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Employment Law Update: Collaborating with Competitors Concerning Employee Compensation May Violate Antitrust Laws

10/28/21

In recent years, the Department of Justice ("DOJ") has become increasingly concerned about unlawful no-poach and wage-fixing agreements between competitors that seek to regulate the terms of employment for employees. The DOJ warned employers that it would scrutinize these agreements. In 2020, the DOJ has made good on its promise with the first criminal indictment regarding a wage-fixing agreement (*United States of America v. Neeraj Jindal*) and in 2021, the first criminal indictment regarding a no-poach agreement (*United States v. Surgical Care Affiliates, LLC and SCAI Holdings, LLC*). This blog post clarifies the types of agreements that may trigger scrutiny by the DOJ under antitrust laws and reviews the 2016 Antitrust Guidance for Human Resource Professionals issued by the DOJ.

No-Poach and Wage-Fixing Agreements

There are two types of agreements at issue: no-poach agreements and wage-fixing agreements. No-poach agreements occur when competitors agree not to hire or recruit one another's employees. Such agreements may violate antitrust laws because they prevent employees from competing in the labor market and negotiating better terms of employment. Wage-fixing agreements are between competitors to limit or fix the terms of employment. An agreement may violate antitrust laws if it constrains individual decision-making with respect to the terms of employment, such as wages, salaries, and benefits. A wage-fixing agreement may also violate antitrust laws if it affects the employees' abilities to negotiate better terms and conditions of employment.

DOJ Guidance

In October 2016, the Department of Justice Antitrust Division and the Federal Trade Commission, issued the Antitrust Guidance for Human Resource Professionals ("Guidance") to help companies determine the legality of an agreement, explaining that "firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services." The Guidance distinguishes between naked no-poaching agreements and legitimate joint ventures.

Naked no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects.

While the Guidance focuses on naked agreements, it clarifies that "[l]egitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws." Case law further clarifies that an agreement limiting competition is exempt from the per se rule if it is ancillary to a separate, legitimate venture between the competitors. The U.S. Court of Appeals for the Third Circuit analyzes such ancillary agreement using the rule of reason. The rule of reason considers the totality of the circumstances surrounding an alleged anti-competitive activity. The Guidance provides an FAQ section that highlights scenarios employers may encounter and explains whether they are problematic under antitrust laws. It can be found at https://www.justice.gov/atr/file/903511/download.

Takeaway: Employers should exercise caution when sharing information or collaborating with competitors on their employees' terms of employment.

If you have any questions about employment agreements and antitrust laws, contact Tracy Armstrong or another member of the Wilentz Employment Law Team.

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