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Client Memorandum September 2012

A Hidden Antitrust Problem: Human Resources

Human resources is not often thought of as an area that is likely to harbour antitrust compliance issues. But a series of consent orders concerning employee non-solicitation agreements are a reminder that certain employment-related agreements between competitors may pose antitrust risk. U.S. antitrust agencies prosecute these agreements as per se illegal under Section 1 of the Sherman Act. And those investigations often lead to protracted, expensive private litigations.

With this in mind, human resources executives and other staff involved in the employment process should be cognizant of what is permitted under the antitrust laws.

Background

The antitrust agencies view agreements between competitors not to solicit certain categories of employees from each other as violating Section 1 of the Sherman Act.

In a recent example, the Department of Justice ("DOJ") alleged that employee non-solicitation agreements between competitors for highly skilled employees lessened competition. The companies were Apple, Google, Intel, Adobe, Intuit Inc, Walt Disney Co.'s Pixar and Lucasfilm — all companies in the technology sector or heavily reliant on technology. The DOJ characterized the agreements as upstream restraints on employment opportunities. According to the DOJ, these agreements deprived the highly skilled employees of better job opportunities. As such, the agreements restrained employee wages.

Those agreements that have been investigated and resulted in a complaint by the DOJ contain four principal characteristics:

- First, the agreements are between competitors. Competitors in this context does not necessarily mean competing in the same line of business. Rather "competitors" includes companies competing for the same set of employees; similarly, companies may also be competing in the marketplace for their respective products.
- Second, the agreements relate to employees with advanced or specialized skills. Previous government investigations involved employees in the technology, medical residency, digital animation, and oil and petrochemical sectors. But these should only be viewed as examples of the types of industries that may face issues. There are certainly many other industries where technical or other specialized skills define the work force.
- Third, the agreements must be without limitation by geography, job function, product group or time period.

This article was originally published in *Corporate Compliance Insights* (August 2012).

- Fourth, the agreements must lack a procompetitive justification.

In the most recent public DOJ investigation, the agreements at issue were not tied to legitimate collaborative projects between competitors. That could have been a saving justification for the involved companies. Rather, the agreements extended to all employees at the competing companies.

Unilateral decisions by companies not to solicit certain categories of employees are generally not subject to prosecution under the Sherman Act. However, coordination between companies competing for the same employees can be an issue, especially when highly skilled or specialized employees are involved. Non-solicitation agreements are especially problematic in industries where a principal means by which companies recruit new employees is "cold calling" – soliciting them directly from competitors.

Awareness

Awareness of your company's participation in employee non-solicitation agreements may be limited, and sometimes uncovered only after the initiation of an investigation by the government. Often, the government may learn of such an agreement through an aggrieved employee or whistleblower.

But frequently the government uncovers problematic agreements as part of larger investigations — for example, when the government reviews documents in conjunction with a Request for Additional Information under the Hart-Scott-Rodino Act (colloquially known as a Second Request) or a Civil Investigative Demand. Acquisitive companies should be particularly attuned to this possibility. An antitrust audit or similar compliance review may help to prevent such documents from being included in future disclosure.

Potential Ramifications For Non-Compliance

Companies faced with an employee non-solicitation agreement investigation by the U.S. antitrust agencies often settle with the government and agree to a consent order. These consent orders typically enjoin such agreements on a prospective basis and require the companies to implement a tailored compliance program.

Parties not agreeing to settle with the government could face Sherman Act liability including civil or criminal fines. And the more potent concern might be private plaintiff litigation. The judge overseeing the private plaintiff suit against Apple, Google, Intel and other technology companies recently rejected a bid by the companies to dismiss the claims that they illegally conspired not to poach each other's employees. The next likely step for those companies is a trial.

Private plaintiffs can bring lawsuits seeking treble damages and attorneys' fees. The number of potential plaintiffs could be significant, depending on the nature of the restraint.

Avoidance

Not all employee non-solicitation agreements are problematic. Agreements, even among horizontal competitors, that are ancillary to a legitimate procompetitive venture may be lawful. Employee non-solicitation provisions contained in severance or similar type agreements are often legitimate under the antitrust laws. Such provisions allow employees to depart a company under favorable terms, while protecting the company from losing other employees. Non-solicitation provisions reasonably necessary for legal settlements, mergers, acquisitions, or other business transactions, including the retention of certain professionals (e.g., consultants, auditors, recruiting agencies) generally do not present competition concerns. Again, it's important that human resources and other staff involved in the employment process are cognizant of what is permitted under the antitrust laws.

Employee non-solicitation agreements that are ancillary to legitimate collaborations between competitors may be permissible if (1) they are narrowly tailored to match the scope of a legitimate collaboration — that is limited by geography, employment function, product group, and/or time period — and (2) reasonably necessary to a collaboration and supported by a procompetitive justification. Ensuring both these conditions reduces antitrust risk.

By way of illustration, suppose two companies decide to create a joint venture that combines one output from each of the companies into a novel product. Each company is contributing a scientist to the venture, without which the venture would not otherwise be able to produce the end product. An agreement between the companies not to poach each other's scientist would be ancillary, limited in scope and procompetitive.

Companies engaging in collaborations involving non-solicitation agreements should examine the scope of the agreement and document the justifications behind the agreements. To the extent practicable, they should record the following:

- the joint venture, collaboration or agreement to which the non-solicitation is ancillary;
- the identity by name or type of the employees who are subject to the agreement; and
- a termination date or event.

An important point: Contemporaneous records are often more credible with the antitrust agencies than after-the-fact justifications crafted by lawyers.

Conclusion

Most companies do not consider human resources as a potential source of antitrust problems, and in many cases that is a correct consideration. However, where two or more companies agree not to solicit each other's employees, an antitrust issue might arise. The best means to avoid the issue is to train HR personnel on the potential antitrust pitfalls associated with non-solicitation agreements and other agreements affecting the hiring of certain employees.

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