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BLOG

Chamber of Commerce Attacks the Constitutionality of DOJ's Attempts to Criminalize No-Poach Agreements

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In a stark rebuke of the U.S. Department of Justice's (DOJ) ongoing effort to pursue its first-ever criminal prosecution of a company for entering into non-solicitation—or no-poach—agreements with competitors, the U.S. Chamber of Commerce (Chamber) recently filed an amicus brief assailing the constitutionality of the DOJ's indictment on due-process grounds.

Background

The DOJ's criminal enforcement in this area commenced only recently. In December 2020, the DOJ obtained its first criminal indictment for wage fixing, in a two-count indictment filed in the Eastern District of Texas. (See here for our prior Competition Corner blog post on the DOJ's antitrust indictment for wage fixing brought against a therapist-staffing company's former owner.) Shortly thereafter, in January 2021, the DOJ obtained a separate criminal indictment in the Northern District of Texas against healthcare competitors for allegedly agreeing not to solicit one another's employees. These two cases are the first criminal prosecutions for competition issues arising in labor markets, carrying the potential for significant fines and possible jail time for individuals.

Historically, the DOJ has handled such anticompetitive labor agreements as civil matters. Notably, in 2010, the DOJ brought three prominent civil suits against high-tech companies for no-poach agreements. In each case, consent judgments were entered against the technology companies, requiring them to cease their alleged agreements.

However, in 2016, the DOJ made clear that, going forward, it "intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers."[1] To set the stage for criminal enforcement of no-poach and wage-fixing agreements, the DOJ and Federal Trade Commission (FTC) jointly issued the Antitrust Guidance for Human Resource Professionals (Guidance) in 2016. The Guidance warned companies and employers of significant antitrust risks, classifying "naked" wage-fixing or no-poach agreements among employers as "*per se* illegal under the antitrust laws." (See here for our prior blog post regarding the issued Guidance.)

Beyond the Guidance, the DOJ has publicly repeated that criminal penalties would be an available tool in its arsenal for naked no-poach agreements. In October 2018, Makan Delrahim, then-Assistant Attorney General for the Antitrust

Division, said at a Senate oversight hearing that "defendants should anticipate potential criminal enforcement actions for any such naked no-poach agreements we uncover that post-date our October 2016 guidance." The DOJ reaffirmed this commitment at the outset of the COVID-19 pandemic, emphasizing that it would "prosecute any criminal violations of the antitrust laws," including "between individuals or businesses to fix prices or wages."[2] (See here for our prior Competition Corner blog post on the joint statement by the DOJ and FTC emphasizing the agencies' continued commitment to protecting labor-market competition during the pandemic.) The Acting Assistant Attorney General for the Antitrust Division, Richard Powers, also recently confirmed the administration's commitment to investigating and prosecuting "*per se* illegal collusion that harms American workers."[3]

Challenges to the DOJ's Approach

With the two recent criminal indictments for labor-market collusion, the DOJ appeared to have made good on its long-standing promise. However, the Chamber—supporting the defendants—was quick to raise concerns with such criminal enforcement. In its amicus brief filed with the Northern District of Texas, the Chamber offered three main arguments against the DOJ's attempts to bring its criminal case:

1. the defendants lack the "fair notice" required by due process since no court has declared non-solicitation agreements to be *per se* illegal;
2. the Guidance classifying naked no-poach agreements as *per se* illegal violates separation of powers and does not provide "fair notice" to companies; and
3. a criminal "rule-of-reason" case is incompatible with due process.

First, the Chamber argues that criminal prosecutions under the Sherman Act should be limited to only that subset of conduct which courts have already determined to be *per se* illegal. The Sherman Act, unlike other traditional criminal statutes, does not clearly identify which conduct it proscribes, leaving courts instead to flesh out the sparse language and determine which conduct falls within the Act's scope. Otherwise, the Chamber argues, the Guidance issued by the DOJ and FTC does not provide sufficient notice to companies and executives, because no court held such offenses to be *per se* illegal before the alleged conduct occurred. Rather, the brief posits that the DOJ's attempts to declare a new *per se* criminal offense through revised policies is unconstitutional and exceeds the enforcement power of the agency, encroaching on the authority vested in Congress and the courts to declare *per se* violations.

The argument then follows that since the conduct cannot be prosecuted as *per se* illegal, it would need to be analyzed under the "rule of reason." The rule of reason is a heavily fact-specific test, balancing procompetitive benefits against anticompetitive harm. Under the rule of reason, no-poach agreements can be lawful depending on the factual analysis of whether they are ancillary to a larger legitimate procompetitive collaboration, "reasonably necessary" to facilitate that collaboration, and not broader than necessary. Per the Chamber, a "criminal rule-of-reason case would be anathema to bedrock principles of due process," often entailing "years of litigation and dueling experts." The Chamber concludes that "it is inconceivable that … the *post hoc*, reticulated, and record-intensive rule-of-reason analysis could provide sufficiently clear notice to support a future criminal prosecution on an entirely different factual record." Ultimately, the Chamber argues that adequate notice has not been provided to businesses, which "are entitled to clear notice from the lawgiver—not just from the prosecutor—of what conduct is criminally out of bounds."

The argument introduced by the Chamber over the constitutionality of the DOJ's attempts to expand *per se* criminal liability to cover such wage-fixing and no-poach agreements in the labor market is likely to be a hotly contested legal issue going forward.

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[1] Dep't of Justice, Press Release, "Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation" (Oct. 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

[2] Dep't of Justice & Fed. Trade Comm'n, "Joint Antitrust Statement Regarding COVID-19" (May 1, 2020), *available at* https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19.

[3] Dep't of Justice, Letter from Acting AAG Richard Powers (Mar. 24, 2021), *available at* https://www.justice.gov/atr/division-operations/division-update-spring-2021/letter-acting-aag-richard-powers.
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