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Employers Beware: Employee Non-Solicitation and Non-Recruitment Agreements Can Raise Potential Civil and Criminal Antitrust Liability

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If the recent criminal prosecutions of health care entities for wage fixing and employee non-solicitation agreements have not done so already, a recently filed class action in Michigan should act as a clarion call for health care employers to review hiring policies and practices. The suit alleges that a Michigan hospital and an anesthesia provider agreed to not hire current or recent employees of the other. This case again highlights the dangers of "informal" policies or "handshake" agreements. We review the allegations in the Michigan case and how it fits into the current enforcement environment and conclude with action items that health care employers should take to protect against disruptive investigations and litigation.

Michigan Case and Governmental Enforcement Priorities in Labor Markets

According to the complaint in Michigan brought by Josh Schexnaildre, a certified nurse anesthetist, the CEO of Munson Healthcare in Traverse City, Michigan instructed hospital recruiters to not solicit or hire current or recent employees of Traverse Anesthesia Associates (TAA), a provider of anesthesia and pain management services to hospitals and outpatient sites. Schexnaildre alleges that while employed by TAA he responded to an advertisement for a CRNA position at Munson. A hospital recruiter told him about the agreement and that the "CEO of the hospital had directly provided the details of the agreement to Munson recruiters."

Reasonable employee non-solicitation clauses are of course common and accepted in M&A transactions. In such instances, enforcers would consider such restrictive covenants as "ancillary" to a legitimate agreement and not necessarily anticompetitive. So-called "naked" – because there is no legitimate purpose they support, *e.g.*, joint venture – no-poach or non-solicitation agreements, however, are horizontal agreements to restrict competition in the labor market and could be categorized as *per se* illegal violations of Section 1 of the Sherman Act, potentially creating criminal liability for both the company and the executive in addition to spawning civil lawsuits with potential treble damages.

In 2016, the Department of Justice and Federal Trade Commission jointly issued Antitrust Guidance for Human Resource Professionals, which announced that naked no-poach agreements would be criminally prosecuted. Since 2020, the Department of Justice has brought three separate criminal indictments against employers – all in the health care space – alleging the existence of "no-poach" agreements. Further, both the DOJ and FTC have conducted multiple investigations of companies and organizations, including trade associations, over such agreements and have obtained consent decrees. Many of these actions have also been in the health care space.

In July, President Biden issued the Executive Order on Promoting Competition in the American Economy designed to enhance competition across multiple sectors of the U.S. economy. One of the order's key areas of focus is the employment market and workers' "freedom to switch jobs or negotiate a higher wage." We anticipate additional "no-poach" investigations and criminal indictments. There will also likely be an increase in private litigants challenging these employer activities. In addition, non-compete clauses and other types of restrictive covenants on employee movement will also be scrutinized and may be the subject of FTC rulemaking.

What should be particularly concerning about recent government enforcement in this area is that individual executives responsible for the alleged unlawful agreements face personal criminal liability in addition to the criminal and monetary exposure of the company. This not only complicates the response to any investigation, as the interests of these leaders may not always be aligned with the entity's interests, but also compounds the risks associated with any kind of agreement or policy that restricts the ability of individual employees or potential employees to find work.

Action Items for Employers

In light of these events, clients should consider taking the following steps:

1. review hiring policies and practices, both formal and informal;
2. ensure that personnel with hiring authority receive regular antitrust compliance training; and
3. review and evaluate any employment agreements or policies that contain non-compete provisions and other restrictive covenants.

If you have any questions or concerns, please reach out to one of the authors. Baker Donelson's antitrust and government enforcement experts can assist employers in this review to identify those that may be problematic, provide compliance training and assist the client in prioritizing agreements. With several former government enforcers, Baker Donelson offers first-hand agency experience, and Firm attorneys have extensive experience representing clients on these issues before federal agencies and in court, including representing a leading hospital in the Southwest in a no-poach investigation and follow-on class action. In addition, Baker Donelson is currently representing a defendant in class action litigations alleging wage suppression and unlawful non-solicitation agreements.