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Prepare For DOJ's Criminal No-Poach Prosecutions

By **Juan Arteaga** (February 5, 2018, 3:02 PM EST)

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In recent years, the U.S. Department of Justice's Antitrust Division has been carefully scrutinizing the employment practices of corporate America. In particular, the Antitrust Division has been focused on whether corporations have entered into illegal "no-poach" agreements — where companies agree not to recruit or hire each other's employees — and "wage fixing" agreements — where companies agree on the compensation (e.g., wages, salary, and benefits) they will make available to current or prospective employees — in order to keep their labor costs down. Recent statements by Assistant Attorney General Makan Delrahim strongly suggest that the Antitrust Division will soon be announcing criminal charges in ongoing no-poach investigations and that enforcement in the employment area will continue to be a top priority for the Antitrust Division. This article discusses the risks that companies and individuals face for participating in no-poach or wage-fixing agreements and identifies certain steps that companies can take to minimize these risks.

During the Obama administration, the Antitrust Division brought a series of civil lawsuits against several Silicon Valley giants for entering into no-poach agreements with their competitors. These cases resulted in settlements enjoining the companies from participating in these types of agreements and requiring them to institute appropriate training and compliance programs. These companies also had to collectively pay nearly $1 billion in order to settle several follow-on private lawsuits. Prior to these cases in the high tech industry, the Antitrust Division brought an action against a hospital association for engaging in certain rate setting practices that suppressed the wages that its member hospitals paid temporary and per diem nurses. Likewise, the Federal Trade Commission brought an action against various nursing homes and corporations for entering into boycotting agreements intended to lessen the fees they paid for temporary nursing services. The FTC also sued a trade association that represented various fashion designers and the organization that produced major fashion shows for entering agreements intended to lower the fees and other compensation they paid for professional modeling services.

Toward the end of the Obama administration, the stakes for companies and individuals participating in unlawful no-poach and wage-fixing agreements got significantly higher. In October 2016, the Antitrust Division and FTC issued "Antitrust Guidelines for Human Resources Professionals,"[1] which announced that no-poach and wage-fixing agreements will no longer be treated as civil antitrust violations and instead will be prosecuted as criminal offenses. Notably, the Antitrust Division and FTC made clear that

companies could be criminally prosecuted for entering into such agreement if they compete for the same employees, irrespective of whether they compete to sell the same products or services.

Believing that the Trump administration would be more "business friendly," many antitrust practitioners, human resources professionals and business executives assumed that the Antitrust Division and FTC would simply not enforce these new guidelines under his watch. This assumption has proven to be incorrect.

In June 2017, the Financial Times reported that the Antitrust Division is actively investigating whether two large financial institutions entered into a no-poach agreement.[2] A few months later, Principal Deputy Assistant Attorney General Andrew Finch delivered remarks where he indicated that companies and their executives "should be on notice" that they will be criminally prosecuted for participating in no-poach or wage-fixing agreements.[3] In doing so, he reiterated that companies selling different products or services may nonetheless be prosecuted for entering into unlawful no-poach or wage-fixing agreements if the DOJ concludes that the companies compete for the same employees: "[A] business across the street ... or, for that matter, across the country … might not be a competitor in the sale of any product or service, but it might still be a competitor for certain types of employees such that a naked no-poaching agreement, or wage-fixing agreement, between them would receive per se condemnation."

Last month, AAG Delrahim followed up that strong warning with a promise of forthcoming criminal prosecutions. During a panel discussion at a recent Antitrust Research Foundation conference, AAG Delrahim indicated that the Antitrust Division has several active no-poach investigations that will likely result in criminal charges in the very near future: "In the coming couple of months you will see some announcements, and to be honest with you, I've been shocked about how many of these [no-poach agreements] there are, but they're real." He also warned companies that previously entered into civil settlements with the Antitrust Division that they could face criminal charges if they have failed to comply with the terms of these settlements. Similarly, he warned companies that no-poach or wage-fixing agreements that predated the human resources guidelines will be prosecuted criminally if they continued after the guidelines were issued.

AAG Delrahim's remarks and the fact that the Antitrust Division has been able to develop prosecutable cases so soon after issuing the HR guidelines guarantee that the Antitrust Division will remain vigilant in the employment area in the coming years. As with many other criminal investigations, the Antitrust Division will likely make it a top priority to bring charges against any individuals — in addition to their corporate employers — involved in these no-poach or wage-fixing agreements. For example, the Antitrust Division's auto parts and northern California real estate auctions bid-rigging investigations have each resulted in close to 75 individuals being criminally charged.

The companies and individuals charged in any criminal no-poach or wage-fixing investigations could face significant penalties and consequences. For example:

- Individuals found guilty of participating in criminal no-poach or wage-fixing agreements could face up to 10 years in prison. In recent years, prison sentences for criminal antitrust violations have averaged approximately two years.

- Corporations found guilty of participating in criminal no-poach or wage-fixing agreements could be required to pay up to $100 million in fines while individuals could be required to pay up to $1 million in fines. Alternatively, prosecutors could seek a fine up to twice the gross financial loss or gain resulting from the violation.

- Corporations and individuals charged with participating in criminal no-poach or wage-fixing agreements will likely have to defend costly and time-consuming private follow-on litigation where they could be forced to pay treble damages (three times the alleged harm) and attorneys' fees.

- The reputational harm that would result from being accused of participating in criminal no-poach or wage-fixing agreements could hamper a company's ability to recruit and retain employees and put at risk key business relationships. Similarly, individuals charged with participating in these types of agreements could lose their current positions as well as find it difficult to secure future employment.

- Multinational corporations charged with participating in no-poach or wage-fixing agreements in the U.S. could be subjected to similar government investigations and private litigation in other countries.

To minimize their risk of being exposed to these significant consequences, companies should consider taking the following steps:

- Implementing training programs for human resources professionals, managers, and other personnel participating in employment and compensation decisions in order to ensure that these employees fully understand what conduct is permissible under the antitrust HR guidelines. Such training could include identifying best practices for external employment-related communications with other employers and discussing the hypotheticals set forth in the guidelines.

- Reviewing and updating their antitrust compliance programs to ensure that these programs contain effective mechanisms for preventing, detecting, and terminating any potentially anti-competitive employment practices, including no-poach and wage-fixing agreements. These programs should include mechanisms for employees to anonymously report employment practices they believe may violate the antitrust laws.

- Conducting an audit of any employment-related agreements that they have with other employers in order to ensure that these agreements are sufficiently related to legitimate business objectives (i.e., merger or acquisition, joint venture, or joint research and development), contain appropriate measures to limit the exchange of any competitively sensitive employment information, and are properly limited in terms of scope and duration.

- Instituting protocols that prevent the sharing of competitively sensitive employment information (e.g., wages, salaries, benefits and recruiting strategies) with other employers through trade associations, conferences, or social events/nonprofessional settings. This could include having in-house counsel review the agendas for meetings and conferences to ensure improper topics will not be discussed, as well as providing attendees a copy of the agencies' "Antitrust Red Flags for Employment Practices," which identifies the types of employment-related communications that should be avoided in a brief and easy to understand manner.[4]

- Ensuring that they limit their participation in industry benchmarking surveys or other information exchanges to ones where: (1) a neutral third party manages the exchange; (2) the exchange involves information that is relatively old; (3) the information is aggregated to protect the identity of the underlying sources; and (4) enough sources are aggregated to prevent competitors from linking particular data to an individual source.

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[1] https://www.justice.gov/atr/file/903511/download

[2] https://www.ft.com/content/4d39fe7a-51d9-11e7-bfb8-997009366969

[3] https://www.bna.com/nopoach-deals-invite-n57982087759/

[4] www.justice.gov/atr/file/903506/download