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The role of antitrust laws in labor markets remains a key area of focus by enforcers, including the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission. At a public workshop on competition in labor markets in Sept. 2019, Assistant Attorney General Makan Delrahim reaffirmed "that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division."

An agreement between two or more companies or employers that limits whether or how they can recruit or hire employees can violate the antitrust laws. From an antitrust perspective, such agreements—often called "no-poach" agreements—may harm employees by placing downward pressure on their compensation, as well as limiting their mobility and employment opportunities.

No-poach agreements may expose employers to civil liability, and have been challenged in class action lawsuits brought by private plaintiffs, and civil actions by the Department of Justice. In 2016, the DOJ's Antitrust Division announced its intention to criminally investigate and prosecute certain no-poach agreements. State enforcers, including Washington State's attorney general, have more recently investigated no-poach agreements, and the targets voluntarily agreed to end those practices.

Other arrangements between competing employers can violate the antitrust laws, too, because of their potential to negatively impact competition for labor. For example, when different companies agree to exchange information related to the terms of employment—such as compensation or benefits information—that can, in and of itself, potentially raise antitrust issues.

While the DOJ does not prosecute such information exchanges criminally, it has brought civil enforcement actions against companies who engage in them without following "safe harbor" guidelines. Information exchanges can be seen as evidence of an implied no-poach agreement or similar arrangement, where the evidence of an express agreement is otherwise ambiguous. Enforcers will also bring enforcement actions for wage-fixing agreements which "involves an agreement with another company regarding employees' salary or other terms of compensation, either at a specific level or within a range."

Thus, companies that enter into no-poach agreements, or exchange information about compensation or other terms of employment without first seeking guidance from experienced counsel, face legal risk. However, antitrust law recognizes that certain agreements between companies that limit hiring or solicitation of employees may be lawful depending on the circumstances, and may even be beneficial to competition. Similarly, antitrust law views information exchanges as both lawful and procompetitive provided certain requirements are followed.

This article is intended to help employers navigate this uncertain antitrust legal landscape. It first discusses no-poach and similar unlawful agreements between employers, then focuses on the particular circumstances under which separate companies can lawfully agree with each other to limit how they compete for employees. It then discusses information exchanges and the best practices for falling within the "safe harbor" guidelines for such exchanges.

Agreements Between Employers Regarding Hiring, Retainer, and Compensation

Agreements between two or more employers regarding whether or how they will compete for each other's employees may be unlawful. According to antitrust enforcers, no-poach agreements may constrain an employee's mobility and access to better job opportunities, depress wages and other compensation, and deprive employees of competitively significant information that can be used to negotiate for better terms of employment.

"Free and open markets are the foundation of a vibrant economy … competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation." A recent statement of interest filed in In re *Railway Employee No-Poach Antitrust Litigation*, a class action challenging alleged no-poach agreements, stated the DOJ's position:

> Just as an agreement among competitors to allocate customers eliminates competition for those customers, an agreement among them to allocate employees eliminates competition for those employees. As with other types of allocation agreements, an employee that is victim of an allocation agreement among employers cannot reap the benefits of competition among those employers that may result in higher wages or better terms of employment. Furthermore, just as allocation agreements in product markets have almost identical anticompetitive effects to price-fixing agreements, no-poach agreements among competing employers have almost identical anticompetitive effects to wage-fixing agreements: they enable the employers to avoid competing over wages and other terms of employment offered to the affected employees.

Such agreements are generally unlawful even if the companies do not compete with regard to the products or services they sell, so long as they compete for talent. For example, high-tech companies whose products do not compete in the downstream market nonetheless compete in the market for hiring programmers. It thus may be unlawful for such employers to agree not to compete with one another in hiring or retention.

This prohibition does not just extend to agreements barring one company from hiring another's employees. They also extend to agreements regarding how one employer may solicit another company's employees. For example, one long-running class action arose from an alleged agreement among high-technology companies to not "cold call" each other's employees—the plaintiffs alleged no outright hiring prohibition.

Although the case ultimately settled for a substantial amount, the court found the plaintiffs' allegations of identical "do not cold call" agreements among the defendants sufficient to state a claim under Section 1 of the Sherman Act. Similarly, an agreement between different companies regarding how they will pay or otherwise compensate their respective employees can be an antitrust violation.

The prohibition also is not limited to only express, formal agreements, and applies to oral or implied agreements. Courts have found the existence of an unlawful agreement on circumstantial evidence alone. See, e.g. *N. Cal. Pharm. Ass'n v. United States*, 306 F.2d 379, 391 (9th Cir. 1962). Key factors courts review when determining whether the evidence shows an unlawful agreement between companies, even absent direct evidence of one, are, first, whether the companies engage in "parallel" conduct. In re *High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1116.

In the hiring context, parallel conduct would be, for example, different companies paying nearly-identical salaries to a particular type of employee. However, particularly in markets with just a few companies competing for talent, economic theory says that companies' salaries may closely track each other, even absent an agreement. So, courts look at other factors—such as communications between employers competing for talent, and whether companies' conduct makes economic sense absent agreement—to see whether the evidence suggests an agreement between companies.

Focus on Agreement

Antitrust law focuses on whether competitors or employers have entered into an anti-competitive agreement, either express or more often implied. So long as a company does so independently, and not as a result of an agreement with other companies, companies have great freedom in deciding how to compensate their employees—at least as far as antitrust laws are concerned. Conversely, even a very limited, seemingly reasonable, restraint on how a company may hire employees may violate the antitrust laws, provided that restraint results from an agreement with another employer.

An employer that enters into an illegal no-poach agreement faces legal peril from many different sources. One is the DOJ, which has pursued enforcement actions against many companies for allegedly engaging in illegal no poach agreements. Before Oct. 2016, they did so only civilly, as opposed to criminally. But, in Oct. 2016, DOJ and the FTC jointly announced that they would begin a "very active" approach in reviewing no-poach agreements, with a view to "proceed[ing] criminally" against agreements that violate the no-poaching rules. As noted, state enforcers have been active in bring enforcement actions involving no-poach agreements. The federal and state enforcement actions tend to result in follow-on civil actions.

Independent civil suits, often brought as class actions by employees, have been filed alleging that companies have entered into unlawful no poach agreements with other companies. Private civil litigation has increased since the issuance of the Oct. 2016 Antitrust HR Guidance, reflecting increased scrutiny and interest among potential plaintiffs and the plaintiffs' bar. These private litigation trends have been driven by the high potential damages—each defendant is both jointly and independently liable, in addition to attorney's fees and interest.

Recently, the DOJ has participated or intervened in several civil suits, by filing statements of interest laying out their views on the anticompetitive impact of no-poach agreements. Also, as has been the case in other contexts, private civil plaintiffs can be expected to file "follow-on" antitrust class actions if and when the DOJ or other enforcement agencies—such as the states—undertakes enforcement actions relating to no-poach agreements.

Mitigating Enforcement and Litigation Risk

In certain circumstances, a no-poach or similar agreement may be both lawful and procompetitive under the "ancillary restraints" doctrine. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986). This section will discuss that doctrine, and the circumstances and structures in which no poach or non-solicitation agreements may be entered without violating the antitrust laws.

Antitrust law places potentially anticompetitive agreements into two general categories: per se, and rule of reason. "Per se" agreements are presumptively unlawful, and courts will not consider or analyze the competitive effects of such agreements. By contrast, "rule of reason" agreements violate the antitrust laws only if they adversely affect competition in a relevant market. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). In recent cases, courts consider this as a threshold issue. From a practical perspective, answering which of those two categories an agreement falls into often decides whether the agreement is found lawful or unlawful, since only a rare "rule of reason" agreement will be found to harm competition, at least in this and similar contexts, but all "per se" agreements are unlawful.

To illustrate, agreements between competing sellers regarding the price at which they will sell—i.e., price fixing agreements—are per se violations of antitrust laws, regardless of whether they have an impact on competition overall, provided that they are not ancillary to a legitimate joint venture or other integration of complementary assets. Nearly all such agreements are illegal. Conversely, an agreement between a manufacturer of a product, and its distributor, regarding where that distributor may sell the product, is analyzed under the rule of reason. Many if not most such agreements are lawful under U.S. law.

Ordinarily, from the DOJ's perspective, naked agreements between employers for labor regarding whether or how they will recruit, compensate or retain actual or potential employees are potential per se violations. However, under the "ancillary restraints" doctrine, an agreement typically considered per se unlawful will be "exempt from the per se rule" if it is ancillary to a separate, legitimate venture between employers. Such no-poach agreements, which, according to the DOJ, are ones "reasonably necessary to a separate, legitimate business transaction or collaboration among the employers," will be analyzed under the rule of reason. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143-45 (3d Cir. 2001).

The DOJ has explicitly adopted this distinction, stating in a recent Division Update that if a no-poach agreement is "*not* reasonably necessary to any separate, legitimate business collaboration between the employers," it will be viewed as a *naked* no-poach agreement. In a recent Statement of Interest, the DOJ said it will prosecute no-poach agreements "as *per se* unlawful *unless* the facts show that they are reasonably necessary to a separate, legitimate business transaction or collaboration among the employers." This applies to no-poach agreements in existence after the October 2016 guidance was issued.

To be "ancillary," an "agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction," between the employers, and must be reasonably necessary to "make [that] main transaction more effective in accomplishing its purpose." *Rothery Storage*, 792 F.2d at 224, 227. The mere existence of a separate, legitimate business transaction or collaboration among employers will not be sufficient, on its own, to overcome a claim of unlawfulness; the "no poach" terms must be reasonably necessary to achieve the benefits of the separate transaction or collaboration.

Two examples illustrate arrangements that may constitute a lawful ancillary restraint. When two companies enter into a joint venture to make a product that neither could make alone, antitrust law generally sees such an arrangement as pro-competitive, since the joint venture benefits consumers. However, such arrangements often involve employees at the two companies working in close contact with one another, thus creating the opportunity for one company to recruit the other's employees.

Absent an agreement between the companies not to recruit each other's employees, the companies might not enter into the joint venture at all, and consumers would not get the benefit of the joint venture's output. Thus, antitrust law will view a narrowly-tailored agreement (more on that later) between the two joint venturers not to recruit each other's employees as a lawful ancillary restraint.

Consulting arrangements, as another example, are generally viewed as pro-competitive, since they permit a company to utilize the consultants' expertise to better its business. The day-to-day interaction between the consultants and company employees, however, creates an opportunity for one company to recruit the other's employees. Thus, as with joint ventures and other legitimate, collaborative activities, antitrust law will ordinarily view a narrowly-tailored agreement between the consulting company and its client not to recruit reach other's employees as a lawful ancillary restraint. To be "ancillary," the restraint must be no broader than necessary to achieve the pro-competitive benefits of the arrangement. That fact-specific analysis considers:

- Whether the no-poaching restraint "permanently prevent[s]" competitors from soliciting employees, or if it instead lasts for a limited time-frame. The latter are more likely to be considered lawful.
- Whether the "restraint[] is non-reciprocal" between companies that are parties to the business collaboration. Reciprocal agreements are viewed more favorably.
- Whether the restraint prohibits hiring, or if it instead just limits how one company can hire another—for example, an agreement between two companies simply to honor one another's non-compete is more likely to pass muster than an outright prohibition on hiring.
- Whether the arrangement specifically identifies those employees who may not be "poached," as opposed to barring efforts to hire any of the respective companies' employees. The former types of arrangements are more likely to be held lawful than the latter.

Recent consent decrees the DOJ has entered into illustrate the types of ancillary restraints that the DOJ—and most likely a court—will deem lawful. This, again, is a fact-specific inquiry, so a company considering entering into any sort of agreement regarding hiring another company's employees should engage antitrust counsel to mitigate enforcement or litigation risk.

Also, many companies – particularly those offering consulting services - may have legacy or form agreements in their files which limit or prohibit hiring other company's employees, and vice-versa. Thus, companies should consider a self-audit, conducted by company counsel, to determine whether any such agreements exists. If any do, the company should engage external antitrust counsel to determine those agreements' legality, and, if any are potentially unlawful, to determine appropriate next steps.

Implication of Information Exchanges: Hiring Practices, Compensation, and Benefits

The antitrust laws extend beyond no-poach agreements, and can make illegal the mere "sharing [of] information with competitors about terms and conditions of employment." Sharing such information creates antitrust issues in two respects.

First, recall that no-poach and similar agreements are rarely provable by direct evidence, but instead typically must be proved circumstantially, through indirect pieces of evidence, which collectively may tend to prove an unlawful agreement. See, e.g., *Interstate Circuit v. United States*, 306 U.S. 208, 225 (1939). When companies share information about employee compensation or benefits, it may inadvertently suggest circumstantial evidence of an agreement. For example, sharing compensation information can permit one company to "police" the other's compliance with an antecedent agreement not to pay employees above a certain amount.

Second, an agreement between employers to share compensation information can place downward pressure on compensation, even absent an agreement between employers on compensation. For example, the DOJ sued the Utah Society for Healthcare Human Resources Administration, a society of HR professionals at Utah hospitals, for the members' agreement among themselves to exchange nonpublic prospective and current wage information about registered nurses that caused defendant hospitals to match each other's wages, keeping the pay of registered nurses artificially low.

Agreements to share information relating to hiring, compensation or benefits, standing alone, are not per se unlawful; they are unlawful only "when they have, or are likely to have, an anticompetitive effect." And while the DOJ does not prosecute information exchange agreements criminally, it does bring civil suits challenging exchanges that harm competition, as the *Utah Society* case demonstrates.

Best Practices for Mitigating Antitrust Risk

No-poach agreements are surprisingly common. In Jan. 2018, the assistant attorney general for the antitrust division announced that the Department was "shocked about how many of these [no-poach agreements] there are." While this enforcer's perspective reveals the extent to which companies may engage in this conduct, it is also a strong warning. Antitrust exposure from no-poach agreements often arises not from a reasoned analysis of the risks and benefits of such conduct, but rather, from their employees' misunderstanding of how the antitrust laws apply to employment or HR practices, or to information exchanges.

Given the potential criminal and civil exposure from no-poach and similar unlawful agreements, few companies would rationally decide to enter into one. Companies, however, do not typically enter into agreements that violate the antitrust laws. Employees do, and they typically do so because of a lack of understanding of antitrust law, and how it applies to their job.

Thus, to mitigate antitrust exposure, companies must educate their employees about antitrust law as it applies to what they do. The contents of an effective employee antitrust training program regarding no-poach and similar arrangements must be tailored to the individual company. In devising such a program, a company should keep the following in mind.

First, antitrust training regarding no-poach and similar agreements should be directed toward the right company audience, namely legal staff, HR professionals, executives and anyone else involved in employee hiring and retention.

Second, this training program should emphasize that the company's competitors for labor (an input market) may include many more companies than typical downstream competitors. They are not the companies that the company competes with in the company's sale of products or services, but are instead the companies the company competes with when hiring and retaining talent.

Third, the DOJ has issued specific guidance on avoiding no-poach and similarly unlawful arrangements, which guidance should inform the contents of any antitrust training program. In particular, DOJ has announced that conduct after October 2016 may be subject to criminal prosecution.

Fourth, the DOJ has also issued guidelines regarding information exchanges in conformance with the antitrust laws. These 'safe harbor' guidelines provide that when a neutral third party manages the exchange, the exchange involves information that is historic, the information is aggregated to protect the identity of the underlying sources, and enough sources are aggregated to prevent competitors from linking particular information to an individual source, the exchange of information will not be illegal. These, too, should inform any antitrust training program.

Fifth, a particular focus of the training program should be on situations in which company employees are likely to come in contact with their counterparts at other companies, such as trade association meetings. Such situations have historically been fertile ground for the creation of agreements that violate the antitrust laws.

Sixth, an antitrust training program should emphasize that, in appropriate circumstances, the DOJ will prosecute no-poach agreements criminally. In conjunction with what is known as the 2015 "Yates Memo," in which the DOJ emphasized that pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation—this means that individuals who enter into no-poach or like agreements face potential criminal liability.

Seventh, if a company learns that it is the target of a DOJ criminal investigation, experienced antitrust counsel should be consulted to assess whether the Antitrust Leniency Program may be worth pursuing. Under this program, "corporations can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions."