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DOJ Provides Guidance on Antitrust Analysis of Employee Non-Compete Agreements

- Employer-employee non-compete agreements have been the focus of increasing attention by the federal antitrust agencies. A recent court filing by the DOJ describes how it analyzes these agreements and, implicitly, when it might choose to bring an enforcement action.

- According to the filing, certain categories of employer-employee non-compete agreements may be considered by the DOJ to be per se illegal horizontal agreements among competitors.

In a recent statement of interest filed in a Nevada state court litigation, the Department of Justice (DOJ) set forth its current views on the antitrust analysis of employee non-compete agreements.[1] The court has not commented on the DOJ's statement, and indeed the case does not present federal antitrust claims. However, the DOJ's statement provides insight into how the agency might evaluate employer-employee non-compete agreements in deciding whether to bring an enforcement action.

Background

Employee non-compete agreements have generally been matters for state law, but have been the subject of recent policy attention by the federal government. Last year, President Biden encouraged the Federal Trade Commission (FTC) "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility" through rulemaking. In December of 2021, the FTC and DOJ held a workshop on "Promoting Competition in Labor Markets" at which non-compete agreements were discussed. Labor markets have also been the subject of enforcement actions. The DOJ has brought criminal charges in several cases alleging wage fixing and no-poach agreements. And in October of 2021, a DOJ official said that the Antitrust Division is "committed to using its civil authority to detect, investigate, and challenge anticompetitive non-compete agreements."

In the Nevada litigation, the plaintiffs are anesthesiologists who are challenging two-year, post-employment non-compete agreements entered into with their employer, a medical group which provides anesthesiologists to a Nevada medical center. According to the DOJ, the terms of the agreements would prohibit the plaintiffs from providing anesthesiology services within 25 miles of the location of their prior employment if they leave the medical group. The DOJ's filing states that the defendant medical group "employs approximately two-thirds of all permanently employed anesthesiologists who are currently working and living in Northern Nevada" and is the "sole and exclusive source of anesthesiology services" to a medical center which is "the only trauma center in the region and the major provider of complex surgical care." The medical group "has promised to supply [the medical center] exclusively," according to the DOJ. The plaintiffs are challenging the validity of their non-compete agreements under Nevada state law governing employment practices.

[1] Stmt. of Interest, Beck v. Pickert Medical Grp., No. CV21-02092, Nev. Second Judicial District Court (Feb. 25, 2022).

Takeaways

According to the DOJ, certain employer-employee non-competes may be per se illegal horizontal agreements among competitors. In its filing, the DOJ first suggested that the non-compete agreements between the medical group and the anesthesiologists may be characterized as horizontal agreements between competitors, and thus would be per se unlawful under section 1 of the federal Sherman Act. The DOJ reasoned that even though the medical group and the doctors were in an employer-employee relationship, the group and the doctors were also potential competitors because both provided anesthesiology services. Importantly, the DOJ noted that "[w]here employees and employers are not actual or potential competitors, a post-employment non-compete agreement likely qualifies as a vertical restraint."

The characterization of a non-compete agreement as per se unlawful could have quite serious consequences, especially if a court determines that the agreement is not ancillary to a legitimate pro-competitive collaboration. Under federal law, a determination that an agreement is ancillary would subject the agreement to a reasonableness defense which is not available for naked per se horizontal agreements.

In the Nevada case, the DOJ does indeed suggest that the agreements in question may not be ancillary. In particular, the DOJ wrote that the non-compete provisions in the employment agreements "may be overbroad." According to the filing, the "agreements mention 'Employee's unique and specialized skill and experience'—describing the employees at the time they were hired—which suggests that the restraints are less about inducing productive employment or new investment in human capital and more about 'protection from competition by Employee.'" The DOJ also wrote: "Even if the restraints are aimed at protecting defendants' confidential information and trade secrets, the non-compete provision may not be reasonably necessary where, as here, the employment agreements already contain numerous other restrictions and covenants on those subjects."

To be sure, employer-employee agreements where the employer and employee could be characterized as horizontal competitors are different from employer-employee agreements where the employer and employee do not or would not compete. The former category would appear to arise more frequently in professional fields where both the employer and employee provide the same services. This is in contrast to situations in which an employee serves a specific function in a broader enterprise. Such a case would likely present a vertical arrangement in the DOJ's eyes, which would be subject to rule-of-reason analysis.

According to the DOJ, in certain circumstances employer-employee non-competes may violate federal antitrust law even when they are ancillary or vertical in nature. The DOJ asserted that the non-compete agreements in the Nevada case "collectively tie up approximately two-thirds of all permanently employed anesthesiologists in Northern Nevada thus constituting a significant restraint on competition for anesthesiology services in the relevant market" and that the doctors covered by the non-compete agreements "could be functionally prohibited from performing anesthesiology services in the region." This, according to the DOJ, could result in anticompetitive effects "sufficient to establish a prima facie rule-of-reason claim." The DOJ went on to write that "[t]o the extent that there is any procompetitive rationale behind the non-compete provisions, it may already be effectuated sufficiently by . . . less restrictive and more narrowly tailored covenants." The filing notes that "the employment agreements already incorporate a number of less-restrictive provisions that safeguard defendants' interests," including non-interference and confidentiality provisions.

Here, the DOJ is applying the rule-of-reason analysis to a horizontal agreement which may be claimed to be ancillary to a legitimate collaboration. However, arguments may now be advanced that a similar rule-of-reason analysis applies to a purely vertical employer-employee relationship. In such cases, the share of the market affected by the non-competes, any pro-competitive justifications for them and the availability of less restrictive options would factor into the antitrust analysis.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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