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Where Are The No-Poach Prosecutions DOJ Promised?

By **Bryan Koenig**

Law360 (October 3, 2019, 6:26 PM EDT) -- The U.S. Department of Justice wants everyone to know it's still serious about prosecuting companies and executives who agree to fix wages or keep employees from seeking other jobs and better pay with the competition.

The department issued a guidance, alongside the Federal Trade Commission, in October 2016 warning that wage-fixing and so-called no-poach arrangements between competitors made or continued after that date could face criminal prosecution. And DOJ Antitrust Division chief Makan Delrahim, who became assistant attorney general in September 2017, has repeatedly underscored for much of his tenure that criminal no-poach prosecution "remains a high priority." He even said in January 2018 that the division had a handful of criminal cases in the works.

"In 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," Delrahim said at the time.

But for all its talk of putting executives behind bars, the agency hasn't brought a single criminal no-poach case in the nearly three years since the guidance.

While the agency is known to be conducting active criminal investigations in the space, some former Antitrust Division prosecutors doubt that any prosecutions will materialize.

"You have DOJ all along the way on record noting that they have ... a multitude of alleged self-reports of no-poach conduct. And yet they've not brought a single criminal case. And I think more tellingly, no other antitrust enforcer has fallen in line with them to criminalize the conduct. So it certainly raises the question why," said Simpson Thacher & Bartlett LLP global antitrust and trade regulation practice co-chair John Terzaken, a former criminal enforcement director of the Antitrust Division.

The DOJ may be hesitant to pursue a case, according to experts, because of how difficult it will be to win in front of judges and juries who've never seen these cases pursued criminally. DOJ investigations can take years, they say, and the division is likely waiting for the perfect set of facts for a case it has confidence it can win. In the meantime, it may be using the threat alone of criminal prosecution to cajole corporate compliance.

The threat of criminal prosecution itself represents a major shift for the department, according to Anna Pletcher, an O'Melveny & Myers LLP partner who recently joined the firm after a lengthy stint with the

Antitrust Division, including as an assistant chief in its San Francisco office.

"It is unusual for the DOJ to prosecute a particular type of behavior civilly, and then reverse course and prosecute it criminally," Pletcher told Law360. "Frequently, we see it go in the opposite direction, where there is conduct that may be considered criminal before, but then the scope of criminal behavior has been narrowed."

A Shift in Tone

The DOJ itself may be trying to rejigger expectations in its criminal no-poach enforcement, according to Eric M. Meiring, a partner with Winston & Strawn LLP and former acting chief of the Antitrust Division, who pointed out an apparent change in Delrahim's tone the last time the antitrust chief discussed the prospect, at a department workshop last week on competition in labor markets. According to Meiring, Delrahim no longer appears to be describing criminal prosecution as imminent.

At the workshop, Delrahim said, according to his prepared remarks, "While we cannot comment on the status or the timing of our criminal no-poach and wage-fixing investigations, I want to reaffirm that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division."

"As former Attorney General Robert Jackson observed, justice is neither automatic nor blind," Delrahim continued. "The success of the department in this initiative is not based on quantitative metrics, but on the qualitative performance of our investigative work. That is especially true in matters implicating an individual's liberty interest."

Meiring honed in on the last two sentences, especially Delrahim's admonition not to judge the DOJ on its "quantitative metrics," and his assertions of "an individual's liberty interest."

"I think he's trying to be more circumspect," Meiring told Law360.

The reference to personal liberty, according to Meiring, may be an allusion to the seriousness of putting someone behind bars and the desire for a clear-cut case where that appears to be the logical outcome for prosecutors, judges and jurors.

Delrahim was far less circumspect in prepared remarks delivered as part of a Senate oversight hearing in early October 2018, just over a year into his tenure, and two years after the no-poach guidance was issued.

"As a matter of prosecutorial discretion, the division will pursue no-poach agreements terminated before October 2016 through civil actions," Delrahim said at the time. "Defendants should anticipate potential criminal enforcement actions for any such naked no-poach agreements we uncover that post-date our October 2016 guidance, although we reserve discretion as appropriate in making our ultimate determinations."

Asked if any no-poach cases are on their way, a DOJ spokesperson referred Law360 to Delrahim's comments at the workshop last week.

Not everyone thinks Delrahim has set aside plans for criminal prosecution. Mark L. Krotoski, a partner with Morgan Lewis & Bockius LLP and former assistant chief in the division's National Criminal

Enforcement Section, notes that the threats of criminal prosecution are coming from the very top.

"You have to take that very seriously," said Krotoski, who argued that investigations like this can be very complicated and time-consuming.

Krotoski also said that Delrahim's continued assertions of criminal cases as a priority "remains as strong a statement as you will see."

Nor did Krotoski read in Delrahim's tonal shift any effort to tamp down on expectations. Instead, he said that explaining the difference between qualitative and quantitative results "is common for every prosecuting office," which may bring a single big case instead of multiple smaller ones, for example.

A Perfect Case, Or None at All

Experts say the DOJ's discretion may be driven by the difficulty both in finding illegal no-poach deals, and in successfully prosecuting them. The DOJ, they say, may be waiting for just the right case to bring.

"If the DOJ brings a criminal case, they will want to make sure that it's a solid per se violation of the antitrust laws. That also makes sense. When you're looking to impose such harsh sanctions, that's criminal fines and jail time, you want to make sure that your case is a very solid per se violation," Pletcher said.

Anti-competitive arrangements made between competitors are inherently difficult to find, experts note, in part because they often are not written down. From the outside, they look like legitimate business conduct, which is why the DOJ relies so heavily on its leniency program granting protections from criminal prosecution and follow-on private litigation for entities who disclose malfeasance. As a result, the DOJ may need a co-conspirator to inform them of a blatant antitrust violation.

However, even if no-poach prosecutions would be hard to win, Eric Grannon, a partner with White & Case LLP and former division counsel, argues that likely wouldn't dissuade the DOJ.

"The division has brought many cases before juries that other prosecutors might have thought were too thin to prosecute criminally," Grannon said.

Another complicating factor is that antitrust investigations often take a long time — Meiring estimates three to five years. That means, he said, if the clock started ticking when the agencies issued their guidance, that would put enforcers "right in the middle" of an investigation life cycle.

"You could be seeing a wave of these things in the next year or two," Meiring said.

Short of bringing cases, Meiring says the best deterrent is likely what the DOJ is doing: public warnings and advocacy in court briefs, including civil enforcement against major rail equipment suppliers and amicus filings in follow-on litigation to that case, as well as support for a case against Duke University.

"It could change people's actions just believing that there is resolve in the Antitrust Division to bring these cases criminally," Meiring said.

At the same time, the DOJ has argued that a harder-to-prove legal standard should be applied to cases against no-poach deals inked under franchise agreements for fast food chains and other businesses.

Just a Warning?

Terzaken suggests that even if the DOJ doesn't bring a criminal case, Delrahim may be continuing to call the prospect a priority as a warning to industry. There's value, Terzaken said, in "continuing to rattle the saber in the business community to make sure people are sitting up and paying attention."

"Much of the value they may derive from this is helping to shape the compliance community," Terzaken said.

There's no threat quite like the prospect of jail time, according to Terzaken, and the mere possibility may be enough to drive corporate compliance efforts focused purely on staying on the DOJ's good side.

"Because people themselves are going to try to draw very bright lines," Terzaken said.

Meiring argues, however, that threats only go so far.

"It has an effect," Meiring said. But it's not as strong "as putting someone in jail."

Grannon says that it's likely no cases have materialized precisely because employers seem to have gotten the message. In particular, he points to the "emphatic nature" of division front office promises of criminal prosecution.

"I think they would be more than happy to bring a case if they had one," Grannon said.

--Additional reporting by Matthew Perlman. Editing by Orlando Lorenzo.

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