were not empty words. On January 19, 2018, at a conference sponsored by the Antitrust Research Foundation at George Mason University, Delrahim announced that DOJ had been “very active” in reviewing potential violations of the antitrust laws resulting from agreements among employers not to compete for workers (reports from that conference are available [here](#) and [here](#)).

Reportedly, Delrahim went on to say that “[i]n the coming couple of months you will see some announcements, and to be honest with you, I’ve been shocked about how many of these there are, but they’re real.” According to Delrahim, if the conduct occurred or continued after issuance of the HR Guidance, the DOJ will treat those agreements as criminal.

Antitrust Legality Of “No-Poaching” Agreements

“No-poaching” agreements are agreements between or among two or more employers not to solicit each other’s employees. They are similar to, but slightly different from, “no-hire” agreements (sometimes referred to as “no-switching” agreements). A “no-poaching” agreement merely prohibits the solicitation of employees; if an employee applies without solicitation, there is no prohibition on hiring that worker. A “no-hire” agreement prohibits the hiring of the worker even if he or she was not solicited. It appears that the DOJ considers both such agreements – if they are “naked” – to be *per se* unlawful and subject to criminal prosecution.

What is a “naked” agreement? It is an agreement that stands alone. It is not ancillary to a larger, legitimate collaboration. Ancillary “no-hire” or “no-poaching” agreements do not violate the antitrust laws if they are reasonable in scope and duration and are reasonably necessary to further the interests of the legitimate collaboration. For example, in *Eichorn v. AT&T Corp.*, 248 F.3d 131, 146 (3d. Cir. 2001), the Third Circuit held that an agreement on behalf of all AT&T affiliates not to hire or solicit any employees from a company (Paradyne) that it sold to Texas Pacific Group, for a period of eight months after the sale, was lawful under Section 1 of the Sherman Act. The Third Circuit found that the agreement was a legitimate ancillary restraint and that its primary purpose was to ensure that the purchaser could retain the skilled services of the Paradyne employees. It concluded that any restraint on the plaintiffs’ ability to seek employment at AT&T or its affiliates was incidental to the sale of Paradyne.

Employer Concerns

In spite of the publicity given to the issuance of the HR Guidance in 2016 and high-profile class action cases such as *In Re High-Tech Employee Antitrust Litigation*, No. 11-CV-02509 (“High-Tech”) (selected case documents available [here](#)), human resources personnel and other executives often do not realize that the antitrust laws apply to the employment marketplace. Thus, many simply are not aware that an agreement among employers not to hire employees or to exchange wage information could result in a violation of the antitrust laws. As noted, Delrahim reportedly expressed shock at the number of potential violations DOJ is investigating even after the issuance of the HR Guidance, but this “number” may simply be the result of a lack of awareness and understanding by employers.

In addition to the impending criminal cases, employers subject to an enforcement action should anticipate that civil lawsuits will follow. These will likely be class actions, and if a class is certified, it could expose the employers to substantial monetary liability. This is the pattern that occurred in the High-Tech consolidated cases which resulted in a settlement of \$435 million (settlement website available [here](#)).

Recommendations

Employers should consider conducting an internal investigation to ascertain whether they are currently engaging in conduct outlined by the DOJ and the FTC in the HR Guidance as potentially unlawful. The investigation should include investigation of potential wage fixing and wage information sharing in addition to “no-poaching/no-hiring” agreements. Employers should also make sure that they have an antitrust compliance policy in place that includes instructions on these practices.

Seyfarth Shaw has substantial experience advising and defending employers in antitrust matters impacting the employment marketplace, such as those involving wage information sharing and no-hiring agreements. Seyfarth also has substantial experience in handling criminal investigations and prosecutions. Should you have any questions, feel free to contact one of the authors or any Seyfarth Shaw attorney with whom you work.

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