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BLOG

DOJ to Continue Focus on Prosecuting No-Poach and Wage-Fixing Agreements

FEBRUARY 18, 2021

The Acting Assistant Attorney General for the Antitrust Division, Richard Powers, sat for an interview with the American Bar Association (ABA) on February 12, 2021, to discuss the Department of Justice's (DOJ) priorities under the new administration.[1] When asked about the heightened focus on wage-fixing and no-poach agreements by the DOJ and whether to expect increased criminal enforcement of employer agreements, Powers responded, "The short answer is yes." He confirmed that investigations into allegations of labor collusion are an increasingly significant part of the DOJ's docket and that prosecuting no-poach and wage-fixing agreements remains a top priority for the Antitrust Division.

This sentiment is similarly reflected in President Biden's own statements about antitrust enforcement in labor markets. During his campaign, the President tweeted an article advocating for the ban of non-compete agreements, and has published a plan that commits to "eliminat[ing] non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers."[2] Further, Biden has nominated Rebecca Slaughter, who has endorsed rulemaking against non-competes, as acting chair of the Federal Trade Commission (FTC), and Biden will have the opportunity to shift the balance of power of the FTC by creating a three-member Democrat majority.[3]

No-poach agreements have been a focus of the U.S. government since about 2016, when the DOJ and the FTC put out an Antitrust Guidance for Human Resource Professionals indicating that they would criminally prosecute companies for illegal no-poach or wage-fixing agreements, and that certain agreements were going to be treated as *per se* illegal under the antitrust laws. As the guidance outlines, wage-fixing agreements are when two or more companies enter an agreement about employment salary or other terms of compensation, and no-poach agreements are when two or more companies agree to refrain from soliciting or hiring the other company's employees. Powers, in his recent interview with the ABA, reiterated the position put forth in the Guidance, stating that the current administration views naked agreements affecting labor markets as *per se* illegal and indistinguishable from market-allocation or price-fixing agreements in output markets.

This increased focus on antitrust prosecutions of wage-fixing and no-poach agreements is a continuation of the previous administration's enforcement in this space. Within the past three months, the DOJ has brought its first two criminal indictments for labor market collusion. In December 2020, the DOJ brought its first criminal charges for wage-fixing against the owner of a physical therapist staffing company for allegedly agreeing with co-conspirators to

fix prices by lowering the pay rates to therapists. Then, last month the DOJ charged a health care company for allegedly agreeing with its competitors to refrain from soliciting senior-level employees in violation of the Sherman Act.

Not all labor-related agreements, however, are *per se* illegal. Indeed, no-poach provisions may be permissible if they are ancillary to a legitimate competitor collaboration, like a merger, and have a pro-competitive justification.

While there is no bright-line rule, and agency assessment of no-poach and wage-fixing agreements are often highly fact-specific, there are several measures that companies, and in-house compliance teams, can take to minimize antitrust risks. For example, companies should:

- Refrain from making blanket restrictions in no-poach provisions that preclude solicitation of any and all employees, and should instead narrowly tailor these provisions to specific job functions, product groups, or employee levels.
- Limit the duration and geographic scope of no-poach provisions.
- Provide exceptions to no-poach provisions (for example, by allowing employee-initiated approaches and solicitation via general advertisements).
- Explicitly state the purpose of no-poach provisions (for example, the protection of employee assets or the protection of confidential business information).
- Refrain from exchanging or discussing company-specific information about employee compensation or other terms of employment with another company.
- Refrain from agreeing with another company about employee salaries, benefits, or other terms of employment.

For more information on antirust considerations in the labor market and the new administration's increased focus on wage-fixing and no-poach agreements, see here for our prior Competition Corner blog post on the anticipated areas of focus by the Biden administration in antitrust enforcement, and here for our prior Competition Corner blog on the DOJ and FTC's recent statement about anticompetitive employer agreements for frontline workers during the COVID-19 pandemic.

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[1] *See* Interview with Antitrust Division Acting Assistant Attorney General Richard Powers (Feb. 12, 2021), *available at* https://www.americanbar.org/events-cle/mtg/web/410472840/.

[2] *See* The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, *available at* https://joebiden.com/empowerworkers/.

[3] *See* FTC Commissioner Rebecca Kelly Slaughter Designated Acting Chair of the Agency (Jan. 21, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/01/ftc-commissioner-rebecca-kelly-slaughter-designated-acting-chair.

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Author

Eva Cole

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