Kluwer Competition Law Blog

COMPETITION LAW CONSIDERATIONS FOR HR PROFESSIONALS

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Monday, September 21st, 2015

Company H.R. functions, such as recruitment and compensation, are not typically regarded as antitrust "hot spots" (as opposed to sales and marketing). Recent cases in the United States, however, highlight how hiring practices can create the risk of competition law violations for companies and their H.R. personnel. Since Canadian competition law is similar to U.S. antitrust law in these respects, it is important that Canadian H.R. professionals be aware of these risks and protect themselves and their companies from exposure.

The most notable recent U.S. case saw the Antitrust Division of the U.S. Department of Justice file a civil complaint against several of the world's largest high-tech companies (such as Apple, Pixar and Intel) for suppressing wages by entering into "non-poaching" agreements that barred them from "soliciting, cold calling, recruiting or otherwise competing for" each other's employees. Several class action lawsuits were also commenced in that regard.

Similar lawsuits continue to be brought involving other industries.

In June of this year, Dr. Danielle Seaman, an assistant professor of radiology at Duke University School of Medicine, filed an antitrust class action against Duke University and Duke University Health System, citing an alleged agreement with the University of North Carolina and the North Carolina Health System to forego hiring certain of each other's medical facility faculty and staff. According to the complaint, Dr. Seaman was told that there was an agreement between UNC and Duke that "lateral moves of faculty between Duke and UNC were not permitted." The two universities had apparently entered into the agreement after they went through an expensive bidding war some years earlier over UNC's bone marrow transplant team.

Also this past summer, former Kansas City Royals scout Jordan Wyckoff filed a class action suit claiming that Major League Baseball and its constituent clubs have unlawfully agreed not to negotiate with or hire away any scout currently under contract with another franchise, unless that team has expressly granted the scout permission to talk with other clubs, which is typically not granted.

According to Wyckoff, by restricting the mobility of employees, MLB teams have artificially depressed the market for their services and suppressed wages accordingly. For example, Wyckoff says that a number of MLB scouts currently make less than the minimum wage and are not paid overtime, even when working more than 40 hours in a given week.

"Non-poaching" agreements are not the only source of potential risk for H.R. professionals to worry about. In some situations, sharing HR information, such as salary information of employees, can be an issue as well.

The consequences of information sharing among employers is at the heart of a series of class actions alleging that hospitals/healthcare systems in different parts of the United States have conspired to suppress wages paid to nurses. Specifically, the plaintiffs alleged that major hospitals/healthcare systems in Memphis, San Antonio, Albany, Chicago, Detroit and Arizona had either (i) reached express agreements on what their nurses would be paid, or (ii) in the alternative, had used the confidential wage information they exchanged to set compensation at levels below what the nurses might have earned otherwise.

Collusive arrangements by employers to restrict employee opportunities and remuneration could also give rise to issues under Canadian competition law. One of the Canadian competition Bureau's enforcement priorities is to detect and prosecute anti-competitive agreements between competitors and it has specifically identified information exchanges as a particular area of concern.

For example, section 45 of Canada's Competition Act makes it a criminal offence for competitors to agree to fix, maintain, increase or control prices for the supply of a product, and to allocate sales, territories, customers and markets for the production or supply of a product. Depending on the circumstances, this provision could be broad enough to cover agreements among competitors to collectively determine wages for employees or to refrain from recruiting each other's employees.

Alternatively, conduct of this nature could be reviewed under section 90.1 of the Competition Act, which authorizes the Commissioner of Competition to apply to the Competition Tribunal for relief where an agreement between competitors – existing or proposed – prevents or lessens or is likely to prevent or lessen, competition substantially in a market.

What the various U.S. proceedings and investigations described above demonstrate is that Canadian companies must ensure that they guard against potential antitrust risks in the H.R./employment area as well. In particular, it must be recognized that companies may be competitors in a "hiring" market even if they are not competitors in the products and services they provide. H.R. professionals should also be wary of coordinating hiring practices and sharing information with competitors and should carefully assess any such ongoing conduct to determine its legality.

ORIGINALLY PUBLISHED IN THE LAWYERS WEEKLY, SEPTEMBER 25, 2015 ISSUE, UNDER THE TITLE "SHADOW DEALS STIFLE COMPETITION"

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

This entry was posted on Monday, September 21st, 2015 at 5:36 pm and is filed under Canada, Source: OECD“>Competition
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.