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Antitrust Attacks on "No-Poach" Agreements Between Employers Accelerating

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As we reported in an earlier blog post, the Federal Trade Commission and Department of Justice issued guidance in the waning days of the Obama administration reminding HR professionals and others that the antitrust laws could apply in the employment arena, particularly with respect to hiring and compensation matters. There was some question about how vigorously the Trump Administration's antitrust enforcement would be in this area, but those questions should no longer exist. 2018 is already turning out to likely be an important year regarding antitrust attacks on "no-poach" agreements between businesses, with a class being certified in a major damage action and the head of the Department of Justice Antitrust Division indicating last month that criminal indictments based upon such agreements would be shortly forthcoming. Executives and HR Departments should recognize the significant risks associated with express or implied agreements or "understandings"—or even "gentlemen's agreements"—where businesses agree not to hire (or poach) each other's employees or executives.

On February 1, 2018, a federal district court in North Carolina certified a class of all persons employed during the period from January 1, 2012 to the present as a faculty member with an academic appointment at the Duke or University of North Carolinas Schools of Medicine. In the antitrust lawsuit seeking treble damages, a Duke radiologist alleged that the deans at Duke and UNC medical school had agreed not to permit lateral moves of faculty between the schools. (The court declined to extend to class to include non-faculty physicians, nurses, and skilled medical staff on manageability grounds, but indicated that they could bring their own separate suit.) *Seaman v. Duke University, et al.,*No 1:15-CV-462 (M.D.N.C. Feb.1., 2018).

During the Obama Administration, the Antitrust Division brought a number of civil lawsuits against Silicon Valley companies, including Adobe, Apple, Google, Intel, Intuit, and Pixar alleging that each entered into no-poach agreements with their competitors. All ended in consent decrees. The inevitable class action lawsuits followed, and the companies ultimately ponied up nearly $1 billion to settle them.

Near the end of the Obama Administration, in October 2016, the Antitrust Division and the Federal Trade Commission issued **"Antitrust Guidelines for Human Resource Professionals"**. The Guidelines indicated that the government would no longer pursue no-poach and wage-fixing agreements as civil cases, but would instead bring criminal prosecutions. Moreover, the companies targeted would not have to be business competitors—it would sufficient if they competed for the same employees.

Last month, during a panel discussion at a conference, the head of Antitrust Division for the Trump Administration, Makan Delrahim, confirmed that the Division has several active criminal investigations and indicated: "In the coming couple of months you will see some announcements [of criminal charges], and to be honest with you, I've been shocked about how many of these [no-poach agreements] there are, but they're real." He suggested that companies that continued such agreements after October 2016 would be pursued criminally, but those who abandoned those agreements with the announcement of the Guidelines would only be targeted with a government civil suit.

If businesses did not get their houses in order before with respect to no-poach and wage understandings, they are well advised to do so now. In addition to government exposure, this area will become an increasingly attractive target for plaintiff class action lawyers.

Authors

Bruce D. Sokler, Member / Co-chair, Antitrust Practice

Bruce D. Sokler is a Mintz antitrust attorney. His antitrust experience includes litigation, class actions, government merger reviews and investigations, and cartel-related issues. Bruce focuses on the health care, communications, and retail industries, from start-ups to Fortune 100 companies.