CCM ALERT

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No-Poaching Agreements and the Department of Justice's Antitrust Guidance

Though no-poaching agreements are common in a variety of business transactions, the Department of Justice has stepped up its oversight of these arrangements and determined that some qualify as per se violations of antitrust law.

A few years back, the Department of Justice launched an antitrust action against several technology giants, including Apple, Google, Intel, Pixar, and others. The action was based on the Sherman Act and alleged that these employers committed a *per se* violation of the antitrust laws when they agreed not to cold-call each other's employees.

These no-poaching agreements were bilateral agreements that, according to the DOJ, eliminated a form of competition - the market to retain and hire employees. Those agreements reduced employee mobility and deprived workers of the opportunity to achieve higher wages and benefits. The particulars of the restraints were embarrassing for a number of big names in the technology industry (and featured a couple of famous e-mails from the late Steve Jobs). The significance of the horizontal no-poaching agreements was particularly acute for many workers (who later filed a civil class action), since California bars vertical non-competition agreements between employer and employee.

In October of last year, the Department of Justice's Antitrust Division, in conjunction with the Federal Trade Commission, released its *Antitrust Guidance for Human Resource Professionals*. That document clarified the DOJ's intent to criminally investigate "allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other's employees." The DOJ's guidance also makes repeated reference to "naked" agreements not to poach employees, meaning those that "are separate from or not reasonably necessary to a larger legitimate collaboration between the employers." Those naked

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restraints are *per se* invalid, a violation of antitrust law, and will be deemed so "without any inquiry into [their] competitive effects."

PRACTICE IMPLICATIONS

So what does this mean in practice? While the parameters of the DOJ's guidance are not set in stone, it's possible to glean a few guiding principles for typical no-poaching scenarios:

- *M&A Due Diligence* – No-poaching agreements are fairly common when an acquirer begins its due diligence of a potential target. Term sheets, letters of intent, and even transactional non-disclosure agreements often contain some form of no-hire clauses. These should be outside the DOJ's antitrust framework. However, the better approach is to limit the scope of these no-hire arrangements to key employees who play a material role in the due diligence process and to a reasonable period of time - say, 6 to 9 months past the time the deal falls apart.

- *Litigation Settlements* – No-poaching agreements very frequently arise during litigation (or threatened litigation) between competitors, usually over trade-secret theft allegations or a dispute over a group of employees' non-compete agreements. Nearly all of those cases settle before trial. In many settlement agreements, a plaintiff demands that the defendant employer agree not to hire the plaintiff's employees for a period of time. These types of agreements likely are unlawful. Nothing in the DOJ guidance contemplates that this type of restraint is "reasonably necessary to a larger legitimate collaboration," and indeed it would seem to be the very type of horizontal agreement with a vertical impact - on non-party employees.

The DOJ has taken steps to inform employers how it will analyze common types of no-poaching contracts, but ambiguities remain.

- *Business-to-Business Transactions* – Somewhere in between these two paradigms are more run-of-the-mill contractual

arrangements between companies that aren't necessarily competitors. Many technology staffing contracts feature some iteration of no-hire/no-poaching clauses. Others do as well, including some service-oriented relationships that look like a poor-man's joint venture. Because of the close relationship developed among the two companies' employees (and their exposure to each other's business), the perceived need for a no-poaching agreement becomes obvious. These will likely be okay, but again a narrow scope with a short time limit is essential. That these agreements are usually not between competitors is helpful to, but not dispositive of, the antitrust analysis, since the relevant market is the *employment* marketplace - quite broad indeed.

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The DOJ's guidance is helpful to an extent, but like much of antitrust law, the parameters are not well-defined. With the new administration and distractions within the leadership at the DOJ, there is even greater uncertainty whether no-poaching agreements will warrant serious civil or criminal scrutiny.

If you have any questions about the matters addressed in this *CCM Alert*, please contact the following CCM author or your regular CCM contact.

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