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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Dems' Legislation Places Employment Practices in Antitrust Crosshairs

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Much has been made of the anticipated "Blue Wave" in the upcoming November midterms. Last July, Democrats unveiled a set of legislative priorities—collectively referred to as "A Better Deal"—they intended to trumpet to connect with voters and ride to congressional majorities. While proposals such as "Medicare for All" and a $15 minimum federal wage garner substantial coverage, others have flown under the radar. One of these less discussed items—but arguably no less significant—is the call for aggressive expansion of the antitrust laws. The details have varied, but the common tenet seems to be a shift in the goals of antitrust—taking it from a competition-protecting doctrine that has focused primarily on consumer-welfare for the past 40 years, to a multi-purpose regime tasked with promoting social goals such as employment and small business concerns, a philosophy championed by Justice Brandeis that some argue was the original intent of the Sherman Act.

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In late April, House Democrats revealed some specific proposals in a slate of bills set on changing the application of antitrust law to employment issues, manifested in proposed legislation such as the End Employer Collusion Act and the Workforce Mobility Act. Representative Keith Ellison (D.-MN) introduced the End Employer Collusion Act, which broadly bans all agreements between employers not to poach each other's employees. (A similar bill was introduced by Senators Cory Brooker and Elizabeth Warren in March.) The Workforce Mobility Act (introduced by Rep. Joseph Crowley (D.-NY)) would presume non-compete provisions in employment agreements to be illegal unless the employer can show that the provision is not anticompetitive. Despite their superficial appeal, a deeper dive into the conduct these bills would prohibit may be useful to understand the potential for these proposals to limit the competitive benefits no-poach and non-compete arrangements often bring.

Tepid Wage Growth In a Warm Economy

Economic prosperity is a common answer Americans give when asked about the most important

SHEPARD GOLDFEIN *and* KAREN HOFFMAN LENT *discuss Democrats' specific proposals regarding the application of antitrust law to employment issues, in this Antitrust Trade and Practice column.*

concerns facing the country, even though unemployment is at 17-year lows, and the continued streak of economic growth nears a national record. Most Important Problem, Gallup, April 2018. This is likely due to several factors, one of which may be a slower climb in employee wages than some expected, given the nation's low unemployment numbers. While many rationales have been proffered for this apparent discrepancy—e.g., globalization, slow gains in productivity, etc.—the representatives behind these bills are assigning at least part of the blame toward the antitrust treatment of no-poach agreements between employers and non-compete covenants in employment contacts. They argue that the judicial application of the antitrust laws has been too permissive of the barriers these agreements erect in worker mobility, which has led to downward pressure on wages.

Application of Antitrust to No-Poach and Non-Competes

Unsurprisingly, such agreements are already illegal under the antitrust laws when they are adjudged to be anticompetitive. But what is an anticompetitive agreement? Courts generally make that determination after a thorough, fact-intensive review of the restraint and its effects on competition in the relevant marketplace. This analysis is commonly referred to as the "rule of reason." For example, a government agency bringing an antitrust challenge against an agreement between employers not to recruit each other's workers would need to establish that the agreement's anticompetitive effects in the relevant market for their employees outweigh its procompetitive (i.e., legitimate business) justifications. An employee arguing that his non-compete covenant with his employer violates the antitrust laws would need to prove the same.

No-Poach and the End Employer Collusion Act

Courts have historically evaluated agreements between employers not to recruit each other's employees under the rule of reason. Nevertheless, the Department of Justice (DOJ) and Federal Trade Commission (FTC) announced in their October 2016 "Antitrust Guidance for Human Resource Professionals" (the Guidance) that they would treat these agreements as "*per se* illegal"—which no court ever has—if the arrangements are "not reasonably necessary to a larger legitimate collaboration between the employers."

> The political nature of antitrust may change if Democrats double down on their stance to push the doctrine into uncharted territory.

Put differently, the antitrust agencies will condemn naked no-poach arrangements without analyzing the competitive effects. The Guidance also explained that the Antitrust Division of the DOJ will consider criminal sanctions against the parties to these agreements, and in January 2018 the division's assistant attorney general said that criminal cases in this area would be coming soon. (The FTC does not have the statutory authority to bring criminal charges, but can refer illicit activity to the DOJ for prosecution.) Yet even in this aggressive guidance, the antitrust agencies still recognize that no-poach agreements can be procompetitive when they are reasonably necessary to legitimate collaborations or transactions, such as in a joint venture or merger context. In those circumstances, a no-poaching agreement will likely withstand antitrust scrutiny if the agreement is both (i) limited in time and scope and (ii) conducive to a procompetitive purpose, such as increase in R&D or the facilitation of an efficiency-producing merger.

The proposed End Employer Collusion Act would go even farther than the antitrust agencies and outlaw all no-poach agreements, regardless of their procompetitive benefits or previous treatment under the rule of reason. No longer could courts account for the nuances that often inform whether the restraint

actually promotes or hinders competition. This may deprive a relevant marketplace of procompetitive benefits; after all, companies may be less eager to enter into joint ventures for new technologies if they know their collaborator could exploit the arrangement to siphon away talented engineers. An interested buyer of a particular business unit may have the capabilities to raise the unit's output or make it more efficient, but will this procompetitive purchaser move forward knowing the seller can hire back its former employees immediately after receiving the check? Both the antitrust agencies and the federal judiciary have long recognized that limited no-poach provisions are reasonably necessary to avoid these anticompetitive outcomes. With its blanket prohibition, the End Employer Collusion Act would represent a policy shift if enacted—that the procompetitive effects of no-poaches are less important than their potential restraint on employee earnings.

Non-Competes and the Workforce Mobility Act

Like no-poach agreements, non-compete agreements in the employer/employee setting have traditionally been analyzed (by both the courts and antitrust agencies) under the rule of reason, largely due to the procompetitive outcomes they may facilitate. These include promoting employer investment into employee training, as well as safeguarding proprietary information and valuable business relationships that employers can leverage into the efficient delivery of goods and services to the ultimate benefit of consumers. Such benefits often outweigh competitive concerns and survive a rule of reason analysis when (i) the non-compete covenant only applies for a reasonable amount of time after the employment period, (ii) is limited in geographic scope, and (iii) is matched to the specific type of work performed by the employee.

Representative Crowley's bill is in tension with decades of precedent by designating non-compete covenants as presumptively anticompetitive in violation of the antitrust laws. It would shift the burden to employers to demonstrate (by a preponderance of the evidence standard) that the procompetitive effects of the non-compete outweigh the anticompetitive harm. In other words, the employer holding the non-compete would be guilty until proven innocent. Therefore the Workforce Mobility Act may be worth tracking for employers to avoid surprises with their non-compete arrangements that have long been acceptable under the antitrust laws.

Conclusion

It remains to be seen how much traction these legislative proposals will garner; as of this writing, these bills do not appear to have the bipartisan support or consensus that has long been a feature of antitrust in the United States. Times change however, and the political nature of antitrust may change with it if Democrats double down on their stance to push the doctrine into uncharted territory. Given their special election success during the Trump administration and the traditional gains made by the minority party in the mid-terms, a "Blue Wave" appears a very real possibility. Accordingly, it may be wise for employers to monitor these proposals closely.