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Antitrust and Labor Law Alert

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Tech Companies Can't Escape Antitrust Liability for Agreeing Not to Solicit Competitors' Employees

Introduction

Sometimes, the worlds of antitrust law and employment law intersect. For example, as most businesses know, it is generally permissible under federal, state, and local law for employers to enter into non-recruitment or non-competition agreements with their employees that are reasonably tailored to prevent unfair competition. A non-recruitment agreement typically prohibits an employee from stealing co-workers for another company. Similarly, a non-competition agreement typically prohibits an employee from working for the employer's competitor both during employment and for a reasonable period of time thereafter. What happens, however, when employers simply bypass these employee agreements and instead enter into agreements with one another about who gets which employees, and at what price? This issue is playing out in *In re High-Tech Employee Antitrust Litigation*, No. 11-cv-02509-LHK (N.D. Cal.), a class action claiming that six of the country's most well-known technology companies agreed not to poach each other's skilled employees. Employment law, meet antitrust law.

Background

In September 2010, the Antitrust Division of the Department of Justice reached a settlement with Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., and Pixar that prevents them from entering into non-solicitation agreements with each other for employees of their respective companies. Following that settlement, several software engineers sued these companies in 2011 for violations of the federal and state antitrust laws. The plaintiffs alleged that these companies had entered into a series of bilateral agreements with one another where they agreed not to solicit each other's employees. The result of these bilateral agreements was to suppress wages and other employee compensation because the companies were prohibited from competing for talent, which would have increased the cost of hiring that talent.

The Decision

After various motions to dismiss, amended pleadings, and a fight over class certification that the plaintiffs won, the district court addressed separate motions for summary judgment filed by the defendants. The federal district court found that the plaintiffs presented sufficient evidence to proceed to trial. The decision is *In re High-Tech Employee Antitrust Litigation*, 2014 U.S. Dist. LEXIS 46335 (N.D. Cal. Mar. 28, 2014). Much of the evidence in this case involved various high ranking executives discussing the fact that competition for talent

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tends to drive up employees' salaries, which hurts the bottom line. For instance, Edward Catmull, President of Pixar, noted in his deposition that solicitation of employees "messes up the pay structure." Similarly, George Lucas (of Lucasfilm Ltd., one of the defendants) stated "we cannot get into a bidding war with other companies because we don't have the margins for that sort of thing."

The Impact

This decision is an excellent reminder to businesses across industries. While companies may be able to enter into agreements with their employees restricting their ability to compete, entering into agreements with competitors in an attempt to reach the same result may violate antitrust laws. On that point, an interesting facet of this case is that the companies involved were largely employing individuals in California. California state law prohibits non-competition agreements with employees, *except* if the agreement is part of the sale of a business. In any event, agreements among competitors tend to receive the highest antitrust scrutiny, and unless there is a valid, procompetitive reason for the agreement, it will likely raise some serious concerns. And while employment-related agreements are not the usual antitrust fodder, one must be aware of the "rules of the road," as these issues do indeed pop up from time to time. In fact, antitrust law could arise in the context of a company trying to avoid expensive litigation over non-compete agreements by entering into "a gentleman's agreement" with one or more competitors, as was apparently the case in this recent litigation.. Antitrust concerns could similarly arise in the context of settling a non-competition lawsuit where the parties agree on "carve-outs" for certain customers or territories. These types of agreements require close examination and consideration.

The Bottom Line

Before entering into any arrangement with another company that may reduce competition, consult with your antitrust counsel. No company wants to face the U.S. Department of Justice (or state attorneys' general for that matter) knocking at the door—and almost certain civil litigation following any such governmental investigation. As the famous "Sergeant Phil Esterhaus" used to say on Hill Street Blues: "Hey, let's be careful out there."

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