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Today's Business: Be forewarned — no-poach agreements are illegal

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David A. Slossberg; *Contributed photo*

State and federal antitrust laws are in place to foster healthy and free competition among businesses — and to protect consumers and workers. When enforced by the government, or private citizens through civil actions, antitrust laws help eliminate illegal restraints of trade that can occur when, for example, competitors conspire to fix prices or use their power to monopolize an industry.

While cases involving price fixing, for example, have been widely publicized, one type of violation not as widely known, and not as aggressively pursued until relatively recently, is referred to as a "no-poach" agreement.

As its name implies, these are unlawful agreements, whether oral or in writing, between businesses that normally are competitors. The businesses agree not to hire or solicit — "poach" — the other's employees. In other words, competitors agree not to compete for employees.

While such agreements benefit the offending businesses by helping them to retain employees and save on labor costs, they are especially damaging to workers, whose career movement and advancement is stymied, and their wages

inappropriately suppressed. These victimized workers are prevented from earning the fair wage they otherwise could be entitled to in an unfettered market or business without such illegal no-poaching agreements.

In October 2016, the Antitrust Division of the U.S. Justice Department announced it would aggressively investigate and prosecute no-poach cases, precisely because of the pervasive hardships they create for workers. The intent was to restore fairness to employees. The government recognized the need to restore the ability of employees to use competing offers to negotiate better terms of employment and to increase their job opportunities. The justice department's announcement sent a very clear signal to businesses to stop the offending practice as well as to workers that they should enforce their rights to work in a free labor market.

Cases in the news recently have highlighted federal interest in eliminating this illegal activity.

The no-poaching practices are prohibited under what commonly is known as Section 1 of the Sherman Act, which declares illegal any contract or conspiracy that is done in restraint of trade or commerce.

Although most no-poaching agreements typically are agreed upon in private, and hidden from employees with little or perhaps no accompanying documents, it nonetheless often is easier to establish an antitrust violation than with other types of anti-competitive conduct. Where the companies are competitors in the labor market, the existence of that relationship and the anti-poaching agreement itself most often is treated as a per se violation of the Sherman Act. The Department of Justice has advanced this view, asserting in court that no-poach agreements between competitors that are not reasonably necessary to any separate, legitimate business collaboration, do, indeed, constitute a per se violation of the Sherman Act.

Once the violation is established in civil actions brought by the workers themselves, the court will consider what financial damages the workers faced — workers who were subject to the unlawful agreements.

One measure of damages may be the difference between what the workers actually were paid by the companies, and what they would and should have been

paid in a free labor market without the no-poaching agreement. While the available remedies cannot completely undue the lack of career advancement and opportunity, they at least can provide some monetary compensation and prevent the practice from continuing in the future.

We are now in a time of increased vigilance under the anti-trust laws. Eliminating no-poach agreements will go a long way to affording employees a fair wage, and career fulfillment.

Attorney David A. Slossberg leads the business litigation practice at Hurwitz, Sagarin, Slossberg & Knuff. He is an editor of the definitive treatise on unfair trade practices and antitrust in Connecticut. His firm was recently appointed to represent workers as part of a group of lawyers in a widely publicized anti-poaching lawsuit. He can be reached at dslossberg@hssklaw.com.