Shifting Enforcement of No-Poaching Agreements

Skadden

04 / 25 / 18

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Karen L. Corman
Partner / Los Angeles
213.687.5208
karen.l.corman@skadden.com

Karen Hoffman Lent
Partner / New York
212.735.3276
karen.lent@skadden.com

Tara L. Reinhart
Partner / Washington, D.C.
202.371.7630
tara.reinhart@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

Fifteen months after the Antitrust Division of the Department of Justice (DOJ) announced its intention to criminally pursue no-poaching agreements — in which competitors agree not to recruit or hire each other's employees — the division's assistant attorney general stated in January 2018 that criminal antitrust cases relating to such agreements would be coming over the next few months.

Assistant Attorney General Makan Delrahim stated at an antitrust conference that his office has been "very active" in reviewing no-poaching agreements. His comments followed the DOJ and Federal Trade Commission's October 2016 issuance of the "Antitrust Guidance for Human Resource Professionals" (the Guidance), in which the agencies stated that "[n]aked wage-fixing or no-poaching agreements ... are *per se* illegal under the antitrust laws," and that the DOJ intended to "proceed criminally" against such agreements.

While the DOJ has long considered naked no-poaching agreements — those "separate from or not reasonably necessary to a larger legitimate collaboration between the employers," according to the Guidance — to be *per se* illegal, historically it has treated such agreements as civil violations of the antitrust laws. Indeed, when the DOJ filed lawsuits in 2010 and 2012 against eight large technology companies challenging agreements among them not to recruit or hire each other's employees (the *High Tech* cases), it claimed the agreements were *per se* illegal but did not pursue them as criminal violations.

Delrahim's recent statement, coupled with the Guidance, thus represents a policy shift. It alerted companies that parties to naked no-poaching agreements would be subject not only to civil but also potentially to criminal antitrust liability for future agreements or existing agreements that have not been terminated since the October 2016 Guidance. On April 3, 2018, the DOJ brought the most recent no-poaching case civilly, alleging a *per se* violation by Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp., for naked agreements entered into several years ago. Filings indicate the companies are settling the case through a consent decree. The DOJ stated in a press release that the alleged conduct was discovered and terminated before the October 2016 Guidance, which caused the DOJ to resolve the conduct through a civil action.

Still, there may be little need for alarm. First, no court has ever held that no-poaching agreements should be addressed as *per se* illegal, never mind criminal. Most cases challenging no-poaching agreements, including the DOJ's *High Tech* cases, ultimately settled before a court weighed in on whether the *per se* standard or rule of reason should apply. Thus, if the DOJ brings indictments, as Delrahim suggested, it will be asking courts to criminalize conduct when there is no precedent establishing *per se* treatment even as a civil violation.

Second, the DOJ has made clear that only naked no-poaching agreements would be considered criminal. "Legitimate joint ventures ... are not considered per se illegal under the antitrust laws" and will not be pursued criminally, the Guidance reads. The agency's position in this regard is consistent with antitrust jurisprudence — courts have applied the rule of reason to no-poaching agreements in several contexts where such agreements could be considered reasonably necessary to legitimate collaborations. For example, in the franchise context, agreements that prohibit franchisees from hiring each other's employees have been evaluated under the rule of reason. (However, several cases alleging that such agreements are *per se* violations are currently pending against many of the nation's largest franchises.) Courts also have upheld, under the rule of reason,

no-poaching agreements executed in the merger context. The key takeaways from these and other decisions are that a no-poaching agreement between competitors is more likely to be viewed favorably where it is (i) tied to a legitimate collaboration or transaction; (ii) limited in duration and scope; and (iii) conducive to some procompetitive purpose, such as an increase in output, quality control, protection of competitively sensitive information or the prevention of free-riding.

Third, the Guidance and Delrahim's statement do not represent an expansion of the scope of conduct that violates the antitrust laws. Thus, many of the practices in which companies routinely engage are no more likely to run afoul of the antitrust laws under this new policy. For example, purely unilateral conduct with respect to hiring employees did not before and does not now implicate the antitrust laws. An "agreement" must be between two separate entities, according to the 1984 U.S. Supreme Court case *Copperweld Corp. v. Indep. Tube Corp.*; Section 1 of the Sherman Act does not reach conduct that is "wholly unilateral." (Two companies that merely have officers or directors in common are still likely considered separate entities for purposes of the antitrust laws.) Thus, a company's unilateral decision not to poach the employees of a competitor is not problematic under the antitrust laws.

In addition, the commonly used nonsolicitation agreements entered into in connection with a corporate transaction to protect the value of the selling business are still permissible, so long as they are ancillary to a legitimate transaction and reasonable in scope and duration. Information exchanges during the diligence process in the transaction context also are permitted as long as they occur in connection with a legitimate proposal for a merger, acquisition, joint venture or other collaborative activity.

Takeaways

Given the increased focus on no-poaching agreements, however, employers should consider adopting, or continuing to implement, the following best practices. First, employers should educate and train all employees with human resources responsibilities on antitrust laws and requirements. Employees should not enter into written or oral agreements about compensation or other terms of employment, or about employee recruitment, with HR professionals at competitor firms. Second, when sharing potentially sensitive employee information in connection with a corporate transaction, companies should consider using a neutral third party to manage the exchange of data, anonymizing the data (either by presenting it by position or in aggregated form) and limiting access to such information, particularly from hiring managers. Third, companies should ensure that noncompete and/or nonsolicit provisions in transaction documents are tailored to the deal and reasonable in duration and scope.

Finally, companies should consider incorporating employee nonsolicits in employment or severance agreements or offering a signing bonus conditioned upon a certain period of employment to guard against poaching of employees. Nonsolicitation provisions entered into with employees are generally enforceable if they serve a valid business reason and are not overly burdensome.