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No-Poach Agreements Receive Their Marching Orders in the US and Europe: Do's and Don'ts For HR Departments

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LABOR MARKET MEETS COMPETITION LAW

In a labor market where companies are competing to attract and retain talent, the rising shortage of highly-skilled employees, high mobility, and high salary demands in certain market segments have created an environment which could lead companies to abandon their fierce competition for talent and take “the easy route.”

The courts and antitrust watchdogs in the United States (US) are no strangers to agreements between firms not to recruit each other’s employees or fixing employment conditions such as salaries and benefits. These so-called no-poaching and wage-fixing agreements, which limit employees’ ability or incentives to move jobs, have been an increasing feature of the US antitrust landscape over the past several years. And, in the last few years, they have attracted the particular ire of the Biden administration, which has taken unprecedented steps to challenge no-poach agreements, as part of a broader effort to increase the competitiveness and mobility of the US labor market.

In Europe, this trend is also dawning: the European Commission (Commission) and the United Kingdom (UK) competition authorities have signaled that these developments in the US will be closely observed and that this area is likely to attract high-profile investigations and further enforcement locally in the coming years.

From the Commission’s perspective, no-poach or wage fixing arrangements are a form of a buyer cartel, which the Commission views to be just as harmful as the traditional seller cartels. To further illustrate this trend, in the European Union (EU), a number of national competition authorities have

already opened antitrust investigations into no-poach and salary agreements and in certain cases already imposed fines, most notably in circumstances where the no-poach agreements were part of a wider cartel.

Having now been “put on notice,” employers, recruiters, and human resource (HR) professionals on both sides of the Atlantic will need to make sure they don’t fall foul of the antitrust laws or face the risk of major fines, lawsuits or even criminal sanctions—quite apart from the reputational damage this could have on their efforts to attract and retain talent. This can be particularly challenging as companies have traditionally focused their antitrust compliance efforts in their marketing and sales departments as well as other operational divisions but not HR. This alert considers the recent legal developments that HR should be aware of and the key do’s and don'ts.

ESCALATION IN THE US

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have decades of experience with regard to no-poaching and wage-fixing agreements across a range of sectors, including technology, health care, aerospace, transport, and others. However, with regard to the enforcement of these laws, the DOJ historically only brought civil enforcement actions against infringers.

In October 2016, the DOJ and FTC announced a significant policy shift in this area and said that DOJ would start criminally investigating and prosecuting naked no-poach and wage-fixing agreements between competing employers. In announcing the shift, the agencies jointly issued Antitrust Guidance for Human Resource Professionals to alert them to competition risks present in the recruitment process, considered in our prior alert.

As a further signal of its seriousness and to act as a stronger deterrent, in late 2020 and early 2021, DOJ filed its first-ever criminal antitrust prosecutions in two cases, bringing charges against an executive and a company respectively. It has brought several more since.

Signaling this as a White House priority, in July 2021, President Biden signed an Executive Order in which the FTC and DOJ are encouraged to consider whether to revise the 2016 Antitrust Guidance to strengthen employee protection.[1] This was followed in March 2022 by the DOJ and Labor Department signing a memorandum of understanding to strengthen their partnership in the vigilance of the labor market against employer collusions.[2]

At the time, the US Treasury Department published a study revealing that US workers are paid 20% less than they would be in a fully competitive market.[3] These findings have had spill-over effects for and emboldened the government’s efforts to address not only anti-competitive horizontal interactions between competing employers but also non-solicitation clauses in employment contracts between companies and their personnel. As many will have seen, most recently FTC kicked off 2023 by unveiling a Notice of Proposed Rulemaking (Proposed Rule) that would ban companies from entering into non-compete agreements with their workers and render void all existing post-employment non-compete agreements.

We can therefore expect US enforcement to continue apace and to expand to practices that many HR departments may still view as standard.

THE EUROPEAN LANDSCAPE: AN INCREASING INTEREST IN APPRENTICE

MODE

Over in Europe, the Commission has not been traditionally focused on labor markets, and to date there has been no decision at EU level by the Commission dealing exclusively with no-poach or wage-fixing agreements, although we understand that at least one case is currently being pursued by the Commission.

However, this is set to change.

In October 2021, the Commission's head of competition, Margrethe Vestager, announced during a speech on EU antitrust enforcement that new types of anticompetitive conduct—including specifically no-poach agreements—are coming into the spotlight of the Commission's investigative work. She referred to no-poaching agreements as "an indirect way to keep wages down, restricting talent from moving where it serves the economy best." She emphasized that such agreements can be a threat to innovation in general as they can prevent new companies from breaking into markets where "the key to success is finding staff who have the right skills." It is also notable that in its draft Horizontal Guidelines published in March 2022 (see here) the Commission included a specific reference to agreements to fix wages as an example of a hardcore restriction in the context of joint purchasing, essentially putting them in the buyer cartel category.

In the UK, the Competition and Markets Authority (CMA) has followed suit, including the same example in the draft horizontal guidance published in January 2023 (see here). Since neither the Commission nor the CMA had previously cited wage fixing as a specific example of hardcore restrictions, this confirms their increasing focus on employment-related behavior. In addition, earlier this year the CMA published a short guide for employers on how to avoid anti-competitive behavior, marking the first time this regulator has explained the application of competition law to the UK labor market. Importantly, the CMA's guidance emphasizes that agreements do not need to be in writing or formal to be illegal; these can take the shape of informal practices. Additionally, the CMA has confirmed that the laws will not only apply to permanent salaried staff, but may also extend to freelancers and contracted workers.

At the EU level, the focus on employment is also reflected in the September 2022 Guidelines on collective agreements by solo self-employed people, where the Commission set out the conditions in which self-employed people can jointly negotiate for working conditions without breaking EU competition rules. In these Guidelines, the Commission sought to address the imbalanced negotiating position faced by solo workers, particularly in the tech economy.[4]

This focus on improving conditions for workers adds to the increasing trend at national Member State level to investigate and sanction no-poach and wage-fixing agreements as well the exchanges of salary information and non-compete clauses. For the current status on the rules in different countries, see our 2023 Global Employer Guide and Termination of Employment Ready Reference.

In several European countries, including Portugal, France,[5] Spain, Croatia, the Netherlands, Hungary,[6] Poland,[7] Greece, Lithuania,[8] Romania, and Germany, the national competition authorities (NCAs) have already taken enforcement actions against no-poach or waging fixing arrangements on the basis that these constitute cartels. It is notable that, so far, national authorities have usually examined no-poach or wage fixing arrangements in the context of a wider anti-competitive agreement between the companies (e.g. involving price fixing and market sharing). However, the Commission's increased interest mirrors the enforcement trends at the NCA level to go after these types of agreements on a standalone basis.

For instance, the Portuguese competition authority took a deeper look into the topic, resulting in the publication of a 2021 report and best practices guidelines for companies.[9]

Given this increased momentum, it would be remiss of employers in Europe not to add labor practices and their HR departments to their antitrust compliance trainings and programs.

HAVING RECEIVED THEIR WARNING NOTICE, WHAT SHOULD COMPANIES BE DOING NOW?

Companies and their HR departments hiring employees on either side of the Atlantic would be well-advised to familiarize themselves with key best practices for minimizing risk exposure.

DO train executives and key individuals involved in recruitment to be sensitized to the antitrust risks of entering into employment-related agreements and information exchanges of any employment-related information.

DO proactively audit existing employment agreements to flag potential risk areas, which will very much depend on the relevant country.

DO evaluate how the business is accessing information or setting its employees' salaries and terms and whether these are appropriate.

DO NOT discuss or enter into agreements with other employers not to recruit certain employees or not to compete on salaries or any other form of compensation. Ensure that potentially justified non-solicitation or non-compete clauses in agreements such as mergers and acquisition (M&A) documentation, joint ventures, distribution, or franchise agreements are reviewed by antitrust counsel before being agreed upon.

DO NOT share information with competing employers about your terms and conditions of employment except where approved by counsel and with appropriate protocols in place. A key area where this can come up in practice is in the context of M&A due diligence, where it will be necessary to redact employee identities and salaries or set up a clean team to handle review of those disclosures (to avoid anti-competitive disclosures in case the deal does not progress). Employers should also be mindful of the risk of detailed competitive information being inadvertently exchanged through conduits such as external recruitment agents. Whilst some transparency is a natural part of a competitive job market, regular or detailed exchanges which lead to firms not competing on their employment terms are likely to raise concerns.

Martina Maggioni, Gabriela da Costa, and Francesco Carloni also contributed to this article.

FOOTNOTES

[1] See https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[2] Press release https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers.

[3] See THE STATE OF LABOR MARKET COMPETITION (treasury.gov).

[4] See https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5796.

[5] In 2017 the French Competition Authority fined three PVC floor coverings manufacturers a total amount of €302 million for violating Article 101 TFEU for several anticompetitive practices, including the exchange of confidential information regarding salaries and bonuses of personnel, as well as for a "gentleman's agreement" not to poach each other's employees (Decision 17-D-20 of 18 October 2017 on practices in the resilient flooring sector). https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/19-october-2017-cartel-floor-coverings-sector; more recently, the French Directorate-General for Competition, Consumer Affairs and Fraud Control issued a communication on 6 January 2023 announcing that it had imposed a €148,000 fine on several metal recycling companies for having agreed to non-compete and no-poach arrangements in the context of a transfer contract agreement. https://www.economie.gouv.fr/files/files/directions_services/dgccrf/concurrence/pac/Transaction_injonction/2023/Communication-TI-recyclage-metaux-non-ferreux.pdf?v=1673018415.

[6] https://www.gvh.hu/en/press_room/press_releases/press-releases-2020/the-gvh-cracked-down-on-a-cartel-and-imposed-a-fine-of-huf-1-billion-on-hr-consultants.

[7] https://uokik.gov.pl/news.php?news_id=17405&news_page=15.

[8] https://kt.gov.lt/en/news/by-agreeing-not-to-pay-players-salaries-lithuanian-basketball-league-and-its-clubs-infringed-competition-law.

[9] The AdC report can be found here: https://www.concorrencia.pt/sites/default/files/Issues%20Paper_Labour%20Market%20Agreements%20and%20Competition%20Policy.pdf and the AdC Best Practices Guidelines here: https://www.concorrencia.pt/sites/default/files/documentos/guias-promocao-da-concorrencia/Best%20Practices%20in%20Preventing%20Anticompetitive%20Agreements%20in%20Labor%20Markets.pdf.

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