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DOJ Antitrust Division Signals Forthcoming Indictments in No-Poach Investigations

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Speaking at an antitrust conference on January 19, 2018, Makan Delrahim, the Assistant Attorney General for the Antitrust Division, stated that over the next few months DOJ will be announcing indictments charging criminal antitrust violations relating to no-poach agreements. DOJ's position is that these agreements, under which companies agree not to hire each other's employees, restrain competition in the market for employees and may constitute per se violations of the antitrust laws. Delrahim's announcement follows joint DOJ/FTC guidance issued in October 2016, which alerted companies that parties to no-poach agreements would be subject, not just to civil antitrust liability, but also potentially to criminal investigation and sanction. Delrahim also highlighted the extent to which the prior guidance had put companies on notice of the federal antitrust agencies' approach to no-poach agreements. Delrahim's announcement offers a clear indication that regardless of other policy reversals by the Trump Administration, the Trump Administration's DOJ remains committed to this particular Obama Administration antitrust enforcement initiative.

Background

In October 2016, the Department of Justice and the Federal Trade Commission jointly issued guidance for human resources professionals that provided general guidelines illustrating how the antitrust laws apply to employee hiring practices (the "2016 Guidance").[1] The 2016 Guidance advised against entering into "no-poach" agreements under which companies agree not to solicit or hire employees from other companies that are party to the agreement. It also reaffirmed traditional prohibitions against agreements between companies about employee salaries, benefits or other terms of employment. But it went further. In a break with prior DOJ practice, the 2016 Guidance announced for the first time that DOJ "intends to proceed *criminally* against naked wage-fixing or no-poaching agreements." (emphasis added).[2] "Naked" agreements of this type are ones that are not tied to any legitimate collaboration or joint venture between the companies.

Prior to the issuance of the 2016 Guidance, DOJ and the FTC had been active in the *civil* enforcement space on these issues. Most recently, DOJ brought civil enforcement actions against groups of technology companies that had entered into no-poach pacts that included, among other things, agreements not to cold-call each other's employees. Three of these cases (against eBay and Intuit;[3] Lucasfilm and Pixar[4]; and a group consisting of Adobe, Apple, Google, Intuit, and Pixar[5]) were ultimately resolved via consent judgments against the subject companies.

[1] Department of Justice Antitrust Division and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (October 2016) at 4, available at https://www.justice.gov/atr/file/903511/download.
[2] *Id.* at 4.
[3] Key filings from *United States v. eBay* are available at https://www.justice.gov/atr/case/us-v-ebay-inc.
[4] Key filings from *United States v. LucasFilm, Ltd.* are available at https://www.justice.gov/atr/case/us-v-lucasfilm-ltd.
[5] Key filings from *United States v. Adobe Systems, Inc. et al.* are available at https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al.

Recent developments confirm that the Trump Administration will continue this policy. In a September 2017 speech, Acting Assistant Attorney General Andrew Finch directly addressed the 2016 Guidance.[6] He went on to caution that companies "should be on notice that a business across the street from them—or, for that matter, across the country—might not be a competitor in the sale of any product or service, but it might still be a competitor for certain types of employees such that a naked no-poaching agreement, or wage-fixing agreement, between them" would be a "per se" violation of the antitrust laws.[7]

Delrahim's recent statement, notably, is the first to signal imminent criminal charges relating to no-poach agreements, and it further underscores DOJ's continued commitment to the principles announced in the 2016 Guidance. In addition to noting that he has "been shocked" at the prevalence of no-poach agreements, Delrahim pointed to the October 2016 guidance as a key marker: if no-poach activity existed prior to the issuance of the guidance *and has continued*, he said, DOJ will likely treat it as a criminal violation. He also flagged that if the technology companies who were subject to civil enforcement actions have not complied with the judgments in those cases, they may now be subject to criminal enforcement actions.

Implications

While Delrahim's remarks are not necessarily surprising in the wake of the 2016 Guidance or the traditional understanding that a per se violation of the antitrust laws could be charged criminally, they serve as a wake-up call to all employers that DOJ is following through on the commitments in that Obama-era document. The Antitrust Division is plainly in the midst of active investigations of no-poach agreements and appears likely to expand its enforcement reach in the area by charging this conduct criminally in coming months. Companies and individuals potentially implicated in such investigations should carefully consider their position in assessing whether, for example, to self-report under the Antitrust Division's leniency program and how promptly to terminate conduct that the Antitrust Division increasingly regards as equivalent to a hard-core antitrust offense.

[6] *See* Acting Assistant Attorney General Andrew Finch Delivers Remarks at Global Antitrust Enforcement Symposium (September 12, 2017), *available at*https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust.
[7] *Id.*