Inside Counsel Beware: Your Job Description Now Includes Antitrust Compliance

Insights
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There has been a veritable explosion of antitrust litigation in the workplace law field, putting employers and their executives at risk. Federal and state antitrust agencies and private plaintiffs have accelerated their attacks on employers who agree to coordinate wage levels (wage-fixing) or not solicit each other's employees (no-poach).

Four years ago, the Department of Justice threatened criminal prosecution of companies and individuals who engaged in such activities. A few weeks ago, the nation's top antitrust law enforcement official reiterated that threat, announcing that he plans to bring a criminal prosecution this year challenging a no-poach agreement. Attorneys General in several states have stepped up their challenges to no-poach agreements, particularly in franchise settings. Private plaintiffs have obtained huge settlements in class action lawsuits challenging no-poach agreements and exchanges of compensation data among employers.

The antitrust prohibitions against price fixing or market allocation in product markets are well understood. What is not as well understood is that the antitrust laws apply equally to labor markets. Just as a price fixing agreement between two companies to fix the price of widgets may lead to antitrust sanctions, a wage-fixing or no-poach agreement between two companies that compete for the same labor may also lead to antitrust sanctions.

Feds Are Accelerating Enforcement
The two federal agencies charged with enforcing the antitrust laws – the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) – have accelerated their efforts against employers suspected of colluding to restrain labor markets.

Over a decade ago, executives of several well-known tech companies, including the late Steve Jobs, agreed not to poach each other's employees through "cold calls." The executives were concerned about losing key employees and that excessive employee turnover was impacting their respective bottom lines.

The DOJ filed three enforcement actions against the tech companies charging that the informal no-poach agreements violated the antitrust laws. The companies entered into consent decrees agreeing not to further engage in such behavior and shortly thereafter were sued by private antitrust attorneys who brought class action lawsuits for damages. The companies eventually settled these

attorneys who brought class action lawsuits for damages. The companies eventually settled those lawsuits for over $400,000,000, serving as a stark reminder that the antitrust laws apply not only to products and services – they also apply to labor markets.

In October 2016, the DOJ and the FTC upped the ante by issuing their "Antitrust Guidance for Human Resource Professionals." The agencies made clear that they were targeting no-poach and wage-fixing agreements, and – for the first time – the DOJ announced its intention to criminally prosecute such agreements:

Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other's employees. And if that investigation uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, **bring criminal, felony charges against the culpable participants** in the agreement, **including both individuals and companies**."

Since issuing the guidance, DOJ officials have reiterated their intention to criminally prosecute "naked" no-poach and wage-fixing agreements. In early 2018, the DOJ sued railroad equipment manufacturers challenging their no-poach agreements. In its press release announcing the settlement, the DOJ explained that the lawsuit was part of a broader investigation into "naked" agreements not to compete for employees and reiterated its policy to criminally prosecute such agreements.

Because defendants in the railroad equipment manufacturer case had terminated their no-poach agreements before the guidance was issued in October 2016, the DOJ decided not to file criminal charges. But the agency indicated it would do so if the no-poach activity had occurred after that date. The DOJ's most recent threat of criminal action came earlier this year, when its top antitrust official told the Wall Street Journal that the agency will file its first-ever criminal case in the first half of this year challenging a no-poach agreement.

The threat of an imminent criminal prosecution by the DOJ should give pause to any corporate executives contemplating a no-poach agreement or seeking to coordinate wage and benefit levels with other employers. The maximum criminal penalties under the federal antitrust laws are severe: 10 years in jail/ $1 million fine for an individual; $100 million fine for a corporation.

Over the years, many corporate executives have been incarcerated for hardcore cartel conduct. For example, in the auto parts industry, a decade-long investigation by the DOJ resulted in 32 executives being sentenced to jail and $2.9 billion in fines for 46 companies for price fixing and market allocation. Just as price fixing and market allocation have been criminally investigated and prosecuted as hardcore cartel conduct, the DOJ has made clear that it now considers wage-fixing and naked no-poach agreements in the same category.

Congress Gets Involved

No-poach agreements have also drawn the attention of some members of Congress. Senators Elizabeth Warren and Cory Booker introduced legislation in 2018 called "The End Employer

Elizabeth Warren and Cory Booker introduced legislation in 2018 called "The End Employee Collusion Act" that would prohibit no-poach agreements. They sent letters to 90 CEO's across several industries urging the elimination of no-poach agreements and requesting information on each company's activities to limit employee mobility.

In October 2019, Rep. David Cicilline, the Chair of the House Subcommittee on Antitrust, pressed the DOJ to bring a criminal prosecution against no-poach agreements, calling a criminal prosecution "a valuable tool" to ensure that labor markets work.

State Attorneys General Get In On The Act

State Attorneys General have joined the crusade against no-poach agreements. In early 2018, the Washington State Attorney General opened an investigation into no-poach agreements used by franchise businesses in the state. He reached agreements with over 100 franchise chains to remove no-poach clauses from their agreements.

Other states followed Washington's lead. Four national fast food chains agreed to eliminate no-poach agreements in a multistate settlement with a coalition of 14 Attorney Generals from California, District of Columbia, Iowa, Illinois, Maryland, Massachusetts, Minnesota, North Carolina, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont.

Private Plaintiffs Score Big Settlements

The uptick in federal and state agency enforcement action has led to a plethora of private antitrust suits challenging no-poach agreements and exchanges of wage information among employers. Many of these suits are filed as class actions. Since the antitrust laws allow for treble damages and the award of attorney's fees, private litigants have a strong incentive to sue. Litigation challenging HR practices is a growth industry for the plaintiff antitrust bar, raising new challenges for inside counsel involved in the HR function.

In several of the cases challenging HR practices on antitrust grounds, employers have obtained dismissals. But in others, employers have agreed to pay substantial settlements:

- The defendants in the high-tech antitrust litigation referenced above paid over $400 million to settle their no-poach lawsuits.
- Duke University recently paid $54.5 million to settle a no-poach lawsuit brought by academic doctors. As part of its settlement, Duke also agreed to appoint an antitrust compliance officer, add antitrust compliance to its training programs, and allow the DOJ to inspect documents and interview employees to ensure compliance.
- Several Detroit hospitals paid $90 million to settle a wage-fixing case brought by nurses (and backed by the SEIU). The hospitals allegedly colluded to fix the wages of employee nurses by exchanging confidential compensation data among themselves. The litigation lasted almost a decade.

Exchanging Compensation Data Can Be Problematic

In the Detroit case, there was no "smoking gun" that the plaintiff hospitals had colluded to set wage levels. Rather, plaintiffs wove a conspiracy narrative, tying together formal exchanges of compensation data with informal discussions on wages among the hospitals' HR professionals. The court held that exchanging wage data, by itself, was not illegal. But it allowed the case to move forward, because the exchange of wage information may have facilitated the coordination of wages among the hospitals.

The court took particular note of informal discussions about wages among the various executives at each hospital. "The record reveals that it was not uncommon — particularly in the early days of the relevant time period from December of 2002 forward — for an employee of one of the Defendant hospitals to contact his or her counterpart at another Detroit-area hospital and obtain information relating to the compensation of RNs," the court noted in its opinion.

As underscored by the Detroit hospitals case, seemingly inconsequential emails or phone calls with another employer on personnel matters can serve as a linchpin for an allegation of an antitrust conspiracy. To be sure, not all exchanges of compensation data among employers are illegal, and no-poach agreements that are reasonably necessary and ancillary to an otherwise legitimate agreement may pass antitrust muster. But inside counsel must tread carefully in this area, and only with the advice of antitrust counsel.

Conclusion

Since our last note on the subject several years ago, governmental enforcement agencies and private plaintiffs have accelerated their antitrust attacks on workplace practices. Inside counsel would be well advised to review your company's current practices and implement safeguards to prevent discussions or agreements with other employers from morphing into antitrust violations.

Traditional employment training programs should include antitrust training, and H.R. and legal teams should work together to ensure that all understand the antitrust implications of personnel decisions. There are few things less scary in life than a phone call from a DOJ attorney notifying you that DOJ has commenced a grand jury investigation and that your company is one of the targets.

Dennis Cuneo is a partner in the firm's Washington, D.C. office. He started his legal career as a trial attorney in the Antitrust Division of the U.S. Department of Justice and has practiced antitrust law for over four decades, working on both criminal and civil matters. Prior to joining the firm, Dennis was the senior vice president of Toyota Motor North America, Inc. where his responsibilities included oversight of legal, government affairs, public affairs, industry relations, administration, human resources, and strategic planning and research. He can be reached at DCuneo@fisherphillips.com or 703.682.7096.

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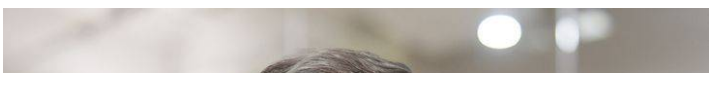

Dennis C. Cuneo
Partner
703.682.7096
Email