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US Regulators to Crack Down on Anti-Poaching Agreements

By Emmett Carrier, J.D. Candidate 2018 | November 28, 2016

In a joint press release, the Department of Justice (DOJ) and Federal Trade Commission (FTC) announced an intent to criminally prosecute companies engaged in antitrust violations, such as wage-fixing and no-poaching agreements. In addition, the federal regulators issued new guidance for human resources professionals designed to educate those in hiring positions about the applicability of antitrust laws in the context of employment decisions.

The Sherman Act, passed in 1890, sought to eliminate monopolies and restraints to trade in order to promote more efficient and competitive markets. Just as antitrust regulations prevent companies from monopolizing and reducing consumer options, thereby raising prices, anti-competitive agreements among corporations can harm the labor markets. No-poach agreements to not solicit or hire each other's talent and wage-fixing agreements among competitors to pay their respective employees similar compensation ultimately leave employees with fewer career options and lower wages.

While criminal prosecution by the DOJ for violations of antitrust laws is not uncommon, anti-competitive employee deals and agreements typically bring civil penalties, which can also be brought by the DOJ. Notable companies incurring fines for anti-competitive practices include Pixar, LG, and Samsung. Most recently, Apple, Google, Intel, and Adobe agreed to collectively pay $415 million in an anti-poaching settlement. The push for criminal punishments will certainly put the highly competitive Silicon Valley arena on notice, a market where talent acquisition and retention are exceptionally valued.

The DOJ and FTC's stronger stance against anti-competitive deal making will play an interesting role in states like California that do not honor non-compete clauses in employee contracts. In most states, the general rule is that companies can contract with their employees to not compete with the company once they leave, as long as the restrictions are reasonable in purpose and scope. However, the California legislature has enacted statutes forbidding non-competes, and the courts have routinely voided such clauses. So, while the policy rationale behind this adjusted approach benefits employees and promotes unfettered markets, corporations ultimately suffer and are left with little recourse to protect and retain their talent. This can potentially hurt young companies, whose star employees may jump ship for "greener" pastures with larger corporations without repercussion, or, force employers to overpay their talent, either through equity or salaries, in order to retain their skills.