EMPLOYERS BEWARE: TIME FOR A NEW “A-POACH”

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Following the U.S. Department of Justice ("DOJ") Antitrust Division's recent public reaffirmation of its commitment to prosecute "no-poach" agreements as *criminal* antitrust violations, Democratic lawmakers have shown their support by demanding that no-poach agreements be regarded as anticompetitive. Senators Elizabeth Warren (D-MA) and Cory Booker (D-NJ) recently introduced the first legislation in Congress designed to make no-poach pacts illegal, by providing workers the right to sue and claim damages. Historically, the DOJ and Federal Trade Commission (collectively, the "Agencies") have taken issue with no-poach agreements, and their position is clear: "naked" agreements among employers not to hire each other's employees or to fix wages and other terms of employment restrains competition in the market for employees, potentially resulting in *per se* violations of Section 1 of the Sherman Act. Now, Democratic lawmakers are taking significant steps of their own by introducing a bill that signifies an increasing concern about no-poach agreements and "monopsony power" — the ability of an employer to suppress wages below the efficient or perfectly competitive level of compensation.

No-poach pacts can involve agreements not to cold-call, solicit, or hire employees. Moreover, these agreements generally eliminate or limit a company's or franchise owners' ability to hire workers from other locations within the franchise. Monopsonist employers can possess bargaining power over their workers. As an example, as of 2016, none of the almost 2,000 Jiffy Lube franchisees are permitted to hire an individual who is currently employed, or was employed less than six months ago, at another Jiffy Lube franchise. [1] According to Senator Booker, "This is patently unfair and against the ideals of a so-called free market . . . . It's anti-democratic, and it's hurting people." The barriers imposed by no-poach agreements can severely limit a worker's ability to move freely among jobs and obtain higher wages and better benefits. Senators Warren and Booker believe that a more alarming repercussion of no-poach agreements is that because they are formed between entities such as a franchisor and franchisee, workers may be completely unaware of the limitations imposed on their mobility.

While most recognize that agreements to fix wages would run afoul of antitrust laws, no-poach agreements may not necessarily raise any anticompetitive or antitrust flags for an employer. However, employers need to be aware of guidance published by the Agencies in 2016 that explicitly states that "agreements among employers not to recruit certain employees…are illegal," and cautions human resource professionals against entering into no-poach agreements or sharing competitively sensitive employment information with competitors. [2] Makan Delrahim, the Antitrust Division's Assistant Attorney General, reaffirmed this message when he spoke at a 2018 conference where he indicated that the DOJ has been "very active" in assessing possible violations of antitrust law and will initiate criminal cases against offending employers in the coming months.

Elsewhere, the DOJ reached a settlement in 2010 with six high-tech giants for anticompetitive employee no-solicitation agreements akin to no-poach agreements. Later, some even became the subject of a no-poach class

action lawsuit based on their agreement not to poach each others' talent. This litigation ultimately ended in a 2015 settlement agreement that cost the companies $415 million. [3]

While not all no-poach agreements are necessarily illegal, a high standard exists for a court to find a no-poach agreement valid. Specifically, courts have found no-poach agreements legal if they are (i) ancillary to a larger, legitimate collaboration; (ii) reasonable in scope and duration; and (iii) reasonably necessary to further the interests of the collaboration. [4]

The recently introduced legislation and commitment to fight no-poach agreements, in combination with the Agencies' shift in focus to pursuing no-poach agreements as criminal violations rather than civil violations, is significant in a number of ways. While the policy rationale behind their "no-poach approach" generally benefits employees and promotes unrestricted markets, employers may be detrimentally affected and left with fewer avenues to retain their talent. Opposing industry advocates argue that no-poach agreements are necessary for companies to protect the investments that they make in their personnel, such as training, and serve as a means to ensure that employees have the requisite skills to successfully deliver their products or services to consumers. For the time being, however, it is imperative that employers understand that the proposed legislation, combined with the Agencies' activities, may thwart these efforts.

Given the renewed interest in the no-poach issue, employers need to remain attentive. Indeed, the fact that employers may face potential civil and criminal liability makes it imperative that employers take the necessary steps to ensure they do not violate the law. Among other initiatives, employers should assess whether they have no-poach agreements and evaluate them carefully. Employers should bear in mind that in some states, they may be able to protect their interests and investments in personnel by entering into non-compete agreements with their employees. Non-compete agreements that are appropriately tailored may provide employers with the protections they seek in a more legally defensible manner. Employers should also educate and train all employees with human resources responsibilities on antitrust laws and legislation. Finally, employers should think about consulting with counsel if considering entering into any type of no-poach agreement.

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[1] A.B. Krueger & O. Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* [working paper], Princeton University & NBER (Sept. 28, 2017), http://dataspace.princeton.edu/jspui/bitstream/88435/dsp014f16c547g/3/614.pdf..

[2] Department of Justice Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 20, 2016), https://www.justice.gov/atr/file/903511/download.

[3] *In re: High Tech Employee Antitrust Litigation*, 2014 WL 6478776 (N.D. Cal. Sep. 3, 2015).

[4] In *Eichorn v. AT&T Corp.*, 248 F.3d 131, 146 (3d. Cir. 2001), the Third Circuit held that an agreement whereby all AT&T affiliates were not to hire or solicit any employees from a company that it sold to Texas Pacific Group for a period of eight months after the sale was lawful under Section 1 of the Sherman Act. The Third Circuit ultimately found that the agreement was a "legitimate ancillary restraint on trade," its primary purpose was to ensure that Texas Pacific Group could retain the skilled services of the company's employees, and that any restraint on the plaintiffs' ability to seek employment at AT&T or its affiliates was incidental to the sale of the company. *Id.*

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