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No-Poaching Agreements: A Protective Shield for Employers? Not So Much

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While many employers are aware of state laws governing restrictive covenants in employment agreements with their employees, employers should also be aware of recent regulations and trends pertaining to agreements entered into with other companies. One typical provision in these agreements is a "no-poaching" clause, through which one company attempts to prevent another, often times a competitor, from hiring its employees or contacts.

The upside of these provisions is obvious: a less competitive labor market will lead to more loyal employees and controlled wages. The downside of these clauses, however, may present a greater risk: both the federal government and the legislatures of many states have determined that these provisions can constitute antitrust violations, which may result in both civil and criminal penalties.

Antitrust and the *per se* rule:

Anti-trust laws are nuanced, complex, and mostly beyond the scope of this article. However, to provide a brief summary:

(i) contracts or conspiracies to restrain trade are generally illegal;
(ii) persons who enter into such contracts may be subject to civil and criminal penalties; and
(iii) notable examples of such agreements are price-fixing or market division agreements between competitors.[1]

A per *se* violation of antitrust law, such as a price-fixing or market division agreement, is presumed illegal and the factual circumstances behind such violations are generally not reviewed in depth by adjudicating bodies once a *per se* violation is established. This presumption is often referred to as the "*per se* rule."

No-Poaching Agreements Violate Antitrust Laws:

In 2016, the U.S. Department of Justice (DOJ) and U.S. Federal Trade Commission (FTC) published the Antitrust Guidance for Human Resource Professionals guide. This guidance explicitly refers to no-poaching agreements as "per se illegal," explaining that:

Agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal.... Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under antitrust laws.... Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.... Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.

Per this guidance, the federal government will prosecute employers that enter into no-poaching agreements and, therefore, it may be prudent to avoid such clauses in agreements moving forward.

More recently, in October 2023, a coalition of Attorneys General from 18 states and Washington D.C. filed an amicus brief in the matter captioned *Robinson et al. v. Jackson Hewitt, Inc. et al*, Case No. 2:19-cv-090660MEF-HSK, urging the U.S. District Court of the District of New Jersey to rule that no-poaching agreements are presumptively unlawful.[2]

The Plaintiffs in *Robinson*, former tax preparers, allege they were harmed by a conspiracy between defendants and their franchisees to refrain from hiring workers from other corporate-owned or franchise locations, which had the ripple effect of suppressing employee wages.

The amicus brief argues that the no-poach agreements at issue are "manifestly anti-competitive," as "would-be competitor companies have agreed to divide the labor market rather than compete for workers." While the amicus brief is not binding law, the support from 19 Attorneys General for the general position that no-poaching agreements are anti-competitive signals that these jurisdictions may introduce harsher legislation in the near future, potentially exposing employers entering into agreements with anti-poaching provisions to prosecution and penalties.

Given the steep criminal and civil penalties for antitrust violations and the ease with which a plaintiff can succeed in a lawsuit for a *per se* antitrust violation, companies should use caution and consult their attorneys before entering into any agreement with a no-poaching clause.

[1] 15 U.S.C. § 1; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

[2] The states included are New Jersey, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New York, North Carolina, Oregon, Pennsylvania, and Rhode Island.

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