A recently announced eight-figure settlement in a “no-poaching” class action serves as a reminder of just how costly attempting to enforce excessive and indiscriminate contractual limitations on the movement of workers can be. As we have reported before, the trend of government activism against worker-executed restrictive covenants is clear and in all likelihood will continue. State lawmakers across the country have introduced and enacted legislation that limits the enforceability of restrictive covenants. These limits range from complete bans on all covenants, to limitations on the covenants’ enforceability as to certain classes of workers, to rebuttable presumptions of unenforceability. As to executive action, state attorneys general have challenged restrictive covenants that employers have required of all workers regardless of wages, skill level or access to proprietary information. State and federal courts have both rewritten and voided restrictive covenants challenged by workers in private litigation. The trend of government activism against another type of restriction on worker mobility, so-called no-poach agreements, where companies agree not to hire each other’s workers, is also becoming clearer.

Background

Unlike the restrictive covenants that seek to protect employers by directly restricting individual workers, no-poach agreements are used as a means to protect employers at a more macro-level. Workers generally are not parties to these agreements. Instead, groups of employers agree not to recruit or hire each other’s workers, often with the stated goal of ensuring that employers are able to realize investments they make in those workers.

Some recent challenges to no-poach agreements involved a group of state attorneys general who launched investigations of several national fast food chains where the corporate franchisors required franchisees to agree not to recruit or hire workers from the franchisor or other franchisees in the chain. Many of those chains entered into settlements with the states, agreeing to cease use of no-poach agreements going forward and to cease enforcement of any pre-existing agreements. The federal government has been involved as well, focusing on broader categories of no-poach agreements, including those of workers in more highly skilled and highly paid creative or technology industry jobs. Last year, for example, the federal government initiated an antitrust action against, and simultaneously settled with, major rail industry employers. These state and federal government actions were followed by dozens of private worker class actions against those employers under federal antitrust laws, and many of those actions remain pending today. The federal government has expressly stated its continued interest in the proper enforcement of federal antitrust laws as to no-poach agreements through its filing of several statements of interest in these private actions.

The Duke/UNC Settlements

One private class action, on behalf of medical faculty members at Duke University School of Medicine and the University of North Carolina (UNC) School of Medicine, alleged that the institutions entered into an express agreement not to recruit or hire each other’s medical faculty members. The action arose when Dr. Danielle Seaman, a radiologist and then-faculty member at Duke, sought a faculty position at UNC. She alleged that following multiple meetings with UNC personnel, UNC ultimately declined to offer Seaman a position. UNC’s decision not to extend an offer to Seaman was based on an express agreement between the institutions’ deans not to permit lateral moves of faculty, according to the
Seaman’s complaint included excerpts of an email she claimed to have received from UNC, stating that the agreement was prompted by a large retention package that UNC ended up offering years earlier to UNC’s bone marrow transplant team to prevent it from leaving UNC for Duke.

Seaman settled with UNC first, in 2017. The terms of that settlement included injunctive relief that consists of a bar, subject to certain narrow limitations, on all no-poaching agreements, UNC’s implementation of compliance programs and training, and UNC’s cooperation with discovery in the ongoing litigation as to the Duke defendants. It did not include any monetary relief. The suit against Duke proceeded, and the district court ultimately certified a class of medical faculty members at Duke and UNC. The remaining parties were set to go to trial in July of this year. Recently, however, the parties reported to the court that they had settled the class claims for $54.5 million in monetary relief. That sum represents between 17% and 44% of Seaman’s damages expert’s estimated range of $125 to $315 million and amounts to approximately $10,000 per class member. The settlement also includes injunctive relief similar to that in the earlier settlement of Seaman’s claims against UNC, to be monitored and enforced by the federal government for a period of five years. The defendants denied the existence of any improper no-poaching agreement.

**Key Takeaways**

The monetary component of the Duke settlement is reportedly the largest of its kind on a per capita basis and resulted from a seemingly casual and benign reference in an email to a “guideline” that Duke and UNC established. Private challenges to employment restrictions such as the one Dr. Seaman brought and the dozens pending against other employers, along with the continued scrutiny of restrictive covenants and no-poach agreements by state and federal governments, serve as yet another reminder that the continued indiscriminate use of broad, sweeping non-competes or no-poach agreements that prevent large groups of workers from changing jobs especially without a clear interest that needs to be protected, creates an ever-increasing risk of the agreements being deemed unenforceable or, worse, a federal antitrust violation subject to treble damages or more.

We urge all employers to conduct a careful and thorough assessment of all arrangements with workers or other companies that have the potential to limit the movement of workers at any level to ensure that the arrangements are narrowly tailored and focused on key workers with access to proprietary and confidential business information. Otherwise, the employer could face costly consequences of running afoul of applicable state and federal laws.

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