Cartel & Criminal Practice

Committee Newsletter

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ABA SECTION OF ANTITRUST LAW

Promoting Competition Protecting Consumers

IN THIS ISSUE

Message from the Co-Chairs

By Mark Rosman and Brent Justus

The Cartel and Criminal Practice Committee is pleased to publish its Summer 2018 Newsletter. On behalf of the Committee, we thank our contributing authors for their work on this edition as well as thethose who volunteered to read and review the newsletter articles.

In this issue, we are fortunate to include a discussion between Lisa Phelan, the Chief of the Washington Criminal I Section at the DOJ's Antitrust Division and our Committee Co-Chair, Brent Justus about the 2016 Guidance for Human Resource Professionals, issued jointly by the Division and the FTC and the Division's recent filing of a civil antitrust lawsuit and consent decree alleging naked no-poach agreements in violation of Section 1 of the Sherman Act. Stefan M. Meisner and Lisa A. Peterson discuss the recent developments concerning no-poach agreements and the uncertainty regarding the treatment of cartels in labor markets since the DOJ has yet to bring a criminal antitrust enforcement action. Lindsey R. Vaala and David C. Smith discuss the fact patterns found in wage-fixing and no-poach agreements that are similar to DOJ price-fixing prosecutions in other markets as well as the dissimilarities. Their article highlights the need for antitrust counsel and compliance programs for HR personnel. Paul Kraczek, Takeyoshi Ikeda, and Scott Whittier discuss the legality of non-compete agreements which prevent a worker from entering into employment with a competitor of its current employer for a set amount of time. While non-competes could potentially lead to wage suppression and other artificial constraints, in the employment marketplace, these agreements were not included in the DOJ's and FTC's Guidance. The authors examine the history of antitrust

enforcement in the employment marketplace, compare and contrast how employer/employee non-compete agreements differ with other scrutinized conduct, and discuss when and to what extent such non-compete agreements could come under the fire of antitrust enforcers.

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http://shop.americanbar.org/eBus/ABAEventsCalendar.aspx

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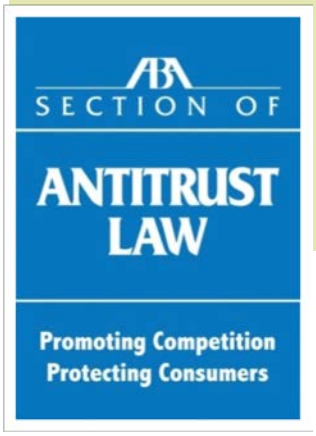

Antitrust Division Views on Wage-Fixing and No-Poach Agreements


by J. Brent Justus and Lisa Phelan[1]

Question 1 (from Brent Justus to Lisa): The Division announced in 2016 that it would be pursuing naked wage-fixing and no-poaching agreements by competing companies criminally. What are the policy reasons underlying this decision?

Naked no-poach and wage-fixing agreements are per se unlawful because they eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, it also seeks to do the same for buyers and sellers of employment services.

Workers, like consumers, are entitled to the benefits of a competitive market. When companies agree not to hire or recruit one another's employees, they are agreeing not to compete for those employees' labor. Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment.

Free market competition in the labor market remains a priority enforcement area for the Division today. As Principal Deputy Assistant Attorney General Andrew Finch recently explained, "Under AAG Delrahim's leadership, the Division has been actively pursuing investigations into naked agreements between employers not to recruit or hire each other's employees. These agreements, which we often refer to as 'no poach' agreements, are simply another form of the per se illegal agreements the Division routinely prosecutes criminally."

Question 2: Why did the Division make an announcement before proceeding criminally against this type of activity?

The Division has consistently taken the position that naked no-poach and wage-fixing agreements are per se unlawful violations of the Sherman Act. Such conduct is subject to criminal prosecution in the same way as price-fixing, bid-rigging, and market allocation schemes.

Our public statements were made in order to give companies and individuals additional clarity regarding our intentions going forward. Since October 2016, the Division has made a number of similar statements reiterating these principles. The Division has also explained that it intends to proceed criminally where an underlying naked no-poach agreement began or continued after October 2016. For no-poach agreements entered into and terminated before that date, the Division may proceed through civil actions for equitable relief in appropriate cases.

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[1] Brent Justus is a Partner at McGuireWoods in Richmond, Virginia and Washington D.C. and Lisa Phelan is Chief of the Washington Criminal I Section at the DOJ's Antitrust Division.

That is why, on April 3, 2018, the Antitrust Division filed a civil antitrust lawsuit against Knorr-Bremse AG ("Knorr") and Westinghouse Air Brake Technologies Corporation ("Wabtec"), and with it simultaneously filed a civil consent decree. The complaint alleges that these companies and a third company, Faiveley Transport S.A. ("Faiveley"), reached naked no-poach agreements beginning as early as 2009 in violation of Section 1 of the Sherman Act. Because the companies terminated the unlawful agreements before October 2016, the Division exercised its prosecutorial discretion to pursue those agreements through civil action.

The competitive impact statement filed in that matter explains that the no-poach agreements at issue in the complaint are properly considered per se unlawful market allocation agreements under Section 1 of the Sherman Act. In the relevant labor markets, the agreements eliminated competition in the same irredeemable way as agreements to fix product prices or allocate customers, and they were not reasonably necessary for any separate, legitimate business transaction or collaboration between the firms. Moreover, the no-poach agreements distorted competition to the detriment of employees by depriving them of the chance to bargain for better job opportunities and terms of employment.

The settlement in United States v. Knorr was a strong, first-of-its-kind settlement that contains several provisions intended to terminate each defendant's no-poach agreements and prevent future violations. It includes: (a) a broad injunction prohibiting each defendant from entering into or maintaining no-poach agreements among themselves and with other employers that will be in force for seven years; (b) an affirmative obligation to cooperate in any Division investigation of other potential no-poach agreements between the defendant and any other employer; (c) a requirement that each defendant affirmatively notify its U.S. employees and recruiters and the rail industry at large of the settlement and its obligations; and (d) the Division's new consent decree provisions designed to improve the effectiveness of the decree and the Division's future ability to enforce it.

Question 3: Does this policy with regard to employee and wage agreements indicate a willingness to go after other buyer-side cartel activities criminally?

The Division has always been willing to pursue buyer-side cartels criminally. One of the first cases I took to trial at the Division was a buyer-side cartel. In United States v. Gannett et al. the conspiracy charged involved outdoor advertising (billboard) companies colluding on rents they would pay to property owners to lease space on their property in order to place billboard signs. The companies allocated customers and locations, and discussed and suppressed rent levels they would pay to lease space on property owners' land. The companies were charged criminally for participating in a conspiracy in violation of Section 1 of the Sherman Act. The companies ultimately pled guilty to the criminal charge, and two executives went to trial and were convicted.

Question 4: What are the characteristics of an illegal agreement in the employment sphere that would merit criminal charges?

As a threshold matter, the Division will only consider criminal charges for conduct that began or continued after October 2016. As to the characteristics of a criminal agreement in the employment context, there are two different types of agreements

One type is what we call a naked wage-fixing agreement. That is an agreement between employers that compete for workers regarding employee salary, benefits, or other terms of compensation, either at specific levels or within a range.

The other type of illegal agreement in the employment sphere is what we refer to as a naked "no-poach" agreement. Here I am referring to agreements between employers who compete for labor not to solicit, cold call, recruit, or hire the other company's employees. The no-poach agreement is naked if it is not reasonably necessary to a separate, legitimate business transaction or collaboration. These agreements are likewise per se illegal.

From a legal perspective, these types of agreements are no different than price fixing, allocation, and other per se illegal conduct. That is because the conduct seeks to eliminate competition—in this case, competition for employees—in an irredeemable way. And just like other sorts of per se illegal antitrust crimes, it is important to note that such agreements do not have to be formal or written. An agreement can be informal or oral only, and can even be inferred from things that are said and done.

Question 5: Can you give us a general update on DOJ's efforts to criminally investigate employment-related cartel activities?

Well, Brent, as you know, a criminal investigation of a Sherman Act conspiracy is usually conducted by the Division through use of a grand jury, and thus grand jury secrecy rules would apply to any such efforts in which the Division may currently be engaged. Moreover, as noted, we are only pursuing criminal conduct of this nature that continued beyond October 2016. That said, without being specific, I can tell you that there are several ongoing criminal investigations into this type of activity.

Indeed, since October 2016, awareness of the unacceptable nature of such conduct seems to be increasing. This is a good thing, since our key goal is always deterrence. The Division continues to receive tips, complaints, and allegations that this kind of conduct may exist in various sectors. The Division follows up on all such allegations to assess the nature and extent of evidence that may exist.

Companies and individuals who are concerned that they may have participated in a naked no-poach or wage-fixing agreement may wish to consult the Antitrust Division's criminal leniency program.

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