

ANTITRUST

DOJ ANTITRUST DIVISION CONTINUES TO PURSUE EMPLOYERS ENGAGED IN EFFORTS TO RESTRICT EMPLOYEE JOB CHANGES

by James M. Burns and Adam M. Wenner

On November 16, the DOJ Antitrust Division filed an antitrust action against eBay, alleging that “[s]enior executives at eBay and Intuit entered into an evolving ‘handshake’ agreement . . . [that] prohibited either company from soliciting one another’s employees . . .” *United States v. eBay, Inc.*, Case No. 5:12-cv-05869 (N.D. Cal 2012). See Compl. at ¶ 2. The action, coming less than two years after a similar lawsuit against Adobe Systems, confirms the Antitrust Division’s strong interest in challenging employer agreements not to “poach” competitor’s employees and demonstrates, once again, that the scope of the antitrust laws is not limited to “price fixing” agreements.

The DOJ Complaint, filed in federal court in San Jose, California, accuses eBay of violating Section 1 of the Sherman Act, which prohibits agreements among competitors that unreasonably restrain trade. Specifically, the Complaint alleges that eBay’s most senior officers “were intimately involved in forming, monitoring, and enforcing” an agreement with Intuit not to hire one another’s employees, and that this alleged agreement “harmed employees by lowering the salaries and benefits they might otherwise have commanded, and deprived these employees of better job opportunities at the other company.” In support of its claims, DOJ quotes from an email from an eBay recruiter stating that “Meg Whitman [then CEO of eBay] and Scott Cook [Intuit’s Founder and Chairman] entered into [an] agreement (handshake style, not written) that eBay would not hire from Intuit, period.” Compl. at ¶ 21. The Complaint further alleges that Intuit agreed to reciprocate – and not recruit or hire eBay employees as well – and that after Intuit subsequently recruited an eBay employee, contrary to the alleged agreement, Whitman asked Cook to “remind your folks not to send this stuff to eBay people.” *Id.* Cook allegedly then responded “#@%&*!! Meg my apologies. I’ll find out how this slip up occurred . . .” *Id.* Not surprisingly, eBay’s alleged conduct also attracted the attention of the California Attorney General’s office, which filed a parallel action against eBay. Notably, however, while the DOJ case seeks only injunctive relief, prohibiting the parties from enforcing the alleged agreement, the California action, which also adds claims under the California antitrust law and the California unfair competition statute, also seeks a civil penalty of \$2,500 per violation.

Adobe Systems Revisited

If the DOJ’s case against eBay sounds somewhat familiar, it should, because it was approximately two years ago, in September of 2010, that the DOJ Antitrust Division filed a similar action against Adobe Systems, Apple, Google, Intel, Pixar and Intuit. *United States v. Adobe Systems Inc., et al.*, Case No. 1:10-CV-1629 (D.D.C. 2010). In that matter, the DOJ alleged that the parties entered into, and actively enforced, agreements between them prohibiting the practice of “cold calling” one another’s employees with competing job offers. The filing led to a quick settlement, with each of the defendants, including Intuit, agreeing to the entry of a Stipulated Judgment calling for the termination of any and all agreements limiting the parties’ ability to

recruit employees from competing firms. Thus, because Intuit had already agreed to the injunctive relief sought in the DOJ case against eBay, the DOJ chose not to file suit against Intuit again, and because the alleged conduct with eBay occurred prior to the entry of the Stipulated Judgment, Intuit was not in violation of that decree.

Lesson Learned?

If the DOJ’s message in *Adobe Systems* wasn’t clear enough, the filing of the action against *eBay* leaves no room for doubt – agreements among competitors that restrict an employee’s ability to increase his or her compensation and benefits through lateral movement can present serious antitrust risks, and will be aggressively pursued by DOJ (and state antitrust enforcers). In addition, like Adobe before it, eBay may soon also find itself a defendant in an antitrust class action proceeding brought by an aggrieved class of employees, seeking significant damages – trebled under the antitrust laws – rather than simply the injunctive relief sought by DOJ in its suit or the limited penalties sought by the California Attorney General. Accordingly, employers – and particularly those with highly skilled and sought after employees – would be well advised to carefully consider the manner in which they seek to “protect” their human capital going forward, or risk serious consequences under the antitrust laws.

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