Hiring Probes Mark Shift In Antitrust Enforcement

By Jacqueline Bell

Law360, New York (May 04, 2010) -- Recent reports of probes by U.S. antitrust enforcers into hiring practices in the technology sector and the oil industry indicate that the government intends to scrutinize the potential anti-competitive actions not only of traditional sellers but of employee “buyers” as well, experts say.

The U.S. Department of Justice is reportedly stepping up an investigation into whether some of the biggest U.S. technology companies firms have reached an agreement not to poach one another's employees, the Wall Street Journal reported recently.

A Federal Trade Commission investigation into hiring practices at big oil companies also revealed by the newspaper appears to involve questions of whether the firms conspired to depress managerial, professional and technical employees' wages using salary-sharing reports.

While the FTC and the DOJ have not confirmed the existence of the probes, and their exact contours are not entirely clear, should either one evolve into a lawsuit, it would be a relatively uncommon type of antitrust challenge, experts say.

The vast majority of antitrust cases involve examinations of anti-competitive practices among sellers — for example whether a group of companies have conspired to fix the prices at which they sell a particular product.

But an antitrust case over hiring practices flips that type of case on its head, they say.

The companies involved are viewed as buyers of workers' services, and a case would examine whether there was a plot to keep labor costs lower than they otherwise would be in a competitive market for those skills.

"It's looking at what we'd call a buy-side case. The mirror image of a sell-side case," said
John B. Kirkwood, antitrust professor at the Seattle University School of Law.

Those types of cases occur with far less frequency than sell-side cases, and the apparent existence of two such investigations could signal an increased interest on the part of the agencies to devoting more resources to scrutinizing buyer behavior.

“They’re pretty aggressive on everything these days. They want to show we’re committed to fighting anti-competitive practices on the buyer side as well as on the seller side,” said Thom Lambert, law professor at the University of Missouri School of Law.

While both reported investigations look at hiring practices, the alleged activities involved would result in two very different types of cases, presenting different types of hurdles for both the agencies and the defendants, experts say.

The FTC’s investigation, according to the Wall Street Journal, focuses on arrangements by oil companies to share salary information, and stems from a lawsuit first brought in 1997, Todd v. Exxon, that resulted in one of the most prominent appeals court decisions examining the antitrust implications of rivals sharing salary information.

The case was brought by a class of oil company employees who claimed their employers regularly exchanged detailed information on the salaries of managerial, professional and technical employees, allowing them to use that information to depress salaries.

The salary reports were compiled by a third-party consulting firm, and were delivered every two years to defendants, according to the workers.

In a 2001 the U.S. Court of Appeals for the Second Circuit, in a decision authored by then-Circuit Judge Sonia Sotomayor, reversed a lower court’s ruling dismissing the case, finding enough evidence to “arouse suspicion of anti-competitive activity.”

Exchanges of cost information are not per se illegal, so in these types of cases courts must determine whether the trading of salary information constitutes an unreasonable restraint of trade under U.S. antitrust law.

“As the Second Circuit said in its opinion, that’s an issue that should be analyzed under Section 1 of the Sherman Act and under a rule of reason analysis,” said Layne Kruse, antitrust partner at Fulbright & Jaworski LLP.

The decision underscored that courts examining potential antitrust implications of salary
sharing should focus on both the structure of the industry to determine the potential impact of salary sharing and the nature of the information exchanged, including how current the data is, whether individuals can be identified using the data, if the information is also made publicly available, and the exact purpose of the salary reports.

In Todd v. Exxon, the context of the opinion, which reviewed a lower court’s decision at the motion to dismiss stage, is important, Lambert said.

The courts at that stage are required to take the plaintiffs’ allegations at face value, including in this case claims that mobility for the employees between industries is relatively limited.

If an FTC probe ended up in a federal court, the agency would have to convince a judge that the relevant market was fairly limited, and employees who found their salaries suppressed could not find similar work in other industries, a task that could prove difficult, Lambert noted.

“It seemed to me in that opinion — that the toughest thing for the plaintiff is the definition of the relevant market,” Lambert said.

By contrast, antitrust cases over anti-poaching agreements, the apparent focus of the DOJ’s investigation into the technology industry, are extremely rare, and the prospect of such a case stemming from the current probe has raised eyebrows.

Thomas Arthur, a professor at Emory University School of Law, said he could imagine a scenario that could breed these types of agreements.

“You might have a situation somewhat analogous to what you see in professional sports, not typical of your usual employment market, where there's only a handful of people who can do what you do,” Arthur said. “What you end up having is a price war.”

If particularly talented employees regularly shop around for a better deal, at some point employers might determine that they gain little from constant attempts to outbid rivals for a red-hot employees, and agree between each other not to poach employees by offering to pay them higher salaries.

But one of the reasons antitrust cases involving that particular fact pattern are so rare is because the law is so clear, Arthur noted.
“All the employers just agreeing — absent an industrywide collective bargaining situation —
its so obviously illegal. And so public if you do it. You can't hide it,” Arthur said. “You don't
get cases — who'd think you could get away with it?”

An actual agreement between technology companies not to poach each other's employees
would be troubling to enforcers and courts, and could be difficult to defend, experts said.

“An agreement among high-tech firms that they won't hire each other's employees is
suspicious, and relatively hard to justify,” Kirkwood said.

There are, however, a few situations where that type of agreement could possibly be
explained away, antitrust experts said.

If the companies involved in such an agreement were part of a legitimate joint venture that
would be significantly harmed by continual poaching, that could pass muster with judges,
experts say.

“That is almost certainly going to get rule of reason treatment. If the parties to the
agreement can show this agreement is necessary to make the venture worth their while, the
agreement could be upheld,” said Lambert.

Also, in certain types of markets, companies could potentially make the argument that each
firm involved came to the decision on its own that poaching only hurt their business, and
decided to end the practice, without consulting rivals.

“If the number of prospective employers is small enough, that maybe could hold,” Arthur
said. “They get the same results as a price-fix without actually having one. Without the
agreement, you have no case. There's not a lot you can do.”

Whatever the outcome of the probes, their existence, and the agency's apparent revitalized
interest in buy-side antitrust issues, indicates that employers pursuing potentially
questionable hiring practices may find themselves under tough scrutiny from enforcers.

"It may represent an acceptance that in their enforcement priorities they [employers]
should devote some efforts to anti-competitive behavior by buyers," Kirkwood said.