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No-Poach Approach Continues: UK Regulator Warns Employers About Anticompetitive Practices

February 15, 2023

Following the US Department of Justice's first criminal conviction for labor market antitrust violations in October 2022, and with scrutiny of labor agreements increasing internationally, the UK Competition and Markets Authority (CMA) is the latest to intervene in the no-poach approach with the publication of a statement warning businesses about anticompetitive labor agreements.

'Significant financial and personal consequences'

Anticompetitive labor agreements are a serious competition law infringement and can amount to cartel conduct. The statement by the CMA makes it unequivocally clear that collusion between employers is illegal, and that "there are significant financial and personal consequences for breaking the law." The CMA highlights three distinct forms of anticompetitive behavior in labor markets:

1. Agreements between businesses not to approach or hire each other's staff, or only to do so subject to the other's consent.
2. Agreements between businesses to fix wages or other employee benefits, including maximum caps on pay or wage rates.
3. Businesses sharing sensitive information, such as terms and conditions and salaries offered to staff, which could include sharing information outside of any recruitment context (e.g., sharing or discussing such information through industry bodies via activities such as benchmarking processes, where salaries or terms of individual employers could be identified).

An agreement does not need to be in writing for it to be in breach of antitrust laws – informal practices or verbal understandings also are in scope. In addition to applying to salaried employees, these rules apply when engaging freelancers and contracted workers.

The CMA recommends that businesses, legal advisers and recruiters:

- Refrain from engaging in these illegal practices.
- Provide training to employees, including recruitment teams, on the application of competition law to recruitment processes.
- Ensure robust internal reporting processes are accessible to staff.
- Consider applying for leniency to the CMA if a no-poaching or wage-fixing agreement has been entered into.

The statement reflects the CMA's increased appetite for bringing enforcement action against such practices. Notably, the CMA opened its first investigation into wage fixing in July 2022, probing four sports broadcasters that allegedly fixed rates offered to freelancers.

FTC pushes to end use of employment noncompete clauses

On other labor fronts, the Federal Trade Commission published a proposed rule in January 2023 that would categorically ban noncompete agreements between employers and a broad class of "workers" – including independent contractors and unpaid interns, senior executives, and everyone in between. This contrasts with the position in the UK, where there are currently no equivalent proposals on noncompete agreements.

The FTC's proposed rule is not final and is likely to be challenged in court; however, if upheld, it would represent a sea change in the enforceability of employee noncompete agreements in the US, where such restrictive

covenants are relatively common. Below are some key takeaways from the proposed rule.

- The rule broadly defines “worker” to include all employees, independent contractors, externs, interns, volunteers, apprentices and sole proprietors who provide services to a client or customer.
- It protects individuals and would not apply to noncompete agreements between corporate entities, so it would have limited application in the deal setting.
- It would ban certain nondisclosure agreements, nonsolicitation clauses and other restrictive covenants that effectively function as noncompete agreements.
- It would apply retroactively, requiring employers to rescind existing noncompete agreements and individually notify current and former employees within 45 days of recission.

The proposed rule is subject to a 60-day public comment period. If the FTC does issue a final rule, it would become effective 180 days after publication. It is not expected to go into effect until the end of 2023, at the earliest.

Learn more about antitrust enforcement of employment agreements

For more information on how companies can protect themselves from criminal and civil antitrust liability, with a focus on enforcement trends and key issues that companies should consider as they evaluate no-poach and other employment agreements, please check out The “No-Poach” Approach: Antitrust Enforcement of Employment Agreements, a recorded webinar presentation by Cooley lawyers Dee Bansal, Jacqueline Grise, Beatriz Mejia and Julia Brinton.

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