

DOJ ANTITRUST DIVISION PROVIDES ADDITIONAL INSIGHT ON ITS ANALYSIS OF NO-POACH AGREEMENTS THAT MAY BE SUBJECT TO CRIMINAL PROSECUTION

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Since 2016, the U.S. Department of Justice Antitrust Division ("DOJ" or "Division") has increased its enforcement focus on agreements between labor market competitors not to hire each other's employees — also known as "no-poach agreements" — stating on multiple occasions that naked no-poach agreements or agreements not to compete on employee compensation risk criminal prosecution. Through statements made earlier this month by a senior official in the Division, DOJ has now provided additional insight on the analysis it uses to determine whether a particular no-poach agreement should be criminally prosecuted. Employers in competitive labor markets should take note of DOJ's repeated warnings when considering employment-related agreements with competitors and exchanging employment-related information with competitors, and they would also be well served to assess their current antitrust risk by proactively reviewing employment-related agreements with other employers through the lens of DOJ's analysis. Such a proactive approach could significantly reduce a company's exposure to extensive penalties arising from antitrust violations.

DOJ'S ANALYSIS OF NO-POACH AGREEMENTS

In prepared remarks delivered at Santa Clara University School of Law,^[1] Deputy Assistant Attorney General Michael Murray explained that although federal antitrust enforcers "long have been active" in the labor space, the Division's "enforcement focus on the labor markets has become even more acute in the past few years," particularly in relation to assessing the appropriateness of any agreements between employers regarding the hiring of each other's employees or the setting of employee compensation.

Seeking to clarify and provide context to the October 2016 issuance of DOJ's and Federal Trade Commission's *Antitrust Guidance for Human Resource Professionals*,^[2] as well as the Division's recent amicus brief filings in various labor market cases, Murray reiterated DOJ's position that it views naked no-poach agreements among labor market competitors as per se violations, while it views no-poach agreements that are not naked or not among competitors as subject to the rule of reason.^[3] Acknowledging the "nuanced and complex framework" through which DOJ analyzes alleged no-poach agreements, Murray outlined the questions DOJ asks when analyzing a no-poach agreement and when determining whether a given agreement should be subject to criminal

prosecution.

Are the entities that allegedly entered into a no-poach agreement capable of "concerted action" required by Section 1 of the Sherman Act?

A parent corporation and its wholly owned subsidiary are not legally capable of conspiring with each other under section 1 of the Sherman Act because they are a single economic entity.[4] For partially owned subsidiaries and joint ventures, the applicable test is whether the alleged conduct joined together separate economic decision-makers such that it deprived the market of "independent centers of decisionmaking." [5] Murray acknowledged that answering this question is a "complicated question of fact," and requires consideration of "how the parties involved . . . actually operate." He pointed out that in the franchise context, this can be a particularly complicated question, and different courts have reached opposite conclusions based on the facts of a given case.

However, if the entities are deemed a single enterprise, they are incapable of "concerted action" under Section 1 and DOJ's inquiry ends there. If not, DOJ's inquiry continues.

Are the entities that allegedly entered into a no-poach agreement competitors in the same labor market?

The answer to this question will determine the standard under which the DOJ will analyze the legality of the alleged no-poach agreement. DOJ's position is that "companies can be competitors in the labor market but not competitors in product or services market." Put another way: "Companies in different industries can compete in the same market for employees," and thus can form anticompetitive agreements in their shared labor market even though they could never form such illegal agreements as to the different products and/or services each provides.

If DOJ determines that the entities are "not competitors in the labor market but instead are, for example, vertically related in their industry, then any agreement among them is subject to the rule of reason." Murray explained that "franchisors and franchisees [] are primarily in a vertical relationship in their industry and generally not competitors with respect to the labor market. Consequently, agreements among them likely are subject to the rule of reason."

Murray explained that, in DOJ's view, if the entities are competitors in the labor market, then entering into a no-poach agreement is the equivalent of a classic market allocation, warranting per se treatment, absent an important caveat that will be discussed next.

Is the no-poach agreement ancillary to a separate, legitimate transaction, and reasonably necessary to "make the main transaction more effective in accomplishing its purpose"?

This is a fact-intensive inquiry, but if the answer is yes, DOJ will analyze the restraint under the rule of reason

standard as opposed to the per se standard. Practically speaking, agreements that DOJ analyzes under the rule of reason will not be criminally prosecuted and, at most, would be subject to civil enforcement and litigation if DOJ believes the anticompetitive effects of the restraint outweigh its procompetitive benefits. Murray provided the following example: "[I]n a franchise case, the ancillary restraints question turns on the relationship between the no-poach agreement and the franchise system, particularly its promotion of interbrand competition."

Murray explained, however, that if the answer is no, DOJ will view the restraint as a "naked" no-poach agreement, apply the per se standard and consider criminal prosecution.

PRACTICAL GUIDANCE

All companies that compete for employees — including nonprofits, universities, and other entities that typically view themselves as having little exposure to violations of antitrust law — should take note of DOJ's current focus and approach to analyzing agreements among competitors in the labor market. Antitrust violations — and even just investigations of potential violations — can result in significant costs and serious consequences for employers and any individual directly or indirectly involved. Accordingly, all companies should consider the following practical guidance to mitigate their antitrust risk and potential exposure to DOJ scrutiny:

1. If engaging in agreements or communications with competitors regarding wages, salaries, benefits, terms of employment, or recruitment strategies, make sure that such agreements or communications serve a legitimate purpose. If you believe such an agreement serves a legitimate business purpose (such as, e.g., a joint venture, a franchise relationship, or a noncompete clause ancillary to an employment agreement), antitrust counsel should be consulted to ensure the defensibility of the agreement.
2. Proactively review any agreements with other employers that are currently in place related to employment issues to ensure legality. Be aware that even "routine" agreements, such as a settlement resolving a restrictive covenant dispute with another employer, may implicate antitrust laws. If any agreements raise concern, consulting antitrust counsel immediately may assist in limiting a company's exposure.
3. If sharing competitively sensitive information regarding wages, salaries, benefits, terms of employment, or recruitment strategies with competitors, ensure that such exchanges serve a legitimate purpose and include appropriate safeguards around such exchanges. In certain circumstances, for example, when companies are evaluating a merger, acquisition, or joint venture proposal, the sharing of limited competitively sensitive information may be lawful provided it is reasonably necessary to evaluate the proposed transaction and appropriate precautions are taken. Antitrust counsel should be consulted before exchanging this type of information, however, to ensure defensibility.
4. Review the company's compliance programs to ensure that proper policies and procedures are in place and that management and human resource professionals are appropriately trained to avoid inappropriate discussions or agreements with other companies seeking to hire the same employees. Traditionally, antitrust issues have not been the concern of hiring and recruiting managers; however, due to the current DOJ guidance, employers in competitive labor markets could be well served to consider implementing

training to ensure familiarity with the relevant antitrust regulations applicable to the recruiting, hiring, and compensation of employees.

As evidenced above, in certain circumstances, competing employers might have legitimate purposes for sharing competitively sensitive information or entering into employment-related agreements. If you believe that you might fall within this category, first document the legitimate business justification for your policy or practice and then seek the opinion and guidance of antitrust counsel.

K&L Gates antitrust practice members defend individuals and companies in a wide variety of criminal cases and civil litigation in the United States, including against allegations of no-poach agreements. The Chicago antitrust and labor, employment and workplace safety groups also counsel and provide corporate training on how to remain compliant with U.S. antitrust laws.

Notes

[1] Michael Murray, "Antitrust Enforcement in Labor Markets: The Department of Justice's Efforts," *Prepared Remarks at Santa Clara University School of Law* (March 1, 2019), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-murray-delivers-remarks-santa-clara-university>

[2] Dep't of Just., Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 20, 2016), <https://www.justice.gov/atr/file/903511/download>

[3] The "per se" approach means that the mere formation of the agreement constitutes the illegal act, while the "rule of reason" approach requires proof that the agreement's anticompetitive effect outweighs the procompetitive benefit.

[4] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

[5] *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

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