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Insurance Tips For 'No Poach' Employment Antitrust Claims

By **Jeff Kiburtz and Heather Habes** (July 30, 2018, 3:36 PM EDT)

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Regulators are taking new and aggressive steps to address the purported use of "no poach" agreements that allegedly violate antitrust law. On July 9 it was reported that attorneys general in 10 states and Washington D.C. targeted eight companies in the fast food industry for production of franchise agreements and other documents relating to so-called "no poach" provisions under which companies agree not to hire, or restrict the circumstances under which they will hire, employees of their competitors.

This is the latest in a series of steps by regulators to address the use of "no-poach" agreements that allegedly violate antitrust law. For instance, the U.S. Department of Justice and Federal Trade Commission in 2016 issued "Antitrust Guidance for Human Resource Professionals" in which the agencies stated that "[n]aked wage-fixing or no-poaching agreements ... are per se illegal under the antitrust laws."[1] The DOJ reiterated that sentiment in 2018, in the wake of bringing a civil action against two rail equipment suppliers, reminding market participants that "the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy."[2]

Regulatory action often precedes private litigation, as was the case with In Re: High-Tech Employees Antirust Litigation, a case venued in the Northern District of California that followed a 2009 DOJ investigation into the hiring practices of large technology firms and reportedly resulted in total settlements in excess of $400 million.[3] Even before the recent announcement by the attorneys general, there had been at least one private suit filed against a company in the fast food industry alleging that the use of "no-poach" agreements violated the Sherman Antitrust Act by preventing employees from obtaining better positions with rival franchises. More could be on the horizon.

Apart from ensuring that current practices comply with applicable state and federal antitrust laws, companies with potential exposure to regulatory scrutiny or private litigation would be well advised to review their insurance policies to determine whether coverage might be available. Here are five basic tips when reviewing these issues:

Existing Policies May Provide Coverage for Antitrust Liability

Without ruling out the possibility of coverage under other types of policy, perhaps the most likely sources of coverage for employment antitrust suits based on alleged "no-poach" agreements are employment practices liability and directors & officers liability insurance policies. Subject to examining the wording of specific terms, which is beyond the scope of this article, many EPLI policies should provide coverage for employment antitrust claims.

The likelihood of securing coverage under D&O policies is more variable. While antitrust exclusions appear in some D&O policies, many D&O policies — typically those issued to nonpublic companies — expressly provide coverage for antitrust claims. Even where there is an antitrust exclusion, close attention should nevertheless be paid to whether it is broad enough to capture employment-related antitrust liability, as it may be distinct from antitrust liability contemplated by the standard exclusion. However, employment-related exclusions — expressed in many different ways — are common in D&O coverage provisions, so attention also must be given to those provisions.[4] The foregoing issues likely would be less relevant in the context of shareholder litigation suits premised on a company's alleged use of "no-poach" agreements, but that issue also should be considered when reviewing coverage.

It May Not Be Too Late to Act

EPLI and D&O policies are typically issued on a claims-made-and-reported basis. The "trigger" for coverage is typically when a claim is made against the insured (and, depending on the specific language utilized, reported to the insurer), not when the allegedly wrongful conduct takes place. Accordingly, claims-made policies issued in the coming years may provide coverage for past conduct, meaning that there still may be time to negotiate broader coverage for claims based on a company's prior use of alleged "no-poach" agreements. Conversely, a company's insurers may decide not to renew the coverage or seek to include more restrictive language in their policies at the next renewal.

How to proceed depends entirely on the current coverage held by the policyholder. If coverage appears questionable or nonexistent, a policyholder may seek to improve the policy language at the next renewal or seek coverage from a different insurer. Alternatively, if a policyholder is faced with a proposed renewal that limits or eliminates coverage for such suits, or its insurer has declined to renew, it may consider providing notice of circumstances under the policy currently in effect even in the absence of a formal claim based on its use of "no-poach" agreements.

Closely Consider Whether There is Coverage for Investigations

Coverage may be available even when no lawsuit has been filed. The extent of coverage available for subpoenas or investigations is a common source of disputes, and has resulted in decisions across the country. The results often depend heavily on the facts and specific policy language at issue, with decisions finding both in favor of coverage[5] and against.[6] Most of the litigation has involved the definition of "claim," but some cases have also considered whether an investigation involves a "wrongful act."[7] While the nuances associated with these issues exceed the scope of this article, close attention should be paid to relevant policy language both during the renewal process and upon receipt of a subpoena or other notice of an investigation. Note, however, that broadening the definitions of "claim" and "wrongful act" from one policy year to the next could present complications, as the insurer

in the latter policy year might try to assert, likely improperly, that a previously unreported matter qualifies as a "claim" made prior to inception even where it did not qualify as a "claim" under the terms of the expired policy.

Proceed With Caution Even When Antitrust Coverage is Express

Despite policy language that expressly provides coverage for antitrust claims, insurers have sometimes taken the position that coverage is nevertheless limited or unavailable.[8] Courts have consistently rejected these insurer positions.[9] These and other cases confirm that indemnity coverage is available for antitrust liability, even when an insurer takes the position that it is not. But these cases also might suggest that insurers may try to limit coverage once a covered claim has emerged.

There is Nothing Uninsurable About Antitrust Liability

Some insurers, despite express coverage grants for antitrust liability, have in certain circumstances attempted to contend that providing coverage for antitrust liability would violate public policy. In so arguing, these insurers have advanced two arguments. The first is that antitrust damages constitute uninsurable restitution, disgorgement or financial advantage. This argument was rejected by both the Sixth and Ninth Circuits in the cases cited above. As the Sixth Circuit explained, the damages sought there represented "classic compensatory damages" that "attempt[] to put the [employees] in the position they would have been if not for the violation."[10] The damages did not constitute "disgorgement," as the "[insured] never gained possession of (or obtained or acquired) the [employees'] wages illicitly, unlawfully, or unjustly," but instead was alleged to have only "retained the due, but unpaid, wages unlawfully."[11]

The second argument is that antitrust violations involve uninsurable intentional or illegal conduct. The Sixth Circuit also rejected this argument, rightly observing that insurance is routinely available for intentional conduct, even when it violates a statute.[12] Public policy is typically implicated only when, for example, there is "intentional infliction of serious bodily injury or intentional destruction of one's own property,"[13] such as sexual abuse of minors,[14] or murder,[15] or that the insured's act is "deliberately done for the express purpose of causing damage" or with a "preconceived design to injure another."[16] In sharp contrast to that type of conduct, intent to cause harm is not a prerequisite for antitrust liability, not even liability premised on conduct found to be a per se violation of antitrust laws.[17]

Conclusion

While a sound risk mitigation strategy almost certainly includes ensuring that current practices conform to government expectations, companies also would be well-advised to consider how their current and future insurance policies may help mitigate risk from prior practices.

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[1] https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf

[2] https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete

[3] https://www.law360.com/cases/4e3fb5601d1d2e4449000001

[4] See, e.g., National Football League v. Vigilant Ins. Co., 36 A.D.3d 207, 213–214, 824 N.Y.S.2d 72 [1st Dept.2006] (antitrust claims not barred by employment exclusion in D&O policy).

[5] See, e.g., Astellas US Holding, Inc. v. Starr Indemnity and Liability Company, No. 17 CV 8220, 2018 WL 2431969, *4 (N.D. Ill. May 30, 2018) (subpoena qualifies as a "claim" when defined to include a "written demand for ... non-monetary ... relief").

[6] See, e.g., MusclePharm Corporation v. Liberty Insurance Underwriters, Inc., 712 Fed.Appx. 745, (10th Cir. 2017) (subpoena does not qualify as a "claim" when defined to include a "written demand for ... non-monetary ... relief").

[7] See, e.g., Astellas US Holding Inc., supra, 2018 WL 2431969, *5 (rejecting insurer's argument that subpoena must include language specifically asserting that policyholder engage in an "actual or alleged wrongful act"); but see Employers' Fire Insurance Company v. ProMedica Health Systems, Inc., 524 F. App'x 241, 251 (6th Cir. 2013) (agreeing with insurer's argument that subpoena and civil investigative demands did not "allege" a "wrongful act," but rather were intended to determine whether a "wrongful act" took place).

[8] See, e.g., St. Luke's Health System, Ltd. v. Allied World Nat'l Assur. Co., 706 F. App'x. 341, 342 (9th Cir. 2017) (finding of antitrust violation did not amount to a finding of improper "financial advantage" for purpose of policy exclusion); William Beaumont Hosp. v. Fed. Ins. Co., 552 F. App'x 494, 500 (6th Cir. 2014) (amounts paid in settlement of employment antitrust suit are not uninsurable restitution or disgorgement).

[9] Id.

[10] William Beaumont Hosp., 552 F. App'x. at 500.

[11] Id. at 499.

[12] Id. at 501.

[13] Id. at 501.

[14] J.C. Penney Cas. Ins. Co. v. M. K., 52 Cal. 3d 1009, 1020 (1991).

[15] State Farm Fire & Cas. Co. v. Dominguez, 131 Cal. App. 3d 1, 5 (1982).

[16] Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 715, 740 (1993); see also Clemmer v. Hartford Ins. Co., 22 Cal.3d 865, 887 (1978).

[17] See, e.g., United States v. Griffin, 334 U.S. 100, 105 (1948) (“It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated.”); Larry V. Muko, Inc. v. Sw. Penn. Bldg. and Const. Trades Council, 670 F.2d 421, 436 (3rd Cir. 1982) (“defendants cannot avoid per se illegality merely because they had no anticompetitive intent”).