

EMPLOYEE POACHING: ITS ETHICAL ISSUES AND LEGAL FRAMEWORK -A CASE STUDY APPROACH

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Abstract: In highly competitive markets, it's become the practice for companies to target and hire the best talents from rival organizations. The argument on whether employee poaching is ethical or not is debatable. Poaching is a wide spread practice, as sectors like IT, technology, retail etc. are booming, it has led to the creation of new jobs. NASSCOM and McKinsey reveals that the jobs in technology space have increased ten-fold from 60,000 professionals to over 6 lacs people in 2015, and the recent increase in the number of start-ups is also fuelling hiring. As there is lack of readily available talent in India, organisations are eyeing at best talents of their competitors.

This paper focuses on understanding the consequences of poaching on stakeholders and its ethicality, in light of legal framework governing Companies both in American and Indian scenario.

Keywords: Employee Poaching , Ethics, Recruitment, Anti-poaching agreement, Stakeholders.

Introduction: Multinationals look for the right talent who can contribute to the organisation from day one. Companies that want to have a competitive edge are differentiating on products, processes, technology and a host of other things, hence to stay ahead they require employees with the right skill sets and knowledge. Though the growth rate in the technology sector is high, creating more employment opportunities; the readily employable graduates in India are less than 30%. This rising gap between the skills required and that available, is causing HRs to look for talents in other organisations. Companies, like Oracle, Hewlett-Packard and Cisco, are diversifying into other businesses; this is increasing competition in the existing industry thus creating a 'Red Ocean.'

Talent poaching is not new in India. When PepsiCo was launched in the country in the 1980s, its human capital was drawn from the talent pool at Hindustan Unilever. Reliance Retail headhunted Raghu Pillai from Future Group back in 2007, and in July last year, software services giant Infosys hired SAP Software & Solutions' Chief Technology Officer, Vishal Sikka as CEO at a jaw-dropping annual compensation of \$5.08 million (over Rs 32 cr) plus stock options worth \$2 million (Source: Economic Times).

Poaching wars will, likely, get a lot fiercer as Indian companies struggle to select their best from a limited talent pool, even as India gallops to a top three spot in the global economy. It's a goal that a Goldman Sachs white paper predicts will be achieved in just 15 years, if India's GDP continues to grow at the expected 7-9 per cent annually.

Poaching Defined: As *'the intentional actions of recruiters in one company to identify, contact, solicit and hire a currently employed individual or group of individuals away from another company.'*

Employees are company's most important asset, but unlike other assets, employees can move. When an

employee moves out of the company, the employee takes with him the human capital that results from the joint investment of the employee (through his time and effort) and the employer (through its formal and informal training programs and through the compensation paid to the employee). The employee might also take business relationships and confidential information.

On the contrary, employers prefer hiring people who have already been groomed in their previous jobs so that they (the hiring company) can start reaping rewards immediately.

Lateral Hiring / Poaching as a Recruitment Strategy : Companies are finding it tough to recruit or source the right talent for a job opening. Factors like increasing competition, high growth rate in Technology and Retail sector, increase in number of start-ups and existing talent crunch are major challenges in recruitment today. Poaching, as a recruitment strategy is debatable. Though, poaching is widely practiced, some consider it to be unethical and illegal. Companies find that many of their existing talent are hired by their competitors.

Review of Literature:

Gardner, Stansbury and David Hart (2010), in their research article 'The Ethics of Lateral Hiring' express that, powerful employers can discourage lateral hiring and control the turnover of their employees by making employees subject to their powers rather than allowing them to be free and autonomous people in their own right. The ethical responsibility for entertaining or rejecting lateral hiring offers should rest with the employees. The authors concluded that though employers may feel offended on departures, the employees are legally and ethically entitled to pursue better opportunities that arise elsewhere.

Danny Kellman (2014), through her article 'Is Poaching Employees Ethical ?' emphasised that,

There is meager difference between aggressive hiring and poaching. Poaching happens when employer is adamant about hiring an employee of a competitor, who has not expressly shown an interest in joining the employers organization. Hence the company can protect its employees from potential poachers, by taking care of them and keeping its workforce happy. Managers and their teams should be rewarded if they retain good employees. HR should keep track of recruits who have history of switching jobs and take pre-emptive action. Both monetarily and non-monetarily benefits such as flexible working hours, vacations and work-from-home options help to retain staff and keep them motivated. More importantly, employee should find their jobs fulfilling and exciting.

Satishchandra Kumar (2015), in his study 'Indian Employees Attitude toward Poaching' used an experimental design with data from 164 Indian managers and professionals working in a variety of industries. The study aims to examine the perception of employer and employees on poaching, perception of companies who engage in poaching, and the possible reasons for switching jobs. The study results indicated that its a perception that employees who are poached are less moral and more business-minded. And companies engaged in poaching are perceived as more competitive and negatively than companies that did not poach. Improvements in salary, status, and social environment emerged as primary reasons for participants to consider switching jobs.

Objectives:

- To analyse the consequences of Poaching on stakeholders using an Ethical framework
- To analyze the validity and enforceability of Non-Poaching Agreement (NPA) under the Indian Contract Act, 1872 and the Competition Act, 2002

Methodology : Case Study approach has been used to analyse the ethical outcomes of poaching in light of investigations initiated by Department of Justice, USA against Microsoft, Adobe, Apple, Pixar, Google, Intel etc. This paper utilises the Consequentialist framework for ethical decision making, to study the consequences of poaching on its stakeholders – Employee, Organisation and Economy.

Case 1 : Analysing Ethical Issues Of Poaching:

A Case Study of Apple, Google, Intel, and Adobe (on Anti-Competitive agreement): IT giants like Apple, Intel, Google and Adobe had to shell out \$415 million to settle an antipoaching civil lawsuit that accused the companies of conspiring not to hire each other's employees.

Top management of Adobe strongly denied that it violated any laws or engaged in any wrongdoing. Nevertheless, they elected to settle this matter in

order to avoid the uncertainties, cost and distraction of litigation.

Individual / Personal Consequences: In high technology sector, there is strong demand for employees with advanced or specialised skills. The main source by which high tech companies recruit these employees is to solicit them directly from other companies, this process is referred to as, "cold calling". The Department of Justice (USA), alleged the existence of competitive agreements between Apple, Intel, Walt Disney, Adobe, Google etc, but rather they agreed amongst themselves not to hire or employ each others existing talent, such agreement restrains employees of better career opportunities. The affected employees had argued that such agreements limited their ability to rise up in the industry and stifled their attempts to earn higher salaries.

The case study makes it clear, that by attempting to block poaching, companies in effect are transferring wealth from employees to themselves, since they obtain employees labor at a lower price and deprive the workers of higher earnings elsewhere.

Organisational (Employer) Consequences : The Anti-Trust Division of Department of Justice (USA), alleged that the senior executives of these companies engaged in a practice of agreeing not to cold call (or employ) any employee of the other company. The complaint alleges that the companies actions reduced the ability to compete for high tech workers and interfered with the proper functioning of the price-setting mechanism, that otherwise would have prevailed in competition for employees.

None of the agreements made by these companies were limited by geography, job function, product group or time period and were broader than reasonably necessary for any collaboration between the companies.

According to Gardner et.al (2010) through their research paper 'The Ethics of Lateral Hiring' claim that, " though there is a temptation to look at poaching as something unethical, the company does not own the employees or their skill sets. To the contrary, companies that try to prevent lateral hiring of employees are actually the ones being unethical."

"These companies may also be violating the law. Some legal analysts say that gentlemen's agreements with competitors to prevent workers from changing jobs may violate federal anti-trust laws"; Gardner et.al (2010).

Economic Consequences: The agreements between Apple and Google, Apple and Adobe, Apple and Pixar and Google and Intel prevented the companies from directly soliciting each others employees. The Department of Justice (USA) said that these agreements eliminated a significant form of competition to attract highly skilled employees, and

overall diminished competition to the detriment of affected employees who were deprived of competitive information and access to better job opportunities.

According to the court, "agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but also impairs full and free competition in the supply of a service or commodity to the public."

Poaching is widespread. The Federal Reserve Board economists estimate that of the 4 million workers who change jobs in a typical month, 80 percent are recruited by their new bosses. That suggests lateral hiring/poaching may provide a way for human capital to flow most efficiently to the places it is needed, helping in economic growth.

Case 2 : Enforceability Of Npa Under Legal Framework:

A Case Study of Microsoft: Microsoft has been alleged contacting Apple Store managers (2009), offering them "significant raises" in salaries and in some cases, moving expenses. The poached managers were, in turn, trying to hire their best salespeople, offering them raises.

The suit against Microsoft filed by former employees 'Deserae Ryan and Trent Rau'(2013) accused, that Microsoft and other companies entered into anti-solicitation and restricted hiring agreements without the consent or knowledge of its workers.

Non-Solicitation agreement : A non-solicitation clause prevents an employee or a former employee from indulging in business with the company's employees or customers against the interest of the company. For example, an employee agrees not to solicit the employees or clients of the company for his own benefit during or after his employment.

Non-Compete agreement : A non-competes agreement is a written legal contract between an employer and employee.

Employers benefit from non-competes agreements because they keep a former employee from sharing industry experience, knowledge, trade secrets, client lists, strategic plans, and other information that is confidential and proprietary to the employer with competitors.

A non-competes may also disallow employment in a particular region of the country. A non-competes almost always prohibits the former employee from working on or developing similar products or starting a competing business. The non-competes agreement also states that the employee may not work for a competing firm for six months to two years after termination of employment.

Non-Poaching Agreement (NPA): A non-poaching agreement therefore enforces guidelines to be followed in cases of lateral hiring. The agreement between two organizations/companies, who are

direct competitors agree not to solicit or 'poach' the employees.

NPA : Validity under Contract Act: Non-poaching agreement, does not contravene section 27 of the Contract Act as it does not prevent an employee from seeking and/or applying for any job/employment. However, non-poaching agreements have been thought to enhance non-competitive behavior in the market place. Section 27 of Indian Contract Act discourages any agreement that puts a restriction on trade. On such grounds, it appears that all non-competes clauses are invalid in India. However, the Supreme Court of India has clarified that some non-competes clauses may be in interest of trade and commerce, and such clauses are not barred by section 27 of the Contract Act, and therefore valid in India.

The Department of Justice (USA) was also of the same view, in 2009 investigations were initiated into companies who had signed non-poaching agreements.

NPA : Validity under the Competition laws: In India the issue of nonpoaching agreements is now also governed by the Competition Act, 2002. The Act restricts organisations from entering into agreements which cause or may cause adverse affect on competition within India. Section 3 expressly states that agreements which are anti-competitive in nature are banned and considered void ab initio.

NPA does not fall under the ambit of this section, as it does not ban lateral hiring, but instead sets guidelines to be followed in case of lateral hiring. To make the NPA in conformity with the competition act , it (a) should not have an adverse effect on competition, (b) should not in any way un-promote competition, and (c) ensures freedom of trade as it does not restrict an employee from working for another employer. To conclude, as long as non-poaching agreements prescribe guidelines for lateral hiring and do not outrightly ban this practice, they are not thought to be in contravention of section 3.

Recommendations by Nasscom : Nasscom is a premier trade association that governs the Indian IT-ITeS industry and sets the tone for public policy for the Indian software industry. As we know, the IT-BPO industry directly employs about 2.3 million employees. It is seen that IT companies are resorting to very 'strong' employee referral programs to meet their short-term project resource obligations. This leads to exit of entire teams from other companies working on important projects. Hence;

- The Nasscom committee on 'Ethics and Corporate Governance' recommended IT-ITeS employees should also serve their entire notice periods and IT-BPO companies to ask for relieving letters from new joiners as a mandatory HR best practice.
- Nasscom also advised IT companies to hire employees by proper means. To approach

prospective employees through unbiased means like advertisements in newspapers, websites, radio or television.

- Nasscom also advised companies to make their employees going on overseas assignments aware of their visa and related compensation rights. Recently a Danish workers union had filed a case against a Noida-based IT company for alleged 'exploitation' of onsite Indian workers.
- It also advised organizations to not indulge in cartelization which may result in another company being unfairly eliminated from competition.
- Nasscom advised companies to follow a whistleblower policy and appoint an ombudsman for addressing the ethics concerns." The scope of whistle blowing should extend to external relations (i.e. customers, partners, competitors, vendors, other external agencies, statutory/others and society at large).
- Many IT employees in the industry are often seen executing private projects in dotcom ventures while simultaneously working in large IT

companies. Regarding employees working in two jobs at the same time, Nasscom said that an employee, should not accept a position of responsibility in any other company without specific sanction.

Conclusion: Poaching should be accepted, and even encouraged, to make companies more competitive. It could be concluded that there is no ethical issue involved with poaching; as the employee always has the discretion to reject the offer. Organizations can't prevent an employee from venturing out of the organization. Employees are to be treated as free people and not as subjects or assets that a company owns. Moreover, any sort of non-solicitation agreement between organizations is unjustifiable under the current socio-economic conditions. The non-compete agreement between the employer and the employee is not legally enforceable. Anti-poaching agreements are relevant only when two organizations are engaged in joint-venture. Poaching is ethical as long as the intention is not to capture the employer's customers or to sabotage the business operations.

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