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Antitrust and litigation law

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Antitrust implications regarding "no-poach" agreements

ABSTRACT

Since 2016, "no-poach" and "wage-fixing" agreements have been addressed by the Department of Justice and Federal Trade Commission as possible infractions of the antitrust legislation. In Brazil, the Administrative Council for Economic Defense (Cade) has not yet directly faced trials regarding these types of agreements, but the authority's General Superintendency already issued a note in which mentions that such practices might be harmful to the labour market.

KEYWORDS

"No-poach" agreements, "wage-fixing" agreements, human resource professionals, US Department of Justice.

"No-poach" agreements are usually entered into by different companies that compete for the same labor market. Their goal is to avoid competing for hired employees. In addition to explicitly prohibiting competition for labor, this type of agreement may prevent competition by establishing clauses, such as the "quarantine" one, which restricts parties from hiring employees that leave their previous job for a certain period of time.

"No-poach" agreements are mainly supported for the following explanations: (i) the need to protect investments made by the companies when it comes to the training of their employees, which is why some job contracts already include the obligation of repaying training expenses[1]; and (ii) the need to prevent employees from exposing competitively sensitive information when leaving one company and going to another. The possibility of a data breach is one of the most significant concerns for why companies decide to enter into "no-poach" agreements, as an effort to prevent highly qualified employees from leaving their jobs

[1] These are "contract repayment training", which are considered lawful in countries such as the United Kingdom. For more information, access the link bellow: <https://www.nottinghamshire.gov.uk/media/1529037/learningagrement.pdf>.

to a competitor. As an example, in 2010, the Department of Justice of the United States filed lawsuits[2] against some of the big techs of Silicon Valley (Apple, Google, and Adobe), who had agreed to limit job offers for each other's employees.

Even though the regulation of the labor market is not expressly addressed in the Brazilian antitrust legislation, its protection might be considered an attribution of the antitrust authorities, based on constitutional precepts. Moreover, various items of the antitrust legislation may be interpreted as applicable to the labor market. The provisions established by Article 36 (I), (III), and (IV) of Section 12.529/2011[3], which refer to the goods and services market, might reach the labor market through qualitative comparison, as well.

In competitive terms, "no-poach" agreements might elevate entry barriers, as well as raise rival employers' costs. These agreements might also reduce consumer welfare – that is, employee welfare – due to the stagnation of wages and job opportunities. When entered into by companies that operate in the same economic sector, "no-poach" agreements may be compared to cartels. In the meanwhile, when entered into by companies that operate on different levels of the same value chain – that is, companies that are vertically integrated – these agreements themselves can represent vertical restrictions, as they have the potential to provoke market closure.

"No-poach" agreements are still barely spoken of in Brazil, although this topic has been gaining prominence on an international level, since criminal investigations surrounding it have recently begun in the United States[4]. In 2016, the US Department of Justice and the Federal Trade Commission published a guide called the "Antitrust Guidance for Human Resource Professionals"[5] (an innovative guide on how antitrust law applies to the hiring process and the payment of wages for human resources professionals in companies).

One of the main statements addressed by the aforementioned guide states that a "no-poach" agreement will be considered in essence illicit, when it does not have a "legitimate justification" to be entered into. Treating "no-poach" agreements as illegal means that the American authorities will consider them as intrinsically harmful to the market, so that their lawfulness cannot be determined based on the economic justifications or competitive effects, but rather solely on the existence of the agreement.

As part of the lawsuits initiated to investigate "no-poach" agreements, the US Department of Justice recommended different standards for antitrust analysis, based on each case and its alleged facts individually. When dealing with a series of cases that became known as the "fast-food chains"[6], the Department of

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[2] From Silicon Valley to the Burger Joint: The Evolving Landscape of Vertical "No-Poach" Cases. Available at: https://www.lexology.com/library/detail.aspx?g=ff02e118-aee9-4613-9935-902163025ad1

[3] **Article 36**
It is considered as infracting of the economic order the acts manifested in any form which intend to or end up causing the following effects:
I - Limiting, distorting or in any way impairing free competition or free enterprise; (...)
III - Arbitrarily increasing profits; and
IV - Abusively exercising dominant market position. (...) "

[4] In December 2020, the US Department of Justice began its first criminal persecution involving a "wage-fixing" agreement entered into between several physiotherapist recruitment companies (Case 4: 20-cr-00358-ALM-KPJ - USA v. Neeraj Jindal). In January 2021, the Department of Justice began a second criminal charge, which involved a "no-poach" agreement entered into by outpatient medical center operators (Case 3: 21-cr-00011-L - USA v. Surgical Care Affiliates , LLC and SCAI Holdings, LLC).

[5] Available at: < https://www.justice.gov/atr/file/903511/download>.

[6] Case 2:18-cv-00244-SAB, Joseph Stigar v. Dough Dough, Inc. et al; (ii) Case 2:18-cv-00246-SAB, Richmond v. Bergery Pullman et. al.; e (iii) Case 2:18-cv-00247-SAB, Ashlie Harris v. CJ STAR, LLC et. al.

Justice issued a “Statement of Interest” explaining that vertical “no-poach” agreements – that is, agreements entered into by companies on different levels of the same value chain – must always be analyzed through the rule of reason. This means that the economic efficiencies caused by the agreement will be taken into consideration to determine its lawfulness. Therefore, “no-poach” and “wage-fixing” agreements entered into by companies that maintain horizontal relationships are interpreted as market division, which means they are also considered illicit in essence, regardless of the economic efficiencies they might generate.

Despite the lack of cases involving “no-poach” agreements in Brazil, the Administrative Council for Economic Defense’s General Superintendency (SG) has already expressed its intention to investigate similar contracts. Within the scope of an administrative proceeding involving a bidding cartel (Administrative Proceeding 08012.003021/2005-72), it was found that the companies had entered into a “non-aggression” pact, regarding their employees, which had established the prohibition of job offers being carried out. On that occasion, the SG stated that this type of agreements could harm the labor market by artificially keeping wages lower than they should be.

Even though “no-poach” agreements have just started to appear in the Brazilian scenario, companies must pay attention to the fact that entering into this kind of agreement, as well as agreements regarding wage-fixing, may imply antitrust accountability. It is highly recommended that one invest in compliance programs that also extend to human resources employees, who are directly responsible for negotiating the hiring and wage terms with the company’s staff.