Client Alert

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New Cases Highlight the Risks and Uncertainty Surrounding Employee No-Poach Agreements

What's New

No-poach agreements, where companies agree not to hire each other's employees, are increasingly under scrutiny as potential antitrust violations because they may unreasonably restrain competition for labor. In certain contexts and subject to conditions, companies may be able to create and enforce employee no-poach agreements without violating the law. The antitrust and employment teams at Hunton Andrews Kurth LLP help companies evaluate and craft no-poach provisions and defend against government and private actions.

As background, no-poach agreements have been a public point of emphasis for the Department of Justice Antitrust Division (DOJ) since October 2016, when it published new guidelines on the issue and announced that going forward such agreements could be investigated criminally. In April 2018, the DOJ announced its first no-poach case since the guidance was issued. However, the DOJ pursued that case civilly because the conduct ended and was reported before the guidelines were issued. Although the DOJ has yet to bring another no-poach case (civil or criminal), senior officials have repeatedly emphasized the number of ongoing criminal investigations related to employee no-poach agreements. Moreover, DOJ has kept no-poach agreements in the public arena and recent developments in private litigation demonstrate that DOJ enforcement is not the only concern with these types of agreements.

DOJ Intervenes in No-Poach Matters

In September 2019, the parties to a private no-poach litigation entered into a unique settlement agreement that provided the DOJ a role in monitoring and enforcing compliance with the settlement's injunctive relief provisions. The class action alleged that Duke University and the University of North Carolina entered into an agreement not to solicit faculty members from each other. Following the announcement of a settlement by the parties, DOJ successfully intervened to join the proposed settlement. This demonstrates the risk that DOJ will intervene in private settlements related to no-poach agreements. As a result, companies that believe they have reached a settlement with private opponents might find themselves confronted with additional demands and scrutiny from the government enforcer.

Although DOJ's intervention here was the first of its kind, DOJ has weighed in on enforcement actions of no-poach agreements by the states. In July 2018, attorneys general of ten states (California, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania and Rhode Island) and the District of Columbia announced they had formed a coalition to investigate no-poach agreements in franchise contracts not to hire employees within the franchises. Thus far, state attorneys general have targeted no-poach provisions in fast food and service franchise agreements. In those cases, the states have argued that no-poach provisions contained in franchise agreements are per se unlawful because they result in an agreement among horizontal competitors (franchisees of the same business within the same market) not to compete for employees. The DOJ, however, has argued that no-poach provisions in franchise agreements are not necessarily illegal and should be properly analyzed under the rule of reason, a much more forgiving standard compared to per se. Assistant Attorney General Makan Delrahim recently

echoed this position in testimony before a House of Representatives antitrust committee, where he asserted that no-poach provisions in franchise agreements may be necessary to protect the franchisee's investment in training its workforce.

Implications for International Conduct or Employees

Another new twist on no-poach litigation is that agreements not to solicit employees who work outside of the United States may still be problematic. In a recent case, plaintiffs alleged that several Defense Intelligence Agency contractors agreed not to solicit one another's workers, who operate out of a facility in England. At the motion to dismiss phase, defendants argued that the claim was not cognizable under the Foreign Trade Antitrust Improvements Act (FTAIA) because the alleged injury affected only foreign commerce. The court, treating the FTAIA as a substantive requirement (rather than a jurisdictional one),[1] held that plaintiffs had sufficiently alleged an injury to US commerce (including, for example, the fact that the employees at issue exclusively work on contracts for the Defense Intelligence Agency) in order to survive a motion to dismiss. Antitrust compliance must therefore remain a priority, even for companies operating abroad where there may be some effect on US commerce.

Why This Matters

Even though criminal cases based on no-poach agreements have not publicly materialized, no-poach enforcement and litigation remain active. Recent cases demonstrate that risks created by no-poach agreements transcend sectors, including higher education and franchises, and US borders. Additionally, DOJ's participation in private settlements and state enforcement increases the risks of no-poach agreements and the uncertainty of how these agreements should be evaluated. The differing views on no-poach agreements in franchise contracts are a reminder that not all no-poach agreements are problematic, and Hunton's antitrust and employment teams are actively involved in both monitoring current legal developments in this area and assisting clients in their defense and drafting needs. Read our related brochure.

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[1] Other courts have treated the requirements of the FTAIA as a jurisdictional threshold.