

Employee “No Poaching” Agreements Meet the Antitrust Laws: Protection of Employees in the New Economy

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or centuries employers have maintained a strong interest in trying to protect their most valuable asset, their key employees, from solicitation by and loss to other employers, especially competitors. As a result, “no poaching” (i.e., “we agree to not solicit or hire each other’s employees”) agreements have become



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prevalent, not only in contracts between competitors, but also in many vendor/ buyer agreements. The “new economy” (post 2008), however, has brought with it an intensified national focus on jobs and employment opportunity, as evidenced dramatically in the recent election cycle. The national policy of our country has always been in favor of employee mobility and any efforts by employers to limit or impede that mobility have been disfavored and limited by most courts. Recently,



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however, in the employment market, this provision has become a focus the magnitude of which has not been seen since the end of the Great Depression. This reality is especially important today in assessing the likely future legal viability of no poaching agreements between employers.

We need to start with the recognition that these agreements are fundamentally different from the typical non-competition, customer

non-solicitation (of the employer’s customers) and confidentiality agreements found in employment contracts, which agreements are commonplace between employers and individual employees, and which are designed with and motivated by a desire on the part of the employer to protect its trade secrets (and other intellectual property) and key customers from solicitation and diversion by employees who decide to leave or who are terminated by

the employer. These agreements are typically enforceable and are assessed under state law. Conversely, no-poaching agreements are across-the-board (i.e., they apply to all employees or all employees within a class of employees), they are entered into between the employers themselves (as opposed to between employers and employees) and they are primarily designed with and motivated solely by a desire to not lose highly trained employees (as opposed to the protection of intellectual property, customer good will and trade secrets). As such, they enjoy much less policy approval by courts and juries than restrictive covenants in individual employment agreements between employers and employees. No poaching agreements also sometimes have the intended effect of eliminating competition between the parties in the market for the procurement of highly trained employees, which intent runs directly and head-on into the competition law and policy of the U.S.

In recent years the federal antitrust enforcement agencies (the Antitrust Division of the Department of Justice ("DOJ")) and the Federal Trade Commission ("FTC") have become more interested in no poaching agreements, which they generally regard as anticompetitive and unlawful violations of the Sherman Antitrust Act. Their thinking is as follows:

1. All contracts, combinations and conspiracies in restraint of trade are *per se*, criminal violations of Section One of the Sherman Antitrust Act. Historically, for example, an agreement between two competitors to not solicit (or take orders from) customers of the other is a criminal violation of Section One, subjecting the parties to substantial criminal as

well as civil penalties (e.g., *United States v. Topco*, 405 U.S. 596 (1972)).

2. Similarly, agreements between buyers to eliminate competition for the purchase of goods or services are equally unlawful as are agreements between sellers concerning their end products (e.g., *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 229 (1948); *Knevelbaard Dairies v. Kraft Foods*, 232 F.3d 1979 (9th Cir. 2000)).
3. In the business of finding and hiring employees, all employers within a relevant geographic area are in fact competitors of one another for the purpose of attracting and hiring trained employees, regardless of whether the employers actually compete with each other for the sale of goods or services.
4. Ipso Facto, any agreement between any two employers (whether they are competitors for the sale of their goods or services or not) to not solicit or hire the employees of one another is a *per se* violation of Section One of the Sherman Act, subjecting the parties to criminal and civil penalties.

Most recently, in a joint position statement issued by the DOJ and the FTC, the agencies issued a policy statement that:

"Companies which collude to set industry hiring and compensation standards and which enter into no-poaching or wage fixing arguments with each other will face criminal and civil investigations and enforcement."

In its press release, the FTC stated: "[w]orkers are entitled to the benefits of a competitive market for their services. They

are harmed if companies that would ordinarily compete against each other to recruit and retain employees agree to fix wages or other terms of employment, or enter into so-called 'no-poaching' agreements by agreeing not to recruit each other's employees." *

Historically, the focus of the DOJ in this area has been to challenge no-poaching agreements between competitors. For example, in the case of *U.S. v. Adobe, et al* (U.S.D.C D.C. 2010), case no-/:10CV-01629 (available at http://www.justice.gov/atr/public/press_release/2010/262648), the DOJ brought suit against the major technology firms (Adobe, Apple, Google, Intel, Intuit and Bixler) for agreeing to not solicit for employment each other's highly trained technology employees. According to the Complaint filed by DOJ in this case:

"The effort of these agreements was to reduce Defendants' competition for highly skilled technical employees (high tech employees), diminish potential employment opportunities for those same employees and interfere in the proper functioning of the price-setting mechanism that would otherwise have prevailed."

The defendants entered into a consent judgment with the DOJ that included an injunction against such behavior in the future. The basis of the Complaint in the *Adobe* case was that the poaching agreements eliminated an element of competition between the competitive employers, and also, that they collusively deprived their employees of "employment opportunities." The same year, the DOJ successfully attacked similar

no poaching agreements in the motion picture film industry (for technical film operators) and enjoined Lucasfilm from using such agreements (Dec. 21, 2010) (available at: http://www.justice.gov/atr/public/press_release/1010/262648.htm).

This has also been the subject of private class action litigation over the years. As far back as the early 1980s, a class action suit was brought against a number of corrugated box and paper manufacturing companies in the South who were alleged to have collusively prevented migratory and transient wood cutters from moving (i.e., changing their employment) from one paper mill to another, in an effort to keep down the wage levels paid to such workers. This author defended one of the paper mills involved in that case, which settled for a payment of a substantial amount of money. Also, a class action was filed recently against Carl's Jr. Restaurants, LLC and its parent company alleging that Carl's and its independent franchises colluded through a series of "no-hire agreements" to prohibit competitive franchisees from soliciting or hiring the employees of other franchisees. In a very recent action, the FTC enjoined the American Guild of Organists (AGO) from maintaining rules that restricted members' freedom to solicit or accept work from any "consumer" who was currently utilizing another member. The FTC challenged this no poaching arrangement under Section 5 of the FTC Act as a method of unfair competition that increased prices for consumers (*American Guild of Organists*, FTC ¶17,676 (2017); CCH Trade Reg. Repts. No. 1506, p. 7, April 13, 2017).

The concept that employers cannot fix the wages (or set wage rates or wage

ceilings or ranges) of employees has been long established and the subject of much litigation (e.g., see the recent Michigan Nurses wage fixing cases), but the focus of the DOJ and FTC (as well as plaintiff's lawyers) on no poaching agreements between non-competitors is new and emergent.

We absolutely expect to see more litigation and claims attacking non-poaching agreements (even involving non-competitors for end product or service sales). These cases are hard to defend from a policy perspective because there are substantially less restrictive alternatives to such agreements. For example,

1. individual employee confidentiality and non-solicitation (of the employers' customers) agreements provide an effective restraint on both the ability of employees to leave, but also on the incentive of some employers to hire them;
2. claw-back provisions that require employees to re-pay training expenses (as long as they are reasonable and not punitive), are generally upheld when applicable and can serve as a deterrent to poaching;
3. non-compete agreements with individual employees, which are tested under state law, are upheld in most states as long as they are reasonable as to duration and scope;
4. active human resource monitoring of competitive wage levels can thwart successful poaching; and
5. predatory attempts by a competitor to weaken or destroy one of its competitors by specifically targeting that company's key employees are remedial under both state unfair competition and business tort laws.

In summary, we see no poaching agreements as becoming increasingly risky for employers. It is recommended that they never be entered into with a competitor and only very carefully, if at all, with non-competitors.

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* Note that the FTC referred to "... companies that would indirectly compete against each other to recruit and retain employees" – not "companies that compete against each other in the same product or service industry." This is an important, and not coincidental, choice of words by the agency.