Corporate Counsel Business Journal

Published April 22, 2020
CCBJournal.com

CCBJ

Guidance for HR Antitrust Compliance

MICHAELA SPERO & PETER MUCCHETTI
CLIFFORD CHANCE

▸ Peter Mucchetti and Michaela Spero of Clifford Chance lay out a framework for applying the antitrust laws in the employment context and provide guidance on how to avoid potential pitfalls.

Human resources (HR) may seem like the last place to look for potential anticompetitive conduct, but as federal and state enforcers have made clear of late, they can and will prosecute violations including no-poach, wage-fixing, and other anticompetitive employment agreements.

In its July 2019 antitrust compliance guidance, the Department of Justice Antitrust Division (DOJ) made clear that companies must monitor and provide antitrust training to HR professionals, as well as appropriately tailor any employment agreements with other companies.[1] The Federal Trade Commission (FTC) announced in February 2020 that it had embarked on a massive study of all acquisitions by five major technology companies, including requiring the companies to provide information on any agreements to hire key personnel from other companies and post-employment covenants not to compete.[2] And in April 2020, the DOJ and FTC issued a joint statement warning that they would enforce the antitrust laws against any employer who suppressed competition for labor amidst the COVID-19 pandemic.[3]

If there were ever a time to "clean house" and ensure HR departments are antitrust compliant, it is now. This article lays out a framework for applying the antitrust laws in the employment context and provides guidance on how to avoid potential pitfalls.

Antitrust Framework

The Antitrust Laws

Federal antitrust law prohibits agreements among competitors to prevent, restrict, or distort competition.[4] Each state also has its own antitrust laws, which often track federal law but can vary, as can state enforcement priorities. In addition, employment agreements can also violate state consumer protection statutes.

DOJ has exclusive authority to prosecute criminal antitrust violations against both companies and individuals, with companies facing fines up to $100 million for each offense, and individuals facing fines up to $1 million and ten years in federal prison per offense. Civil enforcement actions are also available to DOJ, FTC, and State Attorneys General, as well as private plaintiffs.

Analysis Standards

When evaluating potentially anticompetitive agreements, the first question is whether the agreement between the parties is horizontal or vertical. A horizontal agreement is reached between competitors, whereas a vertical agreement occurs within a supply chain or franchise.[5] The second question is whether the agreement is ancillary to a lawful agreement, i.e., whether it is "reasonably necessary to achieve its procompetitive benefits."[6]

In general, antitrust authorities view horizontal agreements, such as no-poach and wage-fixing agreements, that are not ancillary to another agreement as per se violations of Section 1 of the Sherman Act, which are deemed so anticompetitive that they are declared unlawful on their face. On the other hand, horizontal agreements that are ancillary to a lawful agreement, such as non-compete provisions within acquisition agreements, are generally viewed under a "rule of reason" analysis. This analysis also applies to vertical agreements. Rule of reason analysis involves a back-and-forth burden-shifting framework in which the plaintiff must first demonstrate anticompetitive effect, after which the defendant must demonstrate a procompetitive justification.

Demonstrating that horizontal agreements not to compete can be procompetitive in limited situations, DOJ itself has imposed no-poach provisions on parties that are divesting businesses to obtain clearance for a transaction.[7] For example, the consent decree resolving DOJ's challenge

Employment agreements are and will continue to be a target area for federal and state antitrust enforcers moving forward.

to CVS's acquisition of Aetna limited CVS's and Aetna's ability to re-hire employees that the buyer of the divested business had hired from Aetna.[8]

Recent Enforcement

Employment agreements are and will continue to be a target area for federal and state antitrust enforcers moving forward.

The DOJ Perspective

In recent years, DOJ has confirmed it will criminally prosecute certain horizontal agreements that limit competition in employment markets, including no-poach and wage-fixing agreements.[9] In 2018, DOJ reached civil settlements with Knorr-Bremse and Wabtec relating to the companies' anticompetitive no-poach agreement. DOJ noted it would have criminally prosecuted the defendants if their conduct had not ended prior to DOJ's publication of the Antitrust Guidance for Human Resource Professionals in October 2016.[10]

DOJ has also filed Statements of Interest in several private cases, reiterating its position on the application of antitrust laws to employment agreements. In re: Railway Industry Employee No-Poach Antitrust Litigation saw former employees file a class action lawsuit alleging that railroad companies had entered into agreements to "refrain from soliciting or hiring each other's employees without the consent of the current employer." [11] In its Statement of Interest, DOJ took the position that horizontal no-poach agreements among competing employers are per se unlawful, unless ancillary to a separate, legitimate business transaction.

DOJ took a similar position in Seaman v. Duke University, in which a professor at Duke School of Medicine was denied employment at the University of North Carolina School of Medicine because of a no-poach agreement between the schools.[12] Duke University later settled the case for $54.5 million and injunctive relief. DOJ took the unprecedented step of intervening to join the proposed settlement to obtain the right to enforce the injunctive relief entered by the court against Duke.

DOJ believes that one type of agreement likely should be analyzed under the rule of reason: no-poach agreements in the franchise context. For example, in Stigar v. Dough, Inc. and related cases, former employees of fast food franchises alleged that franchise agreements prohibited franchisees from hiring employees from the franchisor's corporate offices or other franchisees.[13] DOJ penned a Statement of Interest arguing that a typical franchise no-poach clause is vertical and can be adequately policed under the rule of reason.

View From the Bench

Federal courts agree that naked no-poach agreements are per se illegal but differ in their treatment of franchise no-poach agreements.[14] In Blanton v. Domino's Pizza, the Eastern District of Michigan denied the defendant's motion to dismiss after determining it needed more factual development to decide which analysis standard would apply to the plaintiffs' allegation that Domino's' franchise no-poach clause violated the Sherman Act. The court held that the plaintiffs had plausibly argued the agreement was unreasonable under both per se and quick-look analysis, as the no-poach provisions were between franchisees, i.e., horizontal competitors.[15]

But in another franchise case, Arrington v. Burger King Worldwide, Inc., the Southern District of Florida granted the defendant's motion to dismiss, holding that the plaintiffs did not sufficiently allege that Burger King and its franchisees were separate economic actors for antitrust

purposes, and thus, the franchise's no-hire agreement was an "internal 'agreement' to implement a single, unitary firm's policies."[16]

State Attorneys General Enforcement

A group of state attorneys general have formed a coalition to take on anticompetitive employment agreements and has obtained settlements with numerous fast food chains to eliminate the no-poach provisions in their franchise agreements.[17] The coalition has also urged the FTC to help stop the use of non-compete provisions in the workplace, particularly for low-wage workers.[18] The FTC appears open to the issue and has held two workshops—the most recent in January 2020—asking the public for comments on non-compete clauses.[19]

Congress Weighs In

Congress is also attuned to these issues, and several prominent politicians have discussed or proposed legislation that would prohibit anticompetitive provisions in employment agreements. For example, Senator Amy Klobuchar announced in February 2019 that she would reintroduce legislation that "would clarify that a merger could violate the statute if it gives a company 'monopsony' power to unfairly lower . . . wages it offers because of lack of competition among . . . employers."[20]

Cleaning House: Suggestions for Avoiding HR Antitrust Pitfalls

To ensure their employment agreements do not come under scrutiny from antitrust enforcers, companies should undertake the following steps as part of their antitrust compliance programs:

First, train HR professionals and executives responsible for hiring to ensure that they understand the antitrust laws.

HR should be included in regular antitrust trainings and advised to seek counsel from an antitrust expert if in doubt about the permissibility of a proposed employment agreement.

Second, review and revise current employment contracts to ensure that they do not contain any problematic clauses.

Companies should implement procedures that allow for continuous monitoring of employment terms and industry engagement, focusing first on agreements where these clauses are most likely to be found. Currently, antitrust enforcers are targeting provisions covering hourly and low-wage workers. Such clauses may also be found in agreements related to highly trained employees, such as engineers, IT experts, and designers.

Third, understand that the antitrust agencies can search for anticompetitive agreements in merger and other investigations.

Proactively reviewing and implementing antitrust compliance measures around HR and employment agreements can help avoid unwanted scrutiny when submitting merger filings.

Fourth, should a company identify problematic clauses in its employment agreements, it should consider taking remedial action.

In the case of a per se illegal no-poach or wage-fixing agreement with horizontal competitors, companies should consider a leniency application to DOJ and other remedial action.

Conclusion

As labor markets continue to take center stage for both antitrust enforcers and Capitol Hill, it is advisable to review antitrust compliance policies surrounding HR and employment agreements with antitrust counsel. ■

[1] U.S. Department of Justice Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

[2] Press Release, U.S. Federal Trade Commission, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[3] Press Release, U.S. Department of Justice Antitrust Division, Justice Department and Federal Trade Commission Jointly Issue Statement on COVID-19 and Competition in U.S. Labor Markets (Apr. 13, 2020), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-jointly-issue-statement-covid-19-and.

[4] Section 1 of the Sherman Act, 15 U.S.C. § 1. Technically, the FTC does not have authority to enforce the Sherman Act. But the FTC does enforce the Federal Trade Commission Act, which prohibits the same activities that violate the Sherman Act.

[5] For employment agreements, the relevant product market is labor services, not the product or service that employers sell.

[6] U.S. Department of Justice Antitrust Division & U.S. Federal Trade Commission, Competitor Collaboration Guidelines, at 8 (Apr. 2000), available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[7] Clayton Act Section 7 prohibits acquisitions that may substantially lessen competition or tend to create a monopoly. 15 U.S.C. § 18.

[8] Final Judgment, United States v. CVS Health Corporation and Aetna Inc., Case 1:18-cv-02340-RJL (D.D.C. Sept. 04, 2019).

[9] E.g., U.S. Department of Justice Antitrust Division & U.S. Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[10] Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[11] Case No. 2:18-MC-00798-JFC (W.D. Pa. July 11, 2018).

[12] Case No. 1:15-cv-00462 (M.D.N.C. Sept. 25, 2019).

[13] Case No. 2:18-cv-00244-SAB (E.D. Wash. Apr. 18, 2019).

[14] See, e.g., In re Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464 (W.D. Pa. 2019).

[15] Order Denying Motion to Dismiss, Case No. 2:18-cv-13207 (E.D. Mich. May 24, 2019).

[16] Order Granting Motion to Dismiss at 12, Case No. 1:18-cv-24128-JEM (S.D. Fla. Mar. 24, 2020) (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767-68 (1984)).

[17] Press Release, Wash. State Office of the Attorney General, AAG to Testify to Congress as AG Ferguson's Anti-No-Poach Initiative Reaches 155 Corporate Chains (Oct. 28, 2019), https://www.atg.wa.gov/news/news-releases/aag-testify-congress-ag-ferguson-s-anti-no-poach-initiative-reaches-155-corporate.

[18] "Abusive" non-compete agreements should be halted by US FTC, attorneys general coalition says, MLex, Mar. 12, 2020.

[19] Press Release, U.S. Federal Trade Commission, FTC Announces Agenda for Jan. 9 Workshop, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-announces-agenda-jan-9-workshop-non-competes-workplace.

[20] Press Release, U.S. Senator Amy Klobuchar, Klobuchar Introduces Legislation to Modernize Antitrust Enforcement and Promote Competition (Feb. 1, 2019), https://www.klobuchar.senate.gov/public/index.cfm/2019/2/klobuchar-introduces-legislation-to-modernize-antitrust-enforcement-and-promote-competition.