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ANTITRUST TRADE AND PRACTICE

Expert Analysis

When Antitrust Meets Human Resources

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Antitrust treatment of wage-fixing agreements and information exchanges amongst employer competitors may soon re-enter the spotlight, coming out of the shadows of its cousin, the more extensively covered no-poach agreement. Despite promises from federal regulators in 2016 to crack down on impermissible agreements between employers and employers' unlawful information exchanges, neither the Federal Trade Commission (FTC) nor the U.S. Department of Justice (DOJ) filed enforcement actions concerning such conduct in 2019. Indeed, the FTC has only brought one civil wage-fixing enforcement action since the agencies released their joint October 2016 guidance cautioning employers of antitrust issues within the labor market. As has been the case with no-poach agreements, state regulators and private litigants will likely pursue wage-fixing and information exchange actions on their own. But, before pundits start tracking these cases hoping that they will be the panacea for antitrust issues in the labor market, one lesson stands out from the no-poach saga: The antitrust inquiry is incredibly detailed-oriented and guided by nuances within antitrust doctrine that disfavor a one-size-fits-all, knee-jerk view of the matter.

Regulatory/Legal Background. Over the past few years, there has been a re-galvanized effort by government agencies and private litigants to use antitrust laws to regulate the labor market. Most of the recent media and regulatory attention has focused on agreements amongst employers not to solicit or "poach" competitors' employees. As we have previously covered, the greatest debate in the no-poach context has been which antitrust standard should apply when analyzing the use of non-solicitation agreements between franchisors and franchisees. See Antitrust Division Increasingly Weighs In as Amicus Curiae, NYLJ (Feb. 8, 2019). The DOJ and certain states led by the Washington State Attorney General have staked out their opposing positions, but stalled cases and conflicting opinions within the judiciary suggest that the debate won't soon be resolved.

Less media attention has been paid to wage-fixing conspiracies and impermissible sharing of information by employers. In October 2016, the DOJ and FTC jointly issued the Antitrust Guidance for Human Resource Professionals (the Guidance), an 11-page document reaffirming the agencies' stance that the antitrust laws apply with equal force to firms that compete to recruit and retain the same employees, irrespective of whether those firms compete in the same product market. The Guidance cautions employers against sharing sensitive

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information with competitors or entering unlawful agreements not to compete on terms of employment, including terms concerning employee salary, vacation benefits, or other forms of compensation. It wasn't until July 2018, however, that the FTC brought one civil wage-fixing enforcement action against a therapist staffing company and its current and former owners. Given its small-scale, the case was relatively straightforward, with the FTC alleging that the owners exchanged information regarding competitors' current pay rate information and lowered their rates accordingly to cut costs. See FTC Complaint, *In the Matter of Your Therapy Service*. But as discussed below, a "naked" restraint and seemingly clear-cut case such as this does not cover the fact-specific complexities of other wage-fixing and information exchange cases.

Information Sharing Is Not Always Unlawful. The Guidance emphasizes that, absent a recognizable, legitimate business purpose, employers competing for employees should not expressly or implicitly communicate with each other regarding their firm's wage information or hiring practices. Even the mere suggestion, or an "invitation to collude," can be actionable. To illustrate, years before the Guidance's release, the DOJ sued the Utah Society for Healthcare Human Resources Administration, a society of HR professionals at Utah hospitals, for conspiring to exchange nonpublic prospective and current wage information (e.g., entry wages, timing and frequency of wage increases) about registered nurses. As the complaint alleged, the defendants exchanged this information through frequent telephone calls, regular meetings, and defendants' annual, published salary surveys. See DOJ Complaint, *United States v. Utah Society for Healthcare Human Resources Administration*. The DOJ and defendants entered a consent decree barring defendants from sharing or requesting wage and compensation information for nurses; no monetary fines were levied. Thus, in the regular course of business, a request from one competitor to another for nonpublic information calls for the straightforward application of antitrust rules against anticompetitive conduct. But things get a bit complicated when employers in the ordinary course of business use aggregator services that compile nonpublic, dated information concerning wages. The 2016 Guidance did not fully address this issue, making only one suggestion of note: periodic exchanges of current wage information in an industry with few employers could establish an antitrust violation.

In contrast, in the deal context, the Guidance acknowledges that exchanging information is occasionally necessary for legitimate purposes, such as to effectuate a merger or participate in a joint venture. Parties should follow the agencies' merger-specific information exchanging guidelines to design protocols that comport with antitrust laws. Though not exhaustive, the information exchange guidelines state that an information exchange may be lawful if (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. Parties can use clean teams and other safeguards to limit the dissemination and use of competitively sensitive information about employees and employee benefits exchanged for diligence and integration planning. See generally Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence (March 20, 2018).

Rule of Reason May Apply to Wage-Fixing Agreements in Certain Contexts. Similarly, the law and regulatory Guidance concerning wage-fixing agreements has its own complications. Generally, employers can be liable for an antitrust violation if they explicitly or implicitly agree on employee salaries or other terms of compensation. According to the 2016 Guidance, it doesn't matter whether the agreement is informal or formal, written or unwritten, spoken or unspoken. Even if an employer does not agree orally or in writing to limit employee compensation or recruiting, other circumstances—such as when there is evidence of discussions and parallel behavior—may lead to an inference that the individual has agreed to do so. The

main rub, as it always has been in antitrust law, is that employers must in actuality—and in appearance—make independent decisions concerning employee salary and compensation. As these several caveats suggest, and as previous cases show, proving a conspiracy exists can be a tough evidentiary burden to overcome.

Moreover, like the no-poach debate trickling through the courts, wage-fixing agreements may present the same issues concerning which antitrust standard applies in a given context. There are three possible standards—per se, rule of reason, and "quick look." Per se is a high bar, since it requires the conduct to be so egregious and antithetical to free market ideals that a categorical ban is needed—meaning, if present, an antitrust violation is immediately assumed without further inquiry into the procompetitive justifications. As such, there has been a cautionary approach to deeming business conduct per se illegal. For most else, the rule of reason applies and, like a balancing act, the decision-maker must consider the anticompetitive effects, the procompetitive justifications, and the alternatives to the latter. "Quick look" is a less rigorous version of the rule of reason analysis. Rarely relied on, "quick look" is reserved for situations where an observer with a rudimentary understanding of economics could conclude that the conduct in question would have anticompetitive effects on the market. See *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Antirust doctrine and the agencies' Guidance make clear that "naked" restraints—that is, agreements separate from or not reasonably necessary to a larger legitimate collaboration between the employers—are per se illegal. An agreement is more likely to be seen as a per se violation when it is between horizontal competitors, or those who compete at the same level. But things get hairy when considering vertical agreements between firms at different levels of production or service. As evidenced in the no-poach debate, complex arrangements—like those in the intrafranchise context—may have horizontal and vertical components that make it difficult to determine which standard should apply.

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Takeaways. The landscape surrounding alleged wage-fix conspiracies and unlawful information exchanges is complex. The evidentiary burden of establishing a conspiracy occurred is high, with or without a smoking gun. Courts must consider the actual relationship between employers to discern if they have a legitimate business reason to standardize wages and share information. Employers should monitor these cases to make sure their information exchange practices don't run afoul of the antitrust laws.

Employers can also follow these basic tips: Publicly-available or old ("competitively stale") employee-specific information is not competitively sensitive and generally can be shared without restriction; non-public employee data should only be shared to the extent necessary (e.g., limited to executives) and only at the time that it becomes necessary to do so; if possible, use a neutral third party to manage the exchange and review of employee data; and to the extent it still meets the legitimate business need, employee data should be aggregated or anonymized prior to sharing.

When in doubt, employers should consult with antitrust counsel and set up internal protocols to avoid unlawfully sharing information about employee compensation and benefits.

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