Are the Federal Antitrust Laws Now a Weapon for Employee Rights?

Labor & Employment Law Update

By John Hayes on May 19, 2022

Perhaps flying under the radar of everyone except antitrust lawyers (and the employers who have been targeted), the Department of Justice (DOJ) has made a concerted push recently to use federal anti-trust laws as a tool to bolster workers' rights, even going so far as to prosecute employers for alleged anticompetitive practices in labor markets. In March the DOJ's Antitrust Division and the Labor Department signed a memorandum of understanding "to strengthen the partnership between the two agencies to protect workers from employer collusion, ensure compliance with the labor laws and promote competitive labor markets and worker mobility."

The Sherman Act, a federal antitrust law, is most commonly used to prevent anticompetitive activity that affects consumers such as monopolies, price fixing, and collusion amongst competitors. In the labor and employment context, the DOJ uses the Sherman Act to combat efforts to fix wages or limit worker mobility.

The DOJ pursuing wage-fixing cases as civil violations of the Sherman Act is nothing new, indeed it is an everyday occurrence. Over the last decade, the DOJ's Antitrust Division has investigated several tech companies for their "no-poach agreements," alleging they constitute unlawful agreements not to hire each other's employees. Fast food franchises have been similarly targeted for their non-compete agreements. However, DOJ's recent push is to *criminally* prosecute employers for violations of antitrust law.

Perhaps a ray of light for employers, the DOJ recently took two of these cases to a jury trial and lost. In Texas the DOJ prosecuted the owner of a physical therapy staffing company and its former clinical director for conspiring with competitors to lower workers' pay. In Colorado, the DOJ prosecuted the former CEO of a kidney dialysis provider for allegedly engaging in unlawful "no-poach" agreements (agreements not to hire the employees of competitors). In both cases the jury declined to find the executives criminally liable under the Sherman Act. Despite these losses the DOJ reiterated the Antitrust Division's "commitment to prosecuting labor market collusion."

While not necessarily binding precedent, these decisions provide some guidance. For example, the judge in Colorado set a high bar for a conviction, instructing jurors that to convict, they must find that the defendants entered into an agreement with a specific anticompetitive intent, a significantly higher burden than the government must meet when pursuing civil violations, where just proving the existence of an agreement which stifles competition in the labor market can oftentimes lead to a finding of a violation. The DOJ has even pushed for certain no-poach and non-solicit agreements be treated as *per se* violations of federal antitrust law. This would make such agreements illegal on their face (currently they are analyzed by a court for any procompetitive justifications).

But employers can be proactive.

First, employers must be cognizant of federal antitrust law and the DOJ's (current) broad interpretation of its application in the employment context. Companies should be extremely careful when communicating with competitors, particularly if those communications touch on wages or employee movement.

Next, companies should examine their employment agreements and policies to ensure they comply with applicable state law concerning restrictive covenants, but also to ensure that there is a business justification for any no-poach or non-compete covenants that would survive scrutiny under federal antitrust law.

While antitrust law may not always have been on the minds of companies and their legal departments in the context of labor and employment, the time has come to change. Employers must be vigilant in this area and take a hard look at their current policies and agreements concerning wages and worker mobility.

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