The DOJ’s Antitrust Scrutiny is Here to Stay

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Over the past couple of years, the U.S. Department of Justice (DOJ) has stepped up antitrust enforcement against companies for entering “no-poach” agreements. These “no-poach” or “no-hire” agreements are arrangements entered into between companies that would otherwise compete for the same employees, whereby each company agrees not to recruit/solicit or hire the other’s employees.

It began in October 2016, when the DOJ and the U.S. Federal Trade Commission (FTC) issued the Antitrust Guidance for Human Resource Professionals (the “guidelines”), warning employers that the DOJ intends to proceed criminally against no-poach agreements in appropriate cases. Notably, the guidelines state that companies will be subject to the guidelines as “competitors” if they compete for the same type of employees, regardless of whether they compete to sell the same type of goods or services. In the guidance, the DOJ and the FTC also issued a “non-exhaustive” list of red flags that should prompt employers to avoid noncompliance:

- Agreeing with another company about employee salary or other terms of compensation, either at a specific level or within a range
- Agreeing with another company to refuse to solicit or hire that other company’s employees
- Agreeing with another company as to employee benefits
- Agreeing with another company on other terms of employment
- Expressing to competitors that the companies should not compete too aggressively for employees
- Exchanging specific information about employee compensation or terms of employment with another company
- Participating in a meeting, such as a trade association meeting, where the above topics are discussed

Further, in April 2018, the DOJ again announced that it would actively investigate and prosecute companies that entered these no-poach agreements. While no-poach agreements are considered per se illegal in extreme cases, the DOJ has stated they can be legal if reasonably necessary to a larger legitimate collaboration between the employers. For instance, reasonably tailored no-poach agreements can often be justified in connection with the sale of a business, or in staffing or consultancy services agreements. In this respect, the DOJ recently filed notices of intent to file statements of interest in three related fast-food franchise no-poach suits in Washington federal court. In the notices, the DOJ argues that parent-franchisor prohibitions that bar individual franchisees from hiring and recruiting from sibling restaurants within a chain should be deemed illegal only if they meet the “rule of reason” standard. Under that standard, there must be a showing that the agreements harm consumers more than they help. This move provides welcome clarification from the DOJ that no-poach agreements are not per se unlawful in every situation.

More recently, on February 6, 2019, in the Seaman v. Duke University case pending in a North Carolina federal court, the DOJ filed another notice of intent to file a statement of interest and released that statement on March 7, 2019. In that case, an agreement between Duke University and the University of North Carolina at Chapel Hill
prohibits the poaching of each other’s medical school professors. In the DOJ’s statement, it urged “the Court to reject defendants’ arguments that such an agreement would be exempt from antitrust liability under Parker (state action immunity doctrine) and must be analyzed under the rule of reason.” The DOJ thus urged the court to apply the strict rule of per se illegality—but nevertheless explained that, in appropriate circumstances like the sale of a company, the rule of reason would be appropriate.

Accordingly, employers should be very cautious and ensure that they are not participating in any unlawful no-poach agreements. Below are some steps employers should consider to avoid becoming the DOJ’s next target:

- Implement compliance training for the company’s human resources department and those involved in hiring regarding no-poach agreements
- Update the company’s antitrust compliance programs to ensure that no-poach agreements can be easily identified and prevented
- Consult employment and antitrust counsel to further evaluate compliance

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