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Employers are Subject to Criminal Antitrust Charges for Wage-Fixing and No-Poaching Agreements

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On January 19, 2018, the Assistant Attorney General for Antitrust, Makan Delrahim, announced that in the coming months the Department of Justice (DOJ) expects to bring its first criminal antitrust charges involving agreements among competitors not to solicit each other's employees – referred to as "no-poaching agreements." Delrahim's comments make it clear that going forward, the DOJ will treat wage-fixing and no-poaching agreements between competitors as *per se* criminal cartel activity; *i.e.*, in the same way it traditionally treats price-fixing, bid-rigging and customer allocation agreements among competitor firms.

The DOJ's increasing focus on anticompetitive conduct among companies that compete in the same employment marketplace is not surprising, as no-poaching and wage-fixing agreements appear to have become more common.

In October 2016, the DOJ and the Federal Trade Commission (FTC) issued a joint "Antitrust Guidance for Human Resource Professionals" (HR Guidance). The HR Guidance was "intended to alert human resources professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws." It emphasized that "an agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision making." It makes no difference whether the companies do not compete to provide the same products or services. If they compete to hire and retain employees, then agreements to reduce competition in the employment marketplace are illegal under federal antitrust laws.

As such, agreements to fix, set, or cap wages, wage ranges, salaries, benefits or terms of employment are indistinguishable from traditional price-fixing activity subject to per se condemnation. Likewise, agreements

to not solicit or hire another company's employees are a form of market allocation – also a *per se* offense under federal antitrust laws. Criminal exposure for such conducts extends not only to firms but also to, among others, individual executives and HR personnel who proposed, struck and/or implemented and carried out such agreements. Both the DOJ and the FTC can bring (and have brought) civil enforcement actions, and private parties injured by such conduct can file suit under federal antitrust laws for monetary recovery, including treble (*i.e.*, three times actual) damages.

The government has stepped up its enforcement against anticompetitive employment practices, though it has thus far stopped short of criminal prosecutions. For instance, the DOJ filed a civil enforcement program against the Arizona Hospital & Healthcare Association for acting on behalf of most hospitals to set uniform rates for nurses. The case resulted in a consent judgment.

Six years ago, the DOJ targeted Adobe, Apple, Google, Intel, Intuit and Pixar in civil enforcement actions for entering into no-poaching agreements. The federal case ended with consent decrees that stopped the practice. While the DOJ sought neither civil penalties nor restitution, private plaintiffs also sued. Those firms ended up settling for a total of $415 million. In 2013, Lucasfilm and Pixar settled software engineers' antitrust claims for $20 million. In 2015, plaintiffs settled claims against Apple, Google, Intel and Adobe for $415 million.

Now the gloves are off, and the next such action likely will be criminal. Delrahim noted that the DOJ has "been very active" of late and that "you will see some announcements." He also stated that he was "shocked with how many of these (agreements) there are." It is important to recognize that a clear line separates conduct the DOJ will pursue criminally and conduct it will pursue civilly. If the illegal conduct stopped with the promulgation of the HR Guidance, any enforcement action will be civil in nature. But, warned Delrahim, "(i)f the activity has not been stopped and continued from the time the DOJ's policy was made, we will treat that as criminal." It also makes no difference that a firm or firms entered into such agreements out of a desire to cut costs, or that they are nonprofit organizations, which are subject to the same criminal and civil antitrust penalties as other market participants. The conduct is illegal even if the agreements in question are unspoken "gentleman's agreements" or are achieved through third-party intermediaries. It is important to note as well that inviting a competitor to enter into such an illegal agreement, even if the invitation goes unaccepted, may itself be an antitrust violation.

Examples of conduct that can trigger felony criminal prosecutions include, but are not limited to, agreements among firms:

- → To not recruit or hire each other's employees
- → To set a pay scale or wage rates
- → To cap wage growth
- → To limit employee benefits

Feel free to contact us if you have any questions or concerns.

Editor's note: Traditional non-compete and other restrictive covenants in individual employment agreements that have a legitimate business purpose and are narrowly tailored remain legal. See below for recent articles on restrictive covenants in employment agreements:

- Despite recent scrutiny, carefully-considered non-competes logical choice in many situations
- Court Finds Broad Non-Disclosure Agreement is Unenforceable Non-Compete
- S.C. Supreme Court Upholds Confidentiality and "Holdover" Inventions Assignment Clauses in Employment Agreement
- Noncompete Agreements in SC are Worth More Than the Paper They're Written On
- North Carolina Business Court Addresses Consideration Requirement for Covenant Not to Compete