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Anti-Raiding Agreements Can Cause Big Trouble For Employers

Working Together

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Recent developments in two California lawsuits confirm that employers take big risks if they agree with competitors not to recruit each other's employees. Apple, Google, eBay, Intuit, and other large technology companies face antitrust claims from both the U.S. Justice Department and employees arising from "handshake agreements" that may have been intended to call a truce in the war for talent, but that the plaintiffs allege drove down salaries and benefits.

About a year ago, the Justice Department and the State of California sued eBay, alleging that Meg Whitman, formerly CEO of EBay, and Scott Cook, chairman at Intuit, had agreed not to recruit or hire each other's employees. Intuit had settled a Justice Department case over hiring practices in 2010, and wasn't named as a defendant. eBay moved to dismiss both cases, but in September of this year, the U.S. District Court denied eBay's motion as to the Justice Department's case, finding that "the United States has plausibly alleged an actionable agreement between the two companies." Read the opinion here. The court dismissed California's case, but gave the state leave to refile. Read the opinion here.

Meanwhile, in 2011 several software engineers brought cases in California state court against seven large technology companies (including Intuit, but not EBay), claiming that anti-raiding agreements among the firms drove down wages. Defendants removed the actions to federal court, where they were consolidated, and the plaintiffs sought class certification. The court initially denied their motion, but gave the plaintiffs leave to amend their complaint. The plaintiffs then filed a Supplemental Motion for Class Certification addressed to the specific concerns the court had raised, which related primarily to the definition of the class and whether common issues would predominate. (While the Supplemental Motion was pending, the plaintiffs reached settlements with Intuit, Pixar, and Lucasfilm, but the case continued against Adobe, Apple, Google, and Intel.) The court granted class certification on October 24, 2013. Read the opinion HERE.

The defendants in both of these cases now face both significant damages exposure and huge litigation costs. Even smaller employers unlikely to face claims under federal antitrust laws should take heed; claims may also be brought under state laws, such as the Connecticut Unfair Trade Practices Act and the Connecticut Antitrust Act, as well as the common law of unfair competition. In Connecticut (unlike in California), courts will enforce reasonable non-competition and non-solicitation agreements between employers and employees, but employers would be well-advised not to enter into anti-raiding agreements with competitors.