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Antitrust Considerations for Staffing Agencies Seeking to Retain Their Employees

Introduction

Employees are a staffing agency's most important asset, as time is spent in hiring, training, and placing employees in positions that meet the needs of clients. Once an individual has been employed, the staffing agency has an economic interest in retaining that employee.

The federal antitrust laws require staffing agencies to compete for employees. Once a staffing agency hires an employee, it has the right to seek to retain that employee in a way that does not restrain competition in violation of the federal antitrust laws. This issue paper seeks to explain what type of actions a staffing agency may take to retain its employees (or to be compensated when they leave) and the actions such a staffing agency may be prohibited from taking.

The American Staffing Association offers this issue paper to address the most common ways used by staffing agencies to retain employees: (1) conversion fees; (2) no-hire agreements with clients; (3) no-poaching agreements; and (4) nonsolicitation agreements.

This issue paper is informational in nature and does not constitute legal advice. Further, this document only references federal antitrust laws; please remember that there are applicable state antitrust laws that may include additional rules and requirements, as well as other statutes that relate to employment practices. Last, each staffing agency's facts and circumstances may differ, thus altering the legal analysis and outcome. ASA members therefore are urged to consult with legal counsel about the matters discussed herein.

Conversion Fees

A provision in an agreement between a staffing agency and a client may include a "conversion fee," whereby the client agrees to pay the staffing agency a fee if it hires the staffing agency's temporary worker during the assignment or within a set amount of days after the assignment ends. Essentially, the fee allows the staffing agency to recoup its recruitment and other costs.

Sample conversion fee language is included in the ASA model staffing agreement:

> "If CLIENT uses the services of any Assigned Employee as its direct employee, as an independent contractor, or through any person or firm other than STAFFING FIRM during or within __ days after any assignment of the Assigned Employee to CLIENT from STAFFING FIRM, CLIENT must notify STAFFING FIRM and (a) continue the Assigned Employee's assignment from STAFFING FIRM for his or her next _____ consecutive work hours for CLIENT; or (b) pay STAFFING FIRM a fee in the amount of _____ times the final billing rate for that Assigned Employee, or $_____, whichever is higher."

Although conversion fee provisions should be reviewed by knowledgeable legal counsel, a strong argument can be made that they are lawful because (1) they are reasonably necessary to further legitimate business arrangements between a staffing agency and a client by allowing the agency to recoup its costs and thus protect itself from the client using it as a free placement agency; and (2) they are not a blanket prohibition against clients hiring assigned temporary workers.

No-Hire Agreements With Clients

Historically, some staffing agencies may have agreed not to solicit or recruit an employee of the client during the term of the agreement and for a limited period of time after the agreement ends. If the provision was reasonable in time and scope, the agreement arguably did not run afoul of antitrust law. *However, the Federal Trade Commission and U.S. Department of Justice, through recent enforcement actions, have called into question such an agreement's legality. Therefore, staffing agencies with no-hire provisions in their client contracts should consult with knowledgeable counsel whether to continue to use them.*

No-Poaching Agreements

An agreement between competing staffing agencies to refuse to solicit or hire each other's employees likely will be illegal under federal antitrust laws and subject to both civil and criminal enforcement by authorities, depending on the circumstances. Such agreements are often referred to as "no-poaching" agreements.

Recent government enforcement actions illustrate the risk in using such agreements. In one case, a federal criminal indictment was issued with respect to an alleged no-poaching agreement between a client and several outsourcing firms; according to the indictment, the client facilitated an agreement among the firms not to solicit or hire each other's employees—which the government contends is a per se violation of federal antitrust law involving direct competitors that cannot be defended based on arguably legitimate business reasons. Similarly, the Illinois attorney general recently sued staffing agencies and their common client for conspiring not to hire each other's employees, in violation of the Illinois Antitrust Act.

These enforcement actions call into question the legality of no-poach agreements facilitated by clients among their staffing agencies, as well as agreements between clients, managed service providers (MSPs), and staffing agencies. Given the potential for criminal liability for staffing agencies and their employees or owners, staffing agencies should consult with legal counsel before entering into any no-poach agreements with clients, MSPs, or other staffing agencies.

Nonsolicitation Agreements

Once a staffing agency's recruiter leaves his or her employment, that recruiter may be prohibited from recruiting the employees of the former staffing agency for a competing staffing agency. Such a restriction is usually found in a larger employment agreement. So long as they are reasonable as to time, employee nonsolicitation provisions arguably are permissible under the federal antitrust laws since they serve a legitimate business purpose of protecting the staffing agency's human resources.

A nonsolicitation provision may read:

> "During the term of this Agreement and for a period of _____ months immediately following the termination of this Agreement, RECRUITER shall not, either directly or indirectly, solicit or recruit any employee of this STAFFING FIRM with whom the RECRUITER had contact to work for any other staffing firm or any client of any other staffing firm."

Conclusion

Under federal antitrust laws, a conversion fee that a client must pay for hiring a staffing agency's employee, and a staffing agency employee's nonsolicitation agreement, arguably are lawful. However, federal authorities take the position that staffing agencies may not agree among themselves to refrain from soliciting other staffing agencies' employees.

This paper is intended as information and not legal advice. Readers requiring legal or other advice regarding the matters discussed in the paper should consult with experienced legal counsel.