Simpson Thacher

Memorandum

No-Poach Agreements Will Remain a Target of Criminal Antitrust Enforcement

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In October 2016, late in the Obama administration, the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission jointly issued guidance warning that no-poaching and wage-fixing agreements among competing employers are *per se* illegal and would be prosecuted criminally. This guidance, officially the "Antitrust Guidance for Human Resource Professionals" (Guidance), marked a more aggressive stance on antitrust enforcement, where previous enforcement activity focused on civil liability and consent judgments.

With the new administration, many Obama-era policies have been reversed or abandoned. But earlier this month the DOJ affirmed its intent to criminally prosecute no-poaching and wage-fixing agreements, indicating it is currently pursuing several such investigations.

Under the Guidance, no-poaching and compensation-fixing agreements are considered *per se* illegal. This means these agreements can be prosecuted as antitrust violations without investigating or proving any anti-competitive effects. Importantly, the DOJ may treat informal oral agreements, or inter-company discussions followed by parallel conduct, as compensation-fixing or no-poaching agreements—no express written agreement is necessary. Companies charged with criminal antitrust violations may face tens of millions in fines, while individuals face an average of 22 months in prison.

Even sharing information about the terms and conditions of employment with competitors or a trade organization poses antitrust risk insofar as it may facilitate collusion or coordinated behavior. The important question here is whether the entities sharing information compete for the same employees, not whether they compete in the marketplace. Information sharing isn't *per se* illegal, but it may be investigated to determine if it has an anticompetitive effect, and can be used as evidence of an implicit illegal agreement.

Even in the context of a joint venture or potential acquisition or merger, care must be taken to limit what information is shared and how.

Consolidated industries and industries with a limited pool of highly skilled employees should be especially aware of these rules. Industries like high-technology and financial services are especially vulnerable, given the fierce competition for gifted employees and commensurately high compensation in these fields. The skyrocketing recruiting and labor costs that can come with landing top developers, let alone the engineers who can spearhead major projects, make no-poaching and wage-fixing agreements particularly appealing. The same is true in financial services. Indeed, it was an investigation into the financial services space that prompted the DOJ's recent confirmation that it would prosecute these agreements criminally. Another example illustrates the need to consider who the competition is in the employment market: in 2010 the DOJ accused Apple and Pixar of entering a no-cold calling agreement, and obtained a consent agreement from them. Though the two are hardly direct competitors, they compete for some of the same highly skilled engineers and colluding on that front could violate antitrust laws.

By directing the Guidance to human resources professionals, the antitrust agencies hid one of the greatest risks for violating it. With fierce competition over employees, it is often senior executives, not HR, who are doing the recruiting. Moreover, senior executives are often more sensitive to ballooning labor and recruiting costs and have more opportunity to discuss compensation and recruiting practices with their counterparts at competing companies. Without training, an effort to control costs or just talk shop with a peer can turn into a costly antitrust violation.

There are a few things companies should be doing to protect themselves:

- First, companies should make sure they have compliance policies in place to limit information sharing with competitors, and to formally bar no-poaching, including no cold calling, and wage-fixing agreements.
- Second, HR staff should be well trained on these issues. Knowing what information needs to be kept confidential and what kinds of companies count as competitors for antitrust purposes should be high priorities for recruiting staff.
- Finally, executives who do recruiting work or who have access to sensitive employee compensation data should also be trained and monitored.

The antitrust agencies have made clear they will pursue antitrust violations where data sharing is having an anti-competitive effect, and non-HR executives who are not trained on these issues risk accidental antitrust violations.

For further information about this guidance, please contact one of the following members of the Firm's Antitrust or Employee Benefits Practices.

NEW YORK CITY

Brian D. Robbins
+1-212-455-3090
brobbins@stblaw.com

Kelly Karapetyan
+1-212-455-7268
kelly.karapetyan@stblaw.com

Ellen L. Frye
+1-212-455-2352
efrye@stblaw.com

Daniel Venditti
+1-212-455-7387
daniel.venditti@stblaw.com

WASHINGTON, D.C.

John Terzaken
+1-202-636-5858
john.terzaken@stblaw.com

Sara Y. Razi
+1-202-636-5582
sara.razi@stblaw.com

Peter Thomas
+1-202-636-5535
pthomas@stblaw.com

Abram Ellis
+1-202-636-5579
aellis@stblaw.com

PALO ALTO

Harrison J. (Buzz) Frahn
+1-650-251-5065
hfrahn@stblaw.com

LONDON

David E. Vann
+44-(0)20-7275-6550
dvann@stblaw.com

Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000