Bloomberg BNA

Antitrust & Trade Regulation Report™

Employment

Human Resources: The Next Antitrust Frontier?

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I. Introduction

Seasoned antitrust counselors and sophisticated corporations invariably know to train sales teams and personnel involved in pricing or competitor collaborations how to comply with the antitrust laws. But what many overlook is an emerging area of antitrust exposure that is forcing practitioners and in-house counsel in the know to reevaluate new pockets of antitrust risk arising not from the sales force, but rather from the Human Resources Department. Recent antitrust investigations by the U.S. Department of Justice (''DOJ'') and follow-on civil litigation against Apple, Adobe, Pixar, and other prominent firms in the high-tech sector regarding no-hire, no cold-call, no counteroffer, and related agreements have exposed the potentially crippling legal risks borne by firms that act in concert with one another to impose restrictions on their employees' ability to seek out other jobs. What some employers may see as innocuous agreements not to recruit one another's prized employees, to limit disruptions across their industry, to compete ''fairly'' for recruits, or merely to clamp down on cold-calling, may subject those companies both to criminal sanctions and massive civil liability running into the hundreds of millions of dollars.

This new frontier is also forcing corporations to reevaluate what types of companies should be viewed as ''competitors'' with which certain agreements should be avoided to limit exposure to per se antitrust liability.[1] Whereas corporations traditionally looked to other companies that sell the same products or compete for

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[1] Antitrust cases are typically analyzed under either the rule of reason, which permits defendants to assert justifications for their conduct, or under the per se rule, which does not. Whether the per se rule or rule of reason applies to the alleged anticompetitive conduct is a critical issue. The risk of liability increases sharply under the per se rule because harm to competition, which is a requisite element in any Sherman Act claim, is presumed when the per se rule applies. Courts have traditionally applied the per se rule to blatantly anticompetitive agreements among ''horizontal'' competitors that compete at the same level of distribution, but not to most ''vertical'' agreements among companies at different distribution levels.

the same customers as their ''horizontal competitors,'' this concept has been expanded in recent DOJ investigations even to include a corporation's customers, clients, suppliers, or any other company that might ''compete'' to hire the firm's employees. Even companies selling different services or products might be considered to be horizontal competitors under this legal analysis in the sense that they are competing to hire the same employees with transferable skills. Thus, a customer or supplier that might be viewed as one company's vertical partner with respect to end products might be considered by the DOJ to be a horizontal competitor in the hiring context. In today's revolving-door world, this expanding definition of horizontal competitors can exponentially increase a company's antitrust risk.

In light of these developments, it may be tempting to instruct companies simply never to enter agreements placing any restrictions on their employees' ability to seek out other employment. But this ignores the realities of the business world. A vast array of firms that provide goods or services to client companies — including firms operating as supply vendors, consultants, and those providing recruiting and temporary employment services — require close and continuous contact with their clients' employees that may encourage personnel on one or the other side of the business relationship to jump ship in the absence of any restrictions to the contrary. In the context of such close business relationships, the poaching of a key employee may not only set the original employer back in terms of its own business plans, but may also lead to a loss of trust between client companies and the firms that serve them. Thus, the firms involved in such relationships may reasonably desire mutual assurances that their relationships will not be used as destabilizing poaching expeditions that will undermine the procompetitive goals of a collaborative relationship or venture. Without such assurances, companies may not even be able to establish the trust they need to collaborate and form a procompetitive ventures in the first place.

Accordingly, more practical guidance is necessary. This article first surveys the relevant legal landscape and then sets forth steps that companies can take to reduce their potential exposure in this developing area of law.

II. Past Antitrust Precedent Analyzing Agreements to Restrict Hiring

Prior to the DOJ's high-tech employees investigations, the issue of whether agreements to restrict hiring violated federal antitrust laws and the specific factual circumstances in which such agreements might or might not do so was rarely litigated. Nonetheless, courts have repeatedly held that certain hiring restrictions may constitute federal antitrust violations. A few federal courts have further held that the rule of reason applied to the evaluation of at least some types of hiring restrictions, albeit without reaching the underlying merits of such cases.

Historically, the types of agreements that have received the most scrutiny are those between two companies not to hire one another's employees (or not to hire one another's former employees).[2] For example, in *Union Circulation Company v. Federal Trade Commission*, the Second Circuit affirmed an order by the Federal Trade Commission (''FTC'') that rival magazine sales companies cease and desist from ''no-switching'' agreements, pursuant to which the companies pledged not to hire the current door-to-door solicitors of their rivals or those who had worked for their rivals within the preceding year. 241 F.2d 652 (2d Cir. 1957).

At the outset of its analysis, the Second Circuit noted that the agreements at issue were ''dissimilar in several significant respects'' to group boycotts that had historically been evaluated under the per se rule in that the no-switching agreements ''are directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing or merchandising practices.'' *Id.* at 657. Moreover, the agreements were ''not designed to coerce retailers . . . into abandoning competitive practices'' and the ''harmful effect upon competition [was] not clearly apparent from the terms of these agreements.'' *Id.* Thus, per se treatment was not appropriate, and while it did not refer to the ''rule of reason'' by name, the Second Circuit proceeded to analyze the agreements in light of their overall impact on the relevant market.

Although it applied a more lenient standard than the per se rule, the Second Circuit still concluded that the no-switching agreements were unlawful. The court noted that the agreements were entered into by ''organizations that represent a very substantial segment of the industry,'' such that the probable effect of the agreements would ''be to 'freeze' the labor supply.'' *Id.* at 658. The court observed that the ''tendency of the 'no-switching' agreements is to discourage labor mobility, and thereby the magazine-selling industry may well become static in its composition to the obvious advantage of the large, well-established signatory agencies.'' *Id.* While the magazine sales companies argued that such agreements helped to deter fraudulent sales practices by solicitors (magazine sales personnel who were terminated for engaging in such practices could not simply be rehired by a competitor), the Second Circuit found that the agreements ''went beyond what was necessary'' to curb such abuses. *Id.* Accordingly, there was no procompetitive justification that would outweigh the agreements' anticompetitive effects.

In the decades following the Second Circuit's decision, a number of other federal courts also determined that no-hiring agreements raised colorable antitrust claims.[3] More recently, in *Haines v. VeriMed Health-*

[2] One other notable area in which courts have assessed the legality of no-hire agreements is in the context of corporate acquisitions and sales. For example, in *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859 (M.D. Tenn. 1980), the court adjudicated an agreement by the seller of a business division not to rehire the management-level employees of the business division that it sold. The court applied the rule of reason and found that the agreement was lawful because it was intended to ease the business division's transition to its new ownership and minimize disruptions, and because there was no indication that the affected employees would have been unable to find similar work in the industry. *Id.* at 868; *see also Coleman v. Gen. Elec. Co.*, 643 F. Supp. 1229, 1242-44 (E.D. Tenn. 1986) (reaching the same result in connection with the sale of a business unit); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 145-48 (3d Cir. 2001) (same).

[3] *See, e.g.*, *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 333-34 (7th Cir. 1967) (holding colorable antitrust claim existed where rival encyclopedia companies allegedly entered into a ''no-switching'' agreement, pursuant to which they

care Network LLC, 613 F. Supp. 2d 1133 (E.D. Mo. 2009), the district court applied the rule of reason to a no-hire agreement between a company that supplied medical literature (VeriMed) and a company that operated medical websites (The HealthCentral Network, or ''THCN''). The plaintiff was a medical writer who operated her own consulting business and also worked as an independent contractor for VeriMed. VeriMed contracted to supply medical literature to THCN, and a provision in that contract provided that during the term of that contract and for one year thereafter, neither company would recruit or solicit any current or former employees of the other. However, in the event that THCN wished to hire a VeriMed employee, it could do so if THCN were to offer full-time employment to the VeriMed employee or if THCN paid a specified fee to VeriMed. *Id.* at 1135. The lawsuit originated because the plaintiff had been providing medical content directly to THCN in her personal capacity, at a higher rate of pay than she received from VeriMed. When THCN found out that the plaintiff also worked for VeriMed as an independent contractor, THCN ceased soliciting content directly from the plaintiff.

The district court viewed the provision in question as essentially a non-compete agreement meant to protect Verimed's legitimate business interests. In the absence of such a restriction, the court reasoned, it would be easy for a customer such as THCN to hire away skilled writers after VeriMed had brought them to the customer's attention. *Id.* at 1137. And, because non-compete agreements are ''a common feature of countless independent contractor relationships'' that are typically analyzed under the rule of reason, the court concluded that such treatment was also appropriate in this case. *Id.* The court then went on to find that the provision was narrowly tailored to advance Verimed's legitimate business interests without unduly restraining competition in that it permitted THCN to hire away VeriMed's employees if certain conditions were met. *Id.* at 1138-39. Moreover, plaintiff's complaint contained no allegations that the agreement at issue negatively impacted the labor market at large, and accordingly the plaintiff's federal antitrust claim was dismissed. However, because the plaintiff was not made aware of the hiring restriction at issue until after the fact, the court declined to dismiss the plaintiff's state law tort claims for fraudulent concealment and misrepresentation. *Id.* at 1139.[4]

While *Haines* and earlier decisions thus provide some guidance as to how courts may evaluate agreements restricting employment opportunities in a few circumstances, they do not do so in a comprehensive fashion. Such guidance has only been provided recently, in the context of the DOJ's high-tech employee investigations and its attendant civil litigation.

III. The High-Tech Employee Matters and the DOJ's Newly-Articulated Views on Agreements Restricting Hiring

1. Overview of the High-Tech Employee Matters

The high-tech employee matters mark a significant shift in the way that hiring restrictions are analyzed and litigated under the federal antitrust laws. By way of background, the DOJ filed a civil antitrust complaint in 2010 against various high-tech giants, including Apple, Adobe, Intuit, Pixar, and others, for allegedly entering into a series of bilateral agreements between 2005 and 2007 not to cold-call their respective employees for job opportunities, which agreements were not disclosed to the affected employees. The DOJ further alleged that the companies competed against one another in the labor market for computer engineers and other high-tech employees, that cold-calling was a significant recruitment tool, and that the cold-calling agreements resulted in decreased competition among the defendants for such employees, thereby ''disrupt[ing] the normal price-setting mechanisms that apply in the labor setting.''[5]

The DOJ filed a similar civil antitrust complaint against Lucasfilm in December 2010 based on an alleged agreement between Lucasfilm and Pixar that the firms would: (1) refrain from cold-calling each other's respective employees for employment opportunities; (2) notify one another in the event that one of them offered a job to an existing employee from the other firm; and (3) refrain from making counteroffers to match or exceed the current employer's counteroffer when offering a job to another firm's employee. As in the prior case, the DOJ alleged that this agreement was enforced by the companies' management and was not disclosed to the affected employees. The DOJ alleged that Lucasfilm and Pixar competed against one another and with other

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would not hire rivals' employees for up to six months after leaving rivals' employ); *Quinonez v. Nat'l Assoc. of Secs. Dealers, Inc.*, 540 F.2d 824, 827-28 5th Cir. 1976) (holding that plaintiff stated an antitrust claim by alleging that an agreement existed among prominent securities trading firms not to hire anyone who had been fired by the member firms);*Roman v. Cessna*, 55 F.3d 542, 544-45 (10th Cir. 1995) (finding that contract engineer who performed services for Boeing had antitrust standing to challenge alleged agreement between Boeing and Cessna not to hire away one another's engineers); *see also Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 143-45 (D.N.J. 2002) (denying class certification in case alleging no-hire agreements among printing ink manufacturers, but concluding the rule of reason would apply to such claims), *aff'd* 84 Fed. App'x 257, 260-61 (3d Cir. 2004) (finding rule of analysis was irrelevant to class certification and declining to take a position on the appropriate rule to apply).

[4] The district court's holding was based in part on the Eleventh Circuit's decision in *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553 (11th Cir. 1983), which involved: (1) a contract between a temporary employment agency (Butler) and its client that neither would hire the other's employees during the life of the contract; and (2) contracts between Butler and its employees that the employees would not accept employment with Butler's client for 90 days after the contract between Butler and its customer had ended. Butler's competitors and former workers brought suit when Butler attempted to enforce the restrictive employment covenants. The Eleventh Circuit found that the employment covenants were lawful and imposed minimal restrictions on the labor market, in that they prevented Butler's employees and clients from ''opportunistically appropriat[ing] the work product of [Butler] without paying it the full value of its services.'' *Id.* at 1558. Moreover, by ''protecting the future stream of income that [Butler] would receive from its [employees], [Butler] was induced to invest more in searching for [temporary employees] than it otherwise would.'' *Id.* at 1560. Furthermore, the court held that Butler did not possess significant market power, the covenant's restrictions were not significant, and any anticompetitive effects were slight. *Id.* at 1562-63.

[5] Compl. ¶¶ 12-16, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010).

companies for the employment of digital animators, and that the effect of this agreement was to stifle competition for labor and decrease job opportunities for the employees at issue.[6]

In these cases, the DOJ took the position that the agreements at issue constituted horizontal restraints among direct competitors in the labor market for high-tech employees and that the agreements lacked any procompetitive benefits. Arguably departing from the cases summarized above, the DOJ maintained that these agreements were per se unlawful.[7] Defendants in each of the cases settled with the DOJ before a federal court could determine the appropriate rule to apply and pledged to end the agreements and to submit to DOJ compliance monitoring for several years.[8]

Settling with the DOJ was only the tip of the iceberg in terms of the defendants' overall exposure, however. Following public announcements of the DOJ's investigation, a class action lawsuit was filed against many of the same high-tech firms on behalf of approximately 65,000 individuals employed by those companies during the period from 2005 to 2010. In July 2013, Lucasfilm and Pixar agreed to pay $9 million combined to settle plaintiffs' claims. Intuit also settled at that time, for $11 million. Following class certification and denial of the remaining defendants' summary judgment motions, the remaining defendants (including, among others, Adobe, Apple, and Intel) also agreed to settle and collectively to pay $415 million to resolve plaintiffs' claims, which provided an average payout of $5,770 per class member.[9] Additionally, the executives of at least one defendant (Apple) were named in a shareholder derivative suit in connection with their involvement in the alleged antitrust violation.[10]

2. Questions Raised By and Lessons Learned From the High-Tech Employees Matters

The high-tech employees matters raise a number of important questions as to the legal risks posed by no-solicitation and no-hire agreements going forward. Critically, as noted above, the DOJ now views such agreements as per se unlawful in some contexts, a view which, if adopted by the courts, would place companies that maintain such agreements at far greater legal risk (particularly given that under a per se approach, plaintiffs would be relieved of the obligation to prove that the agreements in question negatively impacted the relevant labor market). Whether the rule of reason or the per se rule applies to such agreements was not definitively resolved by the high-tech employee matters,[11] but the door is open for a future court to endorse the DOJ's position. Moreover, the mere specter that a court could do so may encourage companies facing lawsuits for such agreements to settle for exorbitant sums.

Just as significant is the fact that, while a number of the companies investigated by the DOJ undoubtedly were direct competitors of one another in the downstream market for goods and services, others, such as Apple (producing consumer electronic devices, operating systems, and related software) and Pixar (producing computer-animated movies), do not appear to have competed directly in any meaningful way. Thus, it would be a mistake to assume that only agreements among direct competitors in the traditional sense are subject to antitrust liability. Agreements between companies that hire the same types of employees may now be fair game, even if those companies operate in separate industries or lines of business.

Perhaps mindful of the business world's need for further guidance in this emerging area, the DOJ's filings in the high-tech cases provide a general overview of the types of agreements that the DOJ views as per se unlawful and those that it believes should instead be subject to a rule of reason analysis. For example, the DOJ explained that where an anticompetitive agreement is ''ancillary'' to a legitimate procompetitive venture, it should not be considered per se unlawful and should instead by analyzed under the rule of reason. To be considered ancillary, however, the restraint ''must be a necessary or intrinsic part of the procompetitive collaboration'' and not be ''broader than reasonably necessary to achieve the efficiencies from a business collaboration.''[12] By contrast, the agreements at issue in the high-tech cases were standalone agreements that were not reasonably tailored to any legitimate business ventures between the defendants, in the DOJ's view.

The DOJ also expressly stated that defendants in the high-tech cases were not prohibited from entering into non-solicitation agreements that were:

(1) ''reasonably necessary for mergers or acquisitions . . . investments, or divestitures, including due diligence related thereto;''

(2) ''reasonably necessary for contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers;''

(3) ''reasonably necessary for the settlement or compromise of legal disputes;''

(4) ''reasonably necessary for contracts with resellers or OEMs;''

(5) ''reasonably necessary for contracts with providers or recipients of services'' other than those already described; or

[6] Compl. ¶¶ 12-20, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010).

[7] *See* Competitive Impact Statement at 2-10, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010); Competitive Impact Statement at 2-8, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010).

[8] *See* Final Judgment § § V.A.-V.C., VI.B, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. *entered* Mar. 18, 2011); Proposed Final Judgment § § V.A.-V.C., VI.B, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. *entered* June 3, 2011).

[9] *See* Order Granting Pls.' Mot. for Final Approval of Class Action Settlement with Defendants at 1-5, 10, *In re High-Tech Employee Antitrust Litig.*, No. 5:11-cv-02509-LHK (N.D. Cal. Sept. 2, 2015), ECF No. 1111. $40 million of the $415 million figure was reserved for attorneys' fees.

[10] *See* Order Granting Defs.' Mot. to Stay; Denying Without Prejudice Defs.' Mot. to Dismiss, *Klein v. Cook*, No. 5:14-cv-03634-EJD (N.D. Cal. May 22, 2015), ECF No. 59 (staying federal derivative action in deference to state action).

[11] *See In re High-Tech Employees Antitrust Litig.*, 856 F. Supp. 2d 1103, 1116-20 (N.D. Cal. 2012) (holding that putative class action plaintiffs had plausibly alleged an antitrust conspiracy but also withholding judgment as to which rule applied to their antitrust claims).

[12] *See* Competitive Impact Statement at 8-9, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010).

   ISSN 0003-6021

(6) "reasonably necessary for the function of a legitimate collaboration agreement, such as joint development, technology integration, joint ventures, joint projects (including teaming agreements), and the shared use of facilities."[13]

To the extent the defendants executed such provisions, however, those provisions were required to:

(1) "identify, with specificity, the agreement[s] to which [they are] ancillary;"

(2) be "narrowly tailored to affect only employees who are anticipated to be directly involved in the agreement;"

(3) "identify with reasonable specificity the employees who are subject to the agreement;"

(4) contain a "specific termination clause or event;" and

(5) be "signed by all parties to the agreement, including any modifications to the agreement."[14]

Finally, the DOJ also affirmed that the defendants were "not prohibited from unilaterally adopting or maintaining a policy not to consider applications from employees of another person, or not to solicit, cold-call, recruit or hire employees of another person," so long as the defendants did not "request or pressure another person to adopt, enforce, or maintain such a policy."[15] Although the DOJ did not elaborate further on this point, the agreement element of Section 1 of the Sherman Actwould not be satisfied where such a policy were truly unilateral.[16]

V. Guiding Principles and Best Practices to Reduce Exposure in This Emerging Area of Antitrust Law

While the precise dividing line between lawful and unlawful agreements restricting employee mobility remains unclear, a number of guiding principles and best practices emerge from the high-tech employee matters and earlier case law. First, the following types of agreements are likely to be the subject of heightened antitrust risk:

- Standalone agreements between companies that have similar kinds of employees not to hire away or actively recruit their respective employees (regardless of whether those companies directly compete against one another).
- Agreements that, even if they are part of a legitimate business venture between the companies at issue, nonetheless do not have any procompetitive justification.
- Agreements that apply to the companies' employees in general, rather than to a specific subset of employees for whom it would be reasonable to impose hiring restrictions due to their participation in a legitimate collaborative venture between the companies.
- Agreements that are not limited by geographic scope or time.
- Agreements that have not been communicated to the affected employees.

Second, to the extent that companies find it reasonably necessary to impose hiring restrictions despite the risks above, they should consider implementing the following best practices:

- Ensure that such restrictions are part of a larger business agreement between the companies in question and that the restrictions serve a legitimate, procompetitive purpose. In connection with this, companies should consider including in the larger business agreement a statement explaining the specific justifications for the hiring restrictions that have been agreed upon.
- Impose no greater restrictions than are necessary to advance the companies' legitimate procompetitive interests. For example, total hiring bans may receive greater scrutiny than limits on how employees may be recruited.
- Specifically identify the employees, positions, and geographic scope to which the restrictions apply.
- Apply the restrictions only to specifically identified employees or positions that are "directly" involved in the larger business agreement between the companies.
- Provide clear termination events for the restrictions, with short time periods (absent unusual circumstances, the restrictions at issue should survive for no more than a few months, or at most one year, beyond the life of the underlying business agreement).
- Notify affected employees that the company's contracts with other firms may contain restrictions on hiring and recruitment activities between the companies.
- Finally, to the extent that companies impose their own unilateral policies regarding the recruitment and hiring of other firms' employees, they should document the legitimate business justifications for such policies and the independent decision-making processes that they used to create those policies. This would help guard against an allegation that a "unilateral" policy was in fact the result of an anticompetitive conspiracy.

Although taking these steps will not eliminate the possibility that companies entering into such agreements will face antitrust scrutiny for doing so, these measures do address the DOJ's primary concerns with such agreements as revealed by the high-tech employees investigations. Accordingly, following these guidelines should serve to mitigate firms' overall antitrust ex-

[13] *See, e.g.*, Final Judgment § § V.A.1.-5., *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. *entered* Mar. 18, 2011).

[14] *See, e.g., id.* § § V.B.1.-5.

[15] *See, e.g.*, Competitive Impact Statement at 13-14, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010).

[16] However, whether a policy is truly unilateral is often the subject of intense scrutiny because the agreement element may be inferred from communications or other conduct suggesting an implicit agreement. Moreover, although untested, it is possible that a plaintiff could pursue a claim for such conduct under Section 2 of the Sherman Act if the firm possessed the requisite market power.

posure while still providing them with the flexibility to enter into procompetitive agreements that are reasonably necessary to pursue their legitimate business interests.

   ISSN 0003-6021