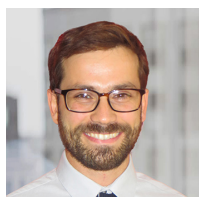

The Department of Justice and Federal Trade Commission Guidance for Human Resources Professionals and Recent Comments by Enforcement Officials Related to No-Poaching Agreements

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Introduction

In product markets, it is well known that agreements among competitors to fix prices or allocate customers violate antitrust laws. What is less commonly known is that antitrust laws apply to employers, as buyers of labor, as well. In this article, we provide an overview of the relevant antitrust laws and how they apply to the hiring and retention of workers by employers. Next, we review recent Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) guidance on how employers can avoid violating antitrust laws. Finally, we summarize recent statements from US agency officials that provide insight into what employers may expect to arise with respect to enforcement of “no-poaching” agreements under the Trump administration, as well as trends in private litigation to follow in 2018.

The High-Tech Antitrust Litigation and Related Matters

Antitrust litigation of no-poaching agreements took center stage in 2010 when the DOJ opened an investigation into six high-tech firms — Adobe, Apple, Google, Intel, Intuit, and Pixar — and subsequently initiated a lawsuit alleging the companies entered bilateral agreements not to “cold call” each other’s employees.^{4,5} The DOJ filed a similar

lawsuit against Lucasfilm, in which Lucasfilm and Pixar were alleged to have reached an anti-solicitation agreement.⁶ In both lawsuits, the DOJ asserted the agreements constituted *per se* violations of the Sherman Act and that the agreements disrupted the competitive nature of the labor market and reduced competition for employees.⁷ In both cases, Defendants settled with consent decrees.⁸

In 2012, the DOJ brought another civil antitrust action against eBay, alleging that the e-commerce corporation formed an agreement with Intuit, a financial software company, not to recruit each other's employees and that this agreement was a *per se* violation of Section 1 of the Sherman Act.⁹ In May 2014, after the Court denied the Defendant's motion to dismiss the *per se* claim, eBay and the DOJ reached a settlement that prohibited eBay from entering into agreements with any companies that would prevent solicitation, cold calling, recruiting and, more generally, competing for employees.¹⁰ eBay also agreed to pay \$2.375 million to affected workers as part of the settlement.¹¹

In comments on these investigations, William Baer, then acting assistant attorney general, stated "[the] so-called 'do not poach' or anti-solicitation agreements are *per se* unlawful"¹² and that "[the DOJ's] continued pursuit of 'do not poach' agreements will help ensure that skilled workers [...] benefit from competition for their services."¹³

The DOJ/FTC Antitrust Guidance for Human Resource Professionals

In the wake of the litigation discussed above, President Obama issued an executive order aimed at addressing wage collusion, unnecessary non-compete agreements, and other anticompetitive practices in April 2016.¹⁴ The DOJ and the FTC were tasked with taking actions aimed at "promoting competitive markets and ensuring that consumers and workers have access to the information needed to make informed choices." In October 2016, the two agencies jointly issued the *Antitrust Guidance for Human Resource Professionals* (hereafter "Guidance"). The Guidance provides general principles to prevent employers and human resource professionals from violating antitrust laws, with a particular focus on "agreement[s] among competing employers to limit or fix the terms of employment [...] with regard to wages, salaries, [...] or [...] job opportunities."¹⁵

The Guidance identifies three categories of potential antitrust violations:

- i) *Wage-fixing agreements*. Agreements between two or more companies, either directly or through a third-party intermediary, to fix wages, salaries or other forms of compensation.
- ii) *No-poaching agreements*. Agreements between two or more companies, either directly or through a third-party intermediary, intended to refuse to solicit or hire each other's employees.¹⁶
- iii) *Information exchanges*. Agreements among competitors to exchange information regarding the terms and conditions of employment, when demonstrated to have, or likely to have, anticompetitive effects.¹⁷

The Guidance is clear in warning employers and human resources professionals of the serious consequences of naked wage-fixing and no-poaching agreements and highlights how the agencies consider this type of behavior to be *per se* illegal. The

Guidance was also the first time the DOJ announced it would criminally prosecute naked wage-fixing agreements, which it states are equivalent to agreements to fix product prices.¹⁸ Similarly, the Guidance makes it clear that naked no-poaching agreements, which the DOJ and FTC consider to be akin to customer allocation schemes, will be investigated and prosecuted criminally.¹⁹ Agreements that are part of a “larger legitimate collaboration between employers,” for example, a joint venture, and are reasonably limited in terms of the job functions and durations of alleged agreements, may instead be subject to rule of reason analysis.²⁰

Outlook for 2018 and Implications For Franchises

The DOJ and FTC are likely to continue active investigation and prosecution of no-poaching agreements under the Trump administration. In September 2017, Andrew Finch, acting assistant attorney general, stated that the DOJ “will continue to advocate for a clear *per se* rule” and that given the “horizontal nature of the agreement — the elimination of competition between employers,...a naked no-poaching agreement, or wage-fixing agreement, between [firms] would receive *per se* condemnation.”²¹ Barry Nigro, deputy attorney general, recently confirmed “the DOJ is pursuing several pending investigations of corporate no poaching agreements,” adding that “[t]he sheer number of investigations is a measure of how seriously the department takes these sort of allegations.”²²

Private litigation involving no-poaching allegations is also expected to continue, including litigation involving franchises. Recent no-poaching cases focus on franchise contracts which include covenants preventing franchisees from soliciting and hiring workers from each other. On June 28, 2017, a former employee at a McDonald’s franchise in Florida brought a class action suit against the fast-food giant in the state of Illinois. The employee alleges she was not hired by a McDonald’s restaurant for a job with a higher salary and better working conditions due to a covenant in McDonald’s franchising agreement, according to which “[a] franchisee shall not employ or seek to employ any person who is at the time employed by McDonald’s, any of its subsidiaries, or by any person who is at the time operating a McDonald’s restaurant or otherwise induce, directly or indirectly, such person to leave such employment.”²³

On November 3, 2017, a similar complaint was filed against Pizza Hut, where employees allege the terms of the Pizza Hut franchise agreement contain no-solicitation and no-hiring covenants that are a naked restraint of competition and a *per se* violation of the Sherman Act.²⁴ Specifically, the franchise agreement states that franchisees cannot “employ, directly or indirectly, any individual in a managerial position who is at the time, or was at any time during the prior 6 months, employed in a managerial position by [another franchisee of Pizza Hut], nor may Franchisee employ, directly or indirectly, any individual in a managerial position who is at the time, or was at any time during the prior 6 months employed in a managerial position by any other franchisee of [Pizza Hut].”²⁵

In a recent paper, economists Alan Krueger and Orley Ashenfelter report that “58 percent of major franchise chains include ‘noncompetitive clauses’ in their franchise contract that restrict the recruitment and hiring of workers currently employed [...] by other units affiliated with the franchisor.”²⁶ It can be expected that antitrust cases involving franchise arrangements will continue to be an active area to follow in 2018.

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Endnotes

- 1 Associate, Analysis Group Inc.
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- 4 “Cold calling” refers to the practice of communicating directly in any manner (orally, in writing, telephonically, or electronically) with another firm’s employee who has not otherwise applied for a job opening.
- 5 Complaint at ¶¶ 15-32, *United States v. Adobe Systems, Inc.*, (No. 10CV 1629), 2011 WL 10883994 (D.D.C. Mar. 18, 2011).
- 6 *Id.* at ¶ 16.
- 7 *Id.* at ¶ 34; Complaint at ¶ 22, *United States v. Lucasfilm Ltd.*, (No. CIV.A. 10-02220 RBW), 2011 WL 2636850 (D.D.C. June 3, 2011).
- 8 Final Judgment, *United States v. Adobe Systems, Inc.*, (No. 10CV 1629), 2011 WL 10883994 (D.D.C. Mar. 18, 2011), available at <https://www.justice.gov/atr/case-document/final-judgment-0>, site visited December 6, 2017; Final Judgment, *United States v. Lucasfilm Ltd.*, (No. CIV.A. 10-02220 RBW), 2011 WL 2636850 (D.D.C. June 3, 2011), available at <https://www.justice.gov/atr/case-document/final-judgment-120>, site visited December 6, 2017.
- 9 Complaint at ¶ 4, *United States v. eBay, Inc.*, No. 12-CV-05869-EJD-PSG, (N.D. Cal., Nov. 16, 2012), available at <https://www.justice.gov/atr/case-document/com-plaint-88>.
- 10 Final Judgment, *United States v. eBay, Inc.*, (No. 12-CV 12-05869-EJD-PSG), 2014 WL 5364751 (N.D. Cal. Sept. 2, 2014), available at <https://www.justice.gov/atr/case-document/final-judgment-76>.
- 11 Final Approval of Settlement, *State of California v. eBay, Inc.*, No. 5:12-cv-05874-EJD (N.D. Cal. Sept. 3, 2015), available at http://www.agtechemploymentsettlement.com/media/771728/final_approval_order.pdf. See also David Streitfeld, *Ebay Settles No-Poaching Antitrust Case*, N.Y. Times, May 1, 2014, available at <https://www.nytimes.com/2014/05/02/technology/ebay-settles-antitrust-case-over-no-poaching-deal.html>.
- 12 Press Release, Dep’t of Justice, Office of Public Affairs, Assistant Attorney General Bill Baer Speaks at the Conference Call Regarding the Justice Department’s Settlement with eBay Inc. to End Anticompetitive ‘No Poach’ Hiring Agreements, (May 1, 2014), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-speaks-conference-call-regarding-justice-department>.
- 13 American Bar Association, Roundtable Conference with Enforcement Officials, *The Antitrust Source*, June 2014, available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/jun14_enforcer_rndtbl_6_17f.authcheckdam.pdf.
- 14 The White House, Executive Order -- Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy, (April 15, 2016), available at <https://obam-awhite-house.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>, site visited December 3, 2017.
- 15 Department of Justice and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals, (Oct. 2016) available at <https://www.justice.gov/atr/file/903511/download>. It is worth noting that by “competing employers,” the Guidance broadly refers to “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” (p. 2, emphasis added).

- 16 *Id.*, p. 3.
- 17 *Id.*, pp. 4-5.
- 18 Press Release, Department of Justice, Office of Public Affairs, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation, (Oct. 20, 2016), *available* at <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-profession-als>.
- 19 *Id.*, p. 4.
- 20 *Id.*, p. 3.
- 21 Press Release, Department of Justice, Office of Public Affairs, Acting Assistant Attorney General Andrew Finch Delivers Remarks at Global Antitrust Enforcement Symposium, (Sept. 12, 2017), *available* at <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust>.
- 22 David Lynch, *DoJ Says No-Poach Hiring Agreements in Crosshairs*, Financial Times, Sept. 12, 2017, *available* at <https://www.ft.com/content/42a1d2c1-4767-37db-ae4c-8bd6886ae4b5>.
- 23 Class Action Complaint at ¶ 77, *Deslandes v. McDonald's USA*, No. 1:17-cv-04857 (N.D. Ill. June 28, 2017).
- 24 Class Action Complaint, *Ion v. Pizza Hut, LLC*, No. 4:17-cv-00788 (E.D. Tex. Nov. 3, 2017).
- 25 *Id.* at ¶ 65.
- 26 Alan B. Krueger and Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, (Princeton University Industrial Relations Section Working Paper No. 614, 2017) *available* at <http://arks.princeton.edu/ark:/88435/dsp014f16c547g>.

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