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Behind the 'anti-poaching' settlement

The tech giants' settlement of an antitrust case against poaching employees reflects a growing backlash against non-compete agreements.

The recently proposed settlement of a federal antitrust case against Apple, Google and other technology companies over allegations that they colluded against hiring each other's employees reflects a growing backlash against non-compete agreements.

There's even a backlash against the proposed $324 million settlement with federal antitrust authorities, as critics note that the 64,000 former employees who are parties to the class-action suit would receive only a few thousand dollars each in compensation. Some are pressing the judge hearing the case to reject the terms as insufficient.

The plaintiffs' lawyers had been seeking $3 billion in damages, which could have tripled to $9 billion under antitrust laws had the companies lost.

A lawyer who specializes in such agreements notes that the reason those companies allegedly colluded in the first place is that California has banned such agreements out of concern that they make it too difficult for employees to find work.

"This is why they did it," **Nick Fortuna of the New York City firm of Allyn & Fortuna** explained to *FierceCFO* in an interview on Tuesday.

Massachusetts is considering such a ban. And Fortuna notes that the backlash isn't limited to those two states, which poses an increasing challenge to companies doing business in more than one.

As the lawyer explains, many states, including California, agree to honor other states' laws but often apply their provisions differently. So while an employee who signed such an agreement in a state other than California and then moves there may still be subject to its restrictions, Fortuna points out that California may choose to enforce them differently.

The state has said it will generally honor such agreements, but Fortuna says it hasn't offered any guidance as to how it will do so. And even states that allow such agreements are sharply limiting what they can restrict.

"The trend is to move away from these agreements," Fortuna said, adding that "courts don't like to see people being put out of work."

More specifically, the lawyer noted that there are differences in what states consider to be reasonable restrictions, including those dictating how long they remain in effect, where they apply, and the type of information they protect.

"They're interpreted differently," Fortuna said, noting that some states interpret the provisions more broadly than others.

What's more, he said, some state courts will void an entire agreement if they think it's too broad, while others will rewrite a provision to make it consistent with that state's laws or simply sever it.

That means multi-state employers "have a lot to consider," Fortuna notes. Essentially, such a company must examine where its competitors are located and look at how those states address the issue.

"There's tension between freedom to work and restrictions on future employment," he says.