Overview

Government contractor teaming agreements frequently include provisions in which the teammates agree that they will not seek to hire (or “poach”) one another’s employees. New “Antitrust Guidance for Human Resource Professionals” (Guidance) released in October by the Antitrust Division of the Department of Justice (DoJ) and the Federal Trade Commission (FTC) addresses “no poaching” and other agreements limiting competition for employees, including wage fixing agreements, and indicates that they may present serious legal risks.

This new Guidance focuses on agreements between competing companies. It broadly defines “competing employers” as companies that “compete to hire or retain employees . . . , regardless of whether the firms make the same products or compete to provide the same services.” The Guidance does not, however, address “no hire” provisions with staffing agencies or the non-solicitation of company employee provisions which may be part of employment agreements.

“No poaching” provisions in teaming agreements – sometimes termed “no recruiting,” “no proselytizing,” or “non-solicitation” agreements – impose restrictions on the recruiting, solicitation and hiring of each other’s employees. An example of such a teaming agreement provision is:

During the period of this teaming agreement, including any extension and any resulting subcontract, and for one year thereafter, neither party shall directly solicit, recruit or hire as an employee or agent, whether fulltime or part-time, by contract or by direct hire, any then current employee of the other party assigned to or participating in the work under this teaming agreement without the prior written consent of the party employing such an individual.

Some teaming agreements carve out the situation where the employee initiates contact with the other teammate, which could occur as a result of noticing a public posting of an employment opportunity, by adding language such as the following:

The foregoing is not to be construed as a prohibition against routine, indirect solicitation or recruiting (e.g., via a newspaper advertisement or an internet announcement of a job opening), but shall be construed as a prohibition against direct solicitation.
The Guidance states that “[a]greements among employers not to recruit certain employees or not to compete on terms of compensation are illegal,” and it advises the DoJ and the FTC to aggressively pursue enforcement actions, both civil and criminal, against illegal “no poaching” pacts and other agreements that improperly limit competition for employees. The Guidance includes examples of previous enforcement actions against employers who have agreed not to compete for employees, as well as a set of Q&As addressing various scenarios.

While the Guidance states that “naked” no poaching agreements are “illegal per se” under the antitrust laws, contractors should note that it suggests “no poaching” clauses such as those in contractor teaming agreements might not be viewed as illegal per se if they are based on legitimate business needs for a collaboration or joint venture:

*If* the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects. Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.

However, even if not per se illegal, “no poaching” clauses in contractor teaming agreements could still be subject to antitrust scrutiny and enforcement and should be carefully considered before inclusion in an agreement.2

Traditional noncompete and nondisclosure clauses in employment contracts should not be subject to criminal enforcement. However, to the extent there is an agreement among competing employers about the duration of such noncompetes or nondisclosures, those intercompany agreements could be illegal and might be challenged if they amount to a “no poaching” pact.

The Guidance focuses on the human resources (HR) function, which is the function usually involved with recruiting employees and determining compensation. The Guidance notes that the HR function is “in the best position to ensure that their companies’ hiring practices comply with the antitrust laws” and “HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.” The Guidance warns the HR function that “the DoJ could bring a criminal prosecution against individuals, the company, or both.” However, other functions may also be involved with teaming agreement “no poaching” clauses. For example, the contracts function or the supply chain function may be involved in drafting and negotiating such agreements with teammates who may be “competing employers.”

The Guidance mentions and links to another resource, which is a list of red flags that HR professionals and others should look out for in employment settings. Some examples of the red flags that raise antitrust concerns are:

- An agreement with another company about employee salaries or other terms of compensation, either at a specific level or within a range.
- An agreement with another company to refuse to solicit or hire that other company’s employees.
- An agreement with another company on other terms of employment.
- An expression to competitors that the companies should not compete too aggressively for employees.
- An exchange of company-specific information about employee compensation or terms of employment.
- Discussion of the above topics with colleagues at other companies, including during social events or in other non-professional settings.

Finally, the Guidance mentions that the DoJ has a business review process to allow businesses to determine how the DoJ may respond to proposed business conduct and that the FTC has a similar process for obtaining an advisory opinion for future conduct.

For more information regarding this advisory or on contractor ethics and compliance programs, please contact Michael Mutek at +1 202 429 1376 or Tom Barletta at +1 202 429 8058 in the Government Contracts practice in our Washington office; Ken Ewing at +1 202 429 6264 in the Antitrust practice in our Washington DC office, or Elizabeth Call at +1 602 257 5208 in the Labor & Employment Practice in our Phoenix office.

11This Guidance is consistent with recent White House efforts to encourage state legislative reforms that restrict use and enforcement of non-compete provisions in employment agreements which limit employees’ ability to work for competitors post-employment. Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses, The White House, Washington (May 2016).

2The Guidance also notes that the form of the agreement, i.e., informal or formal, written or unwritten, spoken or unspoken, will not matter from an enforcement perspective.

Practices