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In-House Lawyers Can Expect Even More Antitrust Scrutiny in 2019

By Juan A. Arteaga

During 2018, many U.S. companies saw their employment practices come under intense antitrust scrutiny. On the federal level, the U.S. Department of Justice (DOJ) prosecuted multiple companies for entering into naked "no-poach" agreements, where companies that compete for the same employees agree not to recruit or hire each other's employees. In addition, the Federal Trade Commission (FTC), along with the Texas Attorney General's office, brought an enforcement action against a therapist staffing company, its owner, and the former owner of a competing staffing company for participating in a wage-fixing scheme, where the defendants agreed to lower their employees' wages to the same level and thereafter attempted to convince other competitors to do the same in order to avoid losing employees to companies that pay higher wages.

On the state level, a number of State Attorneys General formed a coalition that has been systematically going after the no-poach clauses in corporate franchise agreements, which typically prohibit franchisees from hiring employees directly from the franchisor or other franchisees for up to six months following the end of an employee's tenure. To date, nearly 40 national chains in various industries have entered into settlements which require them to remove such clauses from their standard franchise agreements.

These federal and state government enforcement actions have forced companies to have to defend their employment practices on a third front that is often costly, burdensome and disruptive to their business operations: private class action lawsuits. Each company that has entered into a government settlement has been named as a defendant in private lawsuits seeking treble damages on behalf of its current and former employees. To date, none of these companies has been successful in having these lawsuits thrown out at the motion to dismiss stage.

As corporate legal departments look ahead to 2019, it would be

prudent to expect continued and even expanded antitrust scrutiny of their company's employment practices. The leadership teams at both the DOJ's Antitrust Division and FTC have made clear that prosecuting no-poach and wage-fixing agreements will be one of their top priorities in 2019. Moreover, the Antitrust Division has publicly confirmed that it has various ongoing no-poach investigations that will likely result in criminal charges in the near future, thereby exposing the target companies and individuals to significant fines and lengthy prison sentences.

Similarly, a number of State Attorneys General have promised

to keep the heat on national chains with no-poach clauses in their franchise agreements. Indeed, Washington State Attorney General Bill Ferguson—who has been leading this campaign and has declared it his mission to eradicate all no-poach agreements nationwide—has announced that his office's investigation has expanded past the fast food industry to include an additional 13 industries.

This article provides in-house counsel with an overview of key no-poach and wage-fixing investigations and lawsuits that were brought during 2018. In addition, this article identifies steps that in-house counsel can take in order to help ensure that their companies and executives do not participate in any unlawful no-poach or wage-fixing agreements.

The DOJ Aand FTC Have Gotten Tougher on No-Poach and Wage-Fixing Agreements

No-poach and wage-fixing agreements have traditionally been treated as civil, rather than criminal, antitrust violations. Consequently, companies and individuals who participated in such agreements were typically only required to enter "sin no more" civil settlements, which enjoined them from entering into similar agreements in the future and required them to institute appropriate training and compliance programs. Of course, parties that settled no-poach or wage-fixing investigations with the DOJ or FTC often faced follow-on class action lawsuits seeking significant monetary damages. Most recently, several large Silicon Valley companies had to collectively pay nearly $1 billion to settle various lawsuits that were filed after the DOJ found that the companies had participated in unlawful naked no-poach agreements (i.e., no-poach agreements that were not ancillary to legitimate transactions or collaborations, such as a merger, joint venture, or joint research and development arrangement).

However, the DOJ and FTC issued antitrust guidelines for human resource professionals in October 2016 that significantly increased the consequences for participating in no-poach and wage-fixing agreements. Specifically, the agencies' human resource guidelines announced that such agreements would be treated as per se antitrust violations and thus subject to criminal prosecution. As a result of this policy shift, companies and individuals who participate in unlawful no-poach or wage-fixing agreements could be required to pay large fines and serve lengthy prison sentences. Importantly, the agencies' human resource guidelines state that companies will be treated as competitors in the employment context if they compete for the same types of employees regardless of whether they compete to sell the same types of goods or services.

During the past year, the DOJ prosecuted two companies in the rail equipment industry for entering into multiple no-poach agreements with each other and a third competitor. In announcing the settlement reached with these companies (*United States v. Knorr-Bremse AG and Westinghouse Air Brakes Technologies*), the DOJ stated that it exercised its prosecutorial discretion to bring civil, rather than criminal, charges because the companies had terminated their no-poach agreements prior to the agencies issuing their human resource guidelines. To ensure that companies do not read this as a retreat from its commitment to criminally prosecute no-poach agreements, the DOJ has subsequently emphasized that it expects to bring criminal charges in certain ongoing no-poach investigations in the near future. One industry in which the DOJ has publicly signaled that it may bring a criminal no-poach prosecution is the health care industry.

Like the DOJ, the FTC has been active in the employment context during the past year. This past July, the FTC announced that it had reached a settlement with a staffing company, its owner, and the former owner of a competing staffing company for colluding to lower the wages paid to various types of therapists in the Dallas/

Fort Worth area. According to the complaint (*In the Matter of Your Therapy Source*), the defendants agreed to lower their employee wages to the same level and then attempted to persuade their competitors to follow their lead in order to avoid losing employees to competitors that pay higher wages.

Notably, the DOJ and FTC have made clear that they plan on continuing to vigorously enforce the antitrust laws in the employment context during the upcoming year. In October 2018, the head of the DOJ's Antitrust Division, Makan Delrahim, told Congress that the DOJ has "put employers on notice that … no-poach and wage-fixing agreements can be prosecuted as criminal violations" and that his team fully intends to bring such enforcement actions. The head of the FTC's Bureau of Competition, Bruce Hoffman, has similarly stated that "all workers are entitled to competitive wages and the FTC will enforce the antitrust laws against any companies that agree not to compete for workers, or to attempt to drive down workers' wages."

State Attorneys General and Private Plaintiffs Attorneys Have Also Gone After No-Poach Agreements

Since the DOJ and FTC issued their antitrust guidelines for human resource professionals, a number of State Attorneys General have turned their focus toward scrutinizing the no-poach clauses that major corporate chains employ in their franchise agreements. Indeed, the State Attorneys General for several large states—including New York, California, Pennsylvania and Illinois—have formed a coalition that has enabled them to pool their resources as they systematically review the competitive effects of such clauses in different industries.

During the past year, Washington State Attorney General Bob Ferguson has been the most active in challenging no-poach clauses in franchise agreements. Indeed, Ferguson has announced that "his goal is to eliminate the use of no-poach clauses nationwide." In January 2018, his office began this campaign by focusing on the use of no-poach clauses in fast food chain franchise agreements. To date, his office has secured settlements from nearly 30 fast food chains—including McDonald's, Buffalo Wild Wings and Jimmy John's—which require the companies to remove all no-poach clauses from their current and future franchise agreements. Ferguson has also filed a lawsuit against Jersey Mike's after it declined to reach a similar settlement with his office.

In September 2018, Ferguson announced that his office was expanding its no-poach investigation to include the following additional 13 industries:

- Hotels
- Car repair services
- Gyms
- Home health care services
- Cleaning Services
- Convenience stores
- Tax preparation
- Parcel services
- Electronics repair services
- Child care
- Custom window covering services
- Travel services
- Insurance adjuster services

Since making this announcement, Ferguson's office has reached settlements with 12 national chains in a number of these industries, including La Quinta, Edible Arrangements, Planet Fitness and Valvoline.

The companies that have reached settlements with federal and state antitrust enforcers have also been named as defendants in follow-on class actions filed by the antitrust plaintiffs bar. In general, these lawsuits allege that the defendant's use of no-poach clauses in their franchise agreements constitute a per se antitrust violation because these clauses restrain competition for labor and depress employee compensation (i.e., wages and benefits). While most of these cases are still at the motion to dismiss stage, a few courts have already declined to dismiss these actions on the basis that the plaintiffs plausibly alleged that the no-poach clauses restricted competition

for potential employees between franchisees and company-owned stores.

In reaching their decisions, however, these courts have held that the challenged no-poach clauses did not constitute a per se unlawful restraint of competition because the clauses were ancillary to otherwise pro-competitive franchise agreements. As a result, these courts have determined that they will review the plaintiffs claims under a truncated rule of reason "quick look" analysis, which is employed when the challenged practice appears to be facially anticompetitive but could nonetheless be deemed lawful if the defendant proffers sufficient pro-competitive justifications.

Practice Tips for In-House Counsel

Below are five steps that in-house counsel can take in order to ensure that their companies and executives do not enter into any unlawful no-poach or wage-fixing agreements:

• To the extent the company has any franchise or similar agreements, determine whether such agreements contain no-poach clauses and, if so, assess whether these clauses are likely to be found anticompetitive by antitrust enforcers or a court. If a no-poach clause is likely to be found anticompetitive, counsel should consider recommending that the company remove these clauses prior to being subjected to a government investigation or class action lawsuit.

• Conduct an audit of the employment-related agreements that the company has 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 arrangement), contain appropriate measures to limit the exchange of any competitively sensitive employment information, and are properly limited in terms of scope and duration.

• Implement training programs for human resource 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 laws. Such training could include identifying best practices for external employment-related communications with other employers and discussing the hypotheticals set forth in the agencies' human resource guidelines.

• Review and update the company's antitrust compliance programs to ensure that these programs contain effective mechanisms for preventing, detecting, and terminating any potentially anticompetitive 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.

• Institute 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 providing employees with 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.

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