AntitrustConnect Blog

Prosecutors' Focus On Labor Market Collusion Sharpens the Need for Compliance Training

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In an October 16, 2016 FTC/DOJ press release: FTC and DOJ Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation the Antitrust Division first announced: "Going forward, the Justice Department intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers." The Antitrust Division has since made good on that promise with several criminal cases, some involving individuals as defendants, currently in the courts. See, *United States v. Jindal*, No. 4:20-cr-00358 (E.D. Tex. Dec. 9, 2020); *United States v. Surgical Care Affiliates*, LLC, No: 3-21-CR0011-L (N.D. Tex. Jan. 5, 2021); *United States v. Hee et al.,* No. 2:21-cr-00098-RFB-BNW (D. Nev. Mar. 30, 2021); *United States v. DaVita, Inc.*, No. 21-cr-00229-RBJ (D. Colo. July 14, 2021).

The focus on labor market collusion is not a passing interest of the Antitrust Division. On October 1, 2021, Acting Assistant Attorney General Richard A. Powers of the Antitrust Division spoke about the history of and commitment to enforcing the antitrust laws, including criminal enforcement, in labor markets:

> If it was important for enforcers to protect competition in labor markets decades ago — and I believe it was — it is essential now." [Powers added:] "Importantly, criminal prosecution of labor market conspiracies is the tip of the spear; the Division's focus on labor markets extends beyond its cartel program. The Division is also committed to using its civil authority to detect, investigate, and challenge anticompetitive non-compete agreements, mergers that create or enhance monopsony power in labor markets, the unilateral exercise of monopsony power, and information sharing by employers.

The speech can be found (here). The FTC and States have also been active in bringing civil cases challenging "no-poach" labor agreements. Finally, enforcers around the globe have also been making labor market collusion investigations a top priority. Recently EU Competition Commissioner Margrethe Vestager emphasized the EU focus on competition in labor markets due to "no-poach" deals. Vestager said individuals

are negatively effected "when companies collude to fix the wages they pay or when they use so-called 'no-poach' agreements as an indirect way to keep wages down, restricting talent from moving where it serves the economy best." See **EU's Vestager warns of more anti-cartel raids, criticises 'no-poach' deals,** Reuters, By Foo Yun Chee, October 22, 2021. A list of various foreign enforcers' cases involving labor market collusion can be found in Mr. Powers' speech.

Education on Labor Market Collusion Should be a Top Priority for Compliance Training

In the criminal labor market collusion cases the Antitrust Division has recently filed, the parties are "duking it out" as to whether the labor market agreements fall within the per se rule or should be judged by the rule of reason. There are skilled lawyers on both sides of the issue and it will be fascinating to see how the cases turn out. My own view is that, while I think applying the per se rule in *criminal* antitrust cases is unconstitutional, see Cartel Capers, Supreme Court Review Sought for Per Se Rule in Criminal Cases, as long as there is a per se rule, [and there is], the same rules should apply to labor/wages. But, whether a case is per se criminal case or a rule of reason civil case seeking damages, there are good reasons to educate executives involved in the hiring/personnel decisions to try to avoid *any* litigation.

Benefits of Compliance Training for Labor Market Collusion

- **AVOIDING LITIGATION**

The number of actions brought by enforcers at every level indicates that there has been a serious deficiency in compliance training. It has only been since late 2016 that the Antitrust Division has stated that it would treat naked price fixing and "no-poach agreements as criminal violations. It would be possible, therefore, that this "side of the house" may have been neglected or underrepresented in whatever compliance training may have been provided. It appears labor market agreements among competitors developed and some at least are seemingly ongoing.

- **COMPLIANCE CREDIT**

The Department of Justice and the Antitrust Division give credit for compliance programs that meet certain criteria See U.S. DEP'T JUSTICE, CRIMINAL DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, updated June 2020, Antitrust Division Announces New Policy to Incentivize Corporate Compliance, July 11, 2019; Antitrust Division, USDOJ, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, July 11, 2019. In a recent speech, Deputy Attorney General Lisa O. Monaco highlighted the incentives for a company to have a compliance program before the government not so gently indicates that one is needed:

> "A company can fulfill its fiduciary duty to shareholders and maintain a commitment to compliance and lawfulness. In fact, companies serve their shareholders when they proactively put in place compliance functions and spend resources anticipating problems. They do so both by avoiding

> regulatory actions in the first place and receiving credit from the government. Conversely, we will ensure the absence of such programs inevitably proves a costly omission for companies who end up the focus of department investigations."

DAG Monaca's remarks can be read (here), watched on video (here), and the DAG's related memo can be read (here).

- **DUTY TO EMPLOYEES**

DAG Monaco's remarks emphasize a company's fiduciary duty to shareholders. I'd like to also emphasize a corporation's duty to its employees. When I was with the Antitrust Division it was personally disturbing to investigate and sometimes prosecute executives who found themselves involved in a criminal investigation and had never had any antitrust training. To be sure, I think most executives have a "gut feeling" that price fixing and bid rigging are not ethical business practices, but many executives had a serious underappreciation of the length and stress of a criminal antitrust investigation and the fact they could face 10 years in jail. Even if an executive obtains immunity and becomes a government witness, a criminal antitrust investigation is one of the most stressful things an executive–and his or her family–may ever deal with. Even civil cases are a serious problem for employees as well as their company. Employees may "groan" or "roll their eyeballs" if they are scheduled for more compliance training (I may have done that occasionally with all the training we received at DOJ) but the threat of criminal prosecution and a jail sentences should perk up an audience quickly.

Some Suggestions For Compliance Training

I'll offer some suggested compliance guidance regarding labor market collusion for human resource employees and others involved in the hiring process. **Disclaimer:** This is by no means a complete compliance guidance outline–but it would be a start.

One document to highlight would be the speech on October 1, 2021 by Antitrust Division Acting Assistant Attorney General Richard Powers (noted above), which emphasizes that the DOJ has made good on its promise to prioritize labor market collusion cases–including bringing criminal charges against individuals allegedly involved in the collusion. Relevant employees should also have a copy, and a presentation explaining, the Department of Justice and FTC's *Antitrust Guidance for Human Resource Professionals,* Department of Justice, Antitrust Division/Federal Trade Commission, October 2016: "The agencies' joint guidance include[ing] a Q&A section that explains how antitrust law applies to various scenarios that HR professionals might encounter in their daily work lives." It would also be important to have a hotline for employees to call with questions about the *Antitrust Guidance* and how it might apply to particular situations.

I don't think labor market collusion is as difficult to avoid–and detect–as it may seem to some. Labor is an input for making any product. Businesses can't collude with competitors about the price they will pay for inputs to make a product or to allocate suppliers. Think about a company that produces widgets. This widget requires

copper wire, glass products, machinery and labor. It seems obvious (hopefully) that an executive in one company cannot call a competitor and say, "Let's agree to not pay any more than X for the copper?" Or "If you don't solicit quotes from my supplier, I won't from yours." Labor is also an input. Why would it be OK to call a competitor and say "Let's agree not to pay any more than X per hour" for the input of labor?

As with any input, however, not every agreement between competitors is per se illegal or "naked" price fixing violation. When companies integrate resources, as in a buying group or joint venture, the agreement will be judged under the rule of reason: Do the procompetitive benefits outweigh the anticompetitive harm? The FTC/DOJ guidance explains a basic difference between a "naked" agreement and an agreement "ancillary" to a procompetitive collaboration:

> "That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects. Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws." *Antitrust Guidance for Human Resource Professionals,* Department of Justice, Antitrust Division/Federal Trade Commission, October 2016, at 3.

As mentioned, employees should have guidance as to who to call within the company if they have questions about the propriety of an agreement with a competitor regarding labor.

Thinking of labor as any other input, I'd add this to my presentation:

1. An agreement does not have to be in writing. It can be inferred from other circumstances – such as evidence of discussions and parallel behavior.
2. The DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. The penalties can be severe, including jail time for individuals.
3. Like any other cartel, agreements to reduce competition can be prosecuted even if they don't eliminate all competition or are unsuccessful.
4. An added bonus is that if senior executives who have both pricing and hiring authority get this training, it is a refresher about the dire consequences of price fixing, bid rigging and market allocation *either as a seller or a buyer*.

CONCLUSION

In October 2016 when the DOJ FTC *Antitrust Guidance for Human Resource Professionals* was issued it led to a blizzard of "client alerts" warning of this emphasis of the FTC/DOJ. Now would be a good time to see if there was a follow up to client alerts within organizations–including law firms. Did the right people get the *Antitrust Guidance*? Was there follow up training? Is there a process in place for employees to ask questions?

There's much more to be said about compliance and labor market collusion, and no

doubt better and more detailed ways to say it. There are many published articles detailing more complete elements of an effective corporate compliance program and culture. The point of this humble blog post is that if labor market collusion is a priority for enforcement agencies, *compliance training should be a priority for companies*. And, if you take the approach that labor is an input, subject to the same antitrust rules as any other input, you have provided more than just training on labor market collusion.

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