Professional Perspective

No-Poaching Agreements, Wage Fixing, & Antitrust Prosecution

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Contributed by Stuart Gerson, Epstein Becker Green

Especially in difficult economic times, companies look for stability and predictability. Hence, while intent upon avoiding litigation charging wage fixing or its close cousin, no-poach agreements, experience suggests that there are companies that might be considering various ways to exchange information related to employment that can be used for "bench marking."

Such efforts are intended to be lawful means to create and share data that are updated from time to time and that reflect prevailing levels and standards by which companies might be able to intuit what their competitors are doing and therefore can establish market rates and practices which presumably the individual members of the group might adopt.

Although such companies might be concerned only about information exchanges, and not agreements to fix wages or avoid poaching of competitors' employees, the potential enforcement stance of the Department of Justice simply does not allow for this simplification.

Potentially Toxic Data

In short, a direct exchange of employment information among competitors that includes wage and benefit data that are individually identified as to the specific companies providing the data is highly problematic. Even if there is no consequential agreement struck. The Department of Justice will, according to its published criteria and aggressive enforcement stance, argue that the mere exchange of competitors' information will lead to a tacit understanding that will violate the antitrust laws.

If whatever data that theoretically might be received would be unaggregated and would be individually identifiable as to competing companies, and if it would cover essential aspects of employment, including wages, bonuses, working hours, working days, vacation, retirement, workers' compensation, commendation, discipline, travel expenses, residential subsidies, recruitment criteria and promotion criteria, both supplier and recipient would be at risk.

More general information concerning employment conditions including training, resource management, and occupational safety and health is significantly less problematic than information related to wages and benefits.

Government's Enforcement Position

In October 2016, the two main enforcement agencies, the DOJ and FTC, published Antitrust Guidance of Human Resource Professionals. Based upon that guidance, we can set forth certain operative principles against which the hypothetical conduct at issue can be measured, and which should guide compliance activities:

- An agreement among competitors to limit or fix the terms of employment might violate the antitrust laws if the agreement constrains individual firm decision-making with regard to hiring, wages, salaries, or benefits; terms of employment; or even job opportunities.
- A group of agreeing firms are competitors even if they don't make the same products or provide the same services.
- It is unlawful for competitors to expressly or implicitly agree not to compete with one another for employees, even if they are motivated by a desire to reduce costs
- Even if a company does not agree explicitly to fix compensation, hiring practices, or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement.
- Even without an express or implicit agreement on terms of compensation among firms, evidence of periodic exchanges of current wage information in an industry with few employers could establish an antitrust violation because, for example, the data exchange has decreased or is likely to decrease compensation.
- While agreements merely to share information are not per se illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect. And where

information exchanges impliedly do more—that is, move beyond the mere sharing of information to concrete action like no-poach and salary setting agreements—there is a concrete risk of both civil liability and criminal exposure.

It cannot be overemphasized that difficulty could arise even if there is no specific agreement to fix prices or to refrain from poaching.

Antitrust Safety Zone

Do the foregoing warnings preclude a company's obtaining all information concerning compensation and other industry employment data, particularly if such information is the product of an independent survey? No, there is a safety zone that can, under suitable guidelines, allow the receipt of at least survey information. Absent extraordinary circumstances, the government enforcement agencies will not challenge surveys that include information about competitors' wages, salaries, or benefits, if certain conditions are satisfied:

- The survey is managed by a neutral third party such as a consultant, academic institution, or trade association
- The information provided by survey participants is based on data more than 3 months old
- There are at least five companies reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25% on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider

These conditions are intended to ensure that an exchange of price or cost data is not used by competitors for discussion or coordination of prices or costs. They represent a careful balancing of a company's individual interest in obtaining information useful in adjusting the prices it charges or the wages it pays in response to changing market conditions against the risk that the exchange of such information may permit competitors to communicate with each other regarding a mutually acceptable level of prices or compensation for employees.

Advisory Opinions are a Possibility

DOJ has a business review procedure under which a prospective arrangement might be evaluated and exceptions made if the advantage to consumers, that is employees and the market for employment, outweigh any potential restraint. It is unlikely, though, that any approval would be given to an information exchange of the type contemplated unless there were a third party intermediary and employee-related data were aggregated. As noted, an exchange of more general information like safety and health standards would be significantly less problematic than wage and benefit information.

Conclusion

If ever there were any question that no-poach and wage-setting agreements posed a manifest threat of civil and criminal antitrust liability, all doubt has been removed, not just by DOJ and private party class action civil litigation, but also, more recently, by criminal indictments. The government has provided useful guidance concerning the avoidance of liability but, in the end, it is up to individual companies, with the assistance of their antitrust counsel, to undertake thorough training and ongoing compliance surveillance and policy enforcement, in order to avoid legal risk.