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FAST BREAK: ‘NO-POACHING’ AGREEMENTS IN HEALTHCARE

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Ryan Kantor's practice focuses on federal and state government antitrust investigations, antitrust litigation, and counseling on antitrust and competition issues. He represents clients before the US Federal Trade Commission, US Department of Justice (DOJ), state attorneys general offices, and in federal and state courts. Ryan previously served as assistant chief of the Healthcare and Consumer Products section in the DOJ's Antitrust Division.

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Mark L. Krotoski is former Assistant Chief of the National Criminal Enforcement Section in the DOJ's Antitrust Division, supervising international criminal antitrust cartel investigations and successfully leading trial teams in prosecuting antitrust and obstruction of justice cases involving corporations and executives.

- His experience includes every phase of the cartel enforcement process.
- In addition to other DOJ leadership positions, he has nearly 20 years of experience as a federal prosecutor.
- Mark represents and advises clients on antitrust cartel investigations; cybersecurity and privacy matters; trade secret; fraud matters; white collar and government investigations.

Agenda

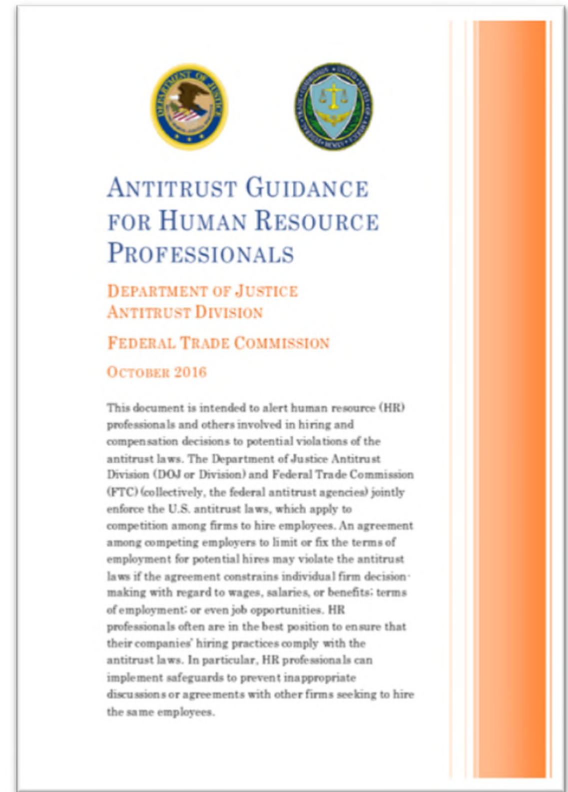
- Antitrust Guidance for HR Professionals
  - Focus on the Healthcare Industry
- Legal Framework
- DOJ Enforcement
- New Emphasis by Antitrust Agencies
- Information Exchanges
- Other Areas of Enforcement
- Key Issues and Recommended Steps
- Resources
- Questions and Answers

FAST BREAK

ANTITRUST GUIDANCE FOR HR PROFESSIONALS / FOCUS ON THE HEALTHCARE INDUSTRY

Antitrust Guidance for HR Professionals

- Jointly issued by US Department of Justice (DOJ) and Federal Trade Commission (FTC) in **Oct. 2016**
  - "[I]ntended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws."
  - Addresses conduct that can result in criminal or civil liability
  - Announces for the first time that the DOJ will pursue certain HR-related agreements criminally, instead of civilly, as it has historically done



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust Division (DOJ or Division) and Federal Trade Commission (FTC) (collectively, the federal antitrust agencies) jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees. An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities. HR professionals often are in the best position to ensure that their companies' hiring practices comply with the antitrust laws. In particular, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.

Healthcare Industry Investigations

- "Combatting rising healthcare prices has been, and under the new Administration will continue to be, a priority for the Division. We are investigating **other potential criminal antitrust violations in this industry**, including market allocation agreements among healthcare providers and **no-poach agreements restricting competition for employees**."
- "We believe it is important that we **use our criminal enforcement authority to police these markets, and to promote competition for all Americans seeking the benefits of a competitive healthcare marketplace**."

JUSTICE NEWS

Deputy Assistant Attorney General Barry Nigro Delivers Keynote Remarks at the American Bar Association's Antitrust in Healthcare Conference

Arlington, VA ~ Thursday, May 17, 2018

A Prescription for Competition

Thank you, Christi, for that kind introduction. I also want to thank Doug Ross and Jeff Brennan, who, along with Christi Braun, organized this important conference.

I am delighted to be here this morning to discuss competition in the healthcare industry, and in particular, some of the healthcare-related issues on which the Antitrust Division is focused.

Healthcare is a large and critical part of our nation's economy. In 2016, healthcare spending by households, businesses, and the government accounted for approximately 18% of Gross Domestic Product, and totaled $3.3 trillion, or $10,348 per person. Imagine a reduction in competition that causes prices to rise by 5% throughout this industry—that equates to $165 billion in annual consumer harm. But, it is not just a question of money: reduce the quality or accessibility of healthcare by 5%, and you potentially cut short millions of lives. Competition in healthcare means being able to afford life-saving surgery, or critical medicines, or an infant's first checkup. It's important. That's why few, if any, segments of our economy merit higher priority when it comes to antitrust enforcement, and healthcare has long been an enforcement priority for the Antitrust Division and our friends at the Federal Trade Commission.

Deputy Assistant Attorney General Barry Nigro, Keynote Remarks at the American Bar Association's Antitrust in Healthcare Conference (May 17, 2018)

https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar

Application to Healthcare Industry

- Numerous no-poach and wage-fixing lawsuits in the healthcare industry over the years
- Significant consolidation throughout the healthcare supply chain
- Other anticompetitive agreements among competitors found recently
  - *U.S. v. Hillsdale Community Health Center et al.* (2015)
  - *U.S. v. Charleston Area Medical Center et al.* (2016)

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LEGAL FRAMEWORK

Sherman Act, Section One

- Is there an agreement?
- If so, does it unreasonably restrain or harm competition?

- Price fixing or market allocation agreement
  - Unreasonable restraint on employee compensation and mobility

- *Per se* unlawful vs. rule of reason
  - Naked restraint
  - Joint ventures

What Is…

- **“No Poach” Agreement**
  - An agreement with another company not to compete for each other’s employees
  - Examples: Not soliciting or not hiring each other’s employees
- **“Wage Fixing” Agreement**
  - An agreement with another company regarding employees’ salaries or other terms of compensation
  - Examples: Setting salaries at a specific level, agreeing which benefits will or will not be offered
- **DOJ Focus**
  - “Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment”
    - DOJ Antitrust Division Update Spring 2018 (April 10, 2018)

Potential Legal Exposure

- **Criminal Prosecution**
  - Against individuals, the company, or both
- **Civil Enforcement**
  - Against individuals, the company, or both
- **Private Litigation**
  - Subject to treble damages
  - Joint and several liability
  - Injunctive relief
  - Attorneys' fees and interest

- **Potential Plaintiffs**
  - Department of Justice
  - Federal Trade Commission
  - State Attorneys General
  - Private Parties
    - Class Actions
    - Employee Suits

FAST BREAK

DOJ ENFORCEMENT

Criminal Cases Under Investigation

Delrahim Says Criminal No-Poach Cases Are In The Works

By **Matthew Perlman**

Law360, New York (January 19, 2018, 5:18 PM EST) -- The U.S. Department of Justice's antitrust chief said Friday that the division has a handful of criminal cases in the works over agreements by companies not to hire each other's workers, signaling that a focus of the Obama administration is continuing.

Assistant Attorney General Makan Delrahim laid out the division's recent work and current initiatives while speaking at a conference hosted by the Antitrust Research Foundation at the Antonin Scalia Law School at George Mason University. He pointed to a **joint guidance issued** by the DOJ and Federal Trade Commission in 2016 — that warned employers that so-called no-poaching agreements would receive the same criminal treatment as traditional price-fixing — and said the agency remains active in the area.

"In the coming couple of months you will see some announcements, and to be honest with you, I've been shocked about how many of these there are, but they're real," Delrahim said at the conference.

Criminal Penalties: Statutory Maximum

Corporations

- Increased maximum fines from $10 Million to **$100 Million**

  [Antitrust Criminal Penalty Enhancement and Reform Act 2004]

- Alternative Fine Provision

  Twice the financial gain to the defendant or twice the financial loss to the victim

Individuals

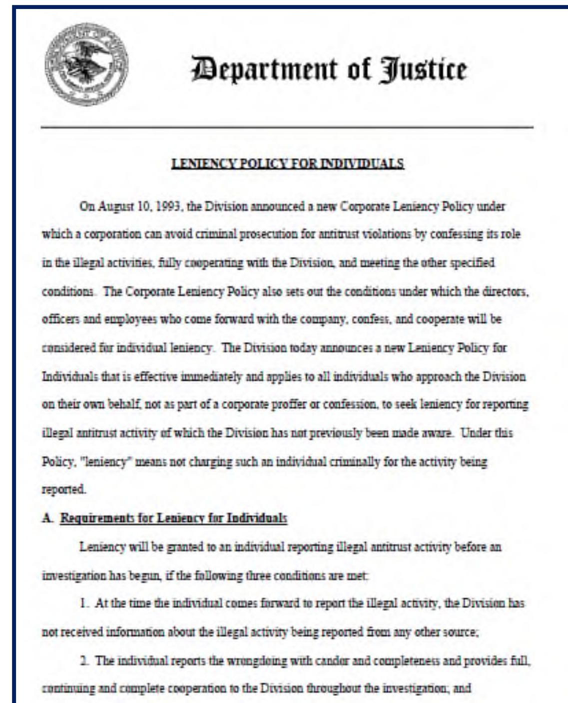
- Prison terms up to **10 years**
- Statutory fines of **$1,000,000**
- More if "twice" the gain or loss

Sherman Act, 15 U.S.C. § 1

DOJ Leniency Program

- **Leniency Program**
  - 1978: Established
  - 1993: Corporate Leniency Program Modified
  - 1994: Individual Leniency Program

- **Benefits**
  - No criminal convictions for company, executives or employees
  - No criminal fine but must make restitution
  - No prison
  - De-treble civil damages
    - Under ACPERA, single damages and no joint and several liability



Department of Justice

LENIENCY POLICY FOR INDIVIDUALS

On August 10, 1993, the Division announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also sets out the conditions under which the directors, officers and employees who come forward with the company, confess, and cooperate will be considered for individual leniency. The Division today announces a new Leniency Policy for Individuals that is effective immediately and applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware. Under this Policy, "leniency" means not charging such an individual criminally for the activity being reported.

A. Requirements for Leniency for Individuals

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and

Recent DOJ Civil Enforcement Action

- *U.S. v. Knorr-Bremse et al.*: lawsuit against "two of the world's largest rail equipment suppliers"
  - German private company and US company, both with US subsidiaries
  - "No-poach" agreements with each other and a third rail equipment supplier based in France (acquired in 2016)
  - *Per se* unlawful horizontal market allocation agreements

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE | Tuesday, April 3, 2018

Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees

Settlement Prohibits Companies from Maintaining Employee "No-Poach" Agreements and Requires Cooperation in Ongoing Antitrust Division Investigation of Such Agreements

The Department of Justice announced today that it has reached a settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), two of the world's largest rail equipment suppliers, to resolve a department lawsuit alleging that the companies had for years maintained unlawful agreements not to compete for each other's employees. The lawsuit further alleges that the companies entered into similar "no-poach" agreements with rail equipment supplier Faiveley Transport S.A. before Faiveley was acquired by Wabtec in November 2016.

The Justice Department's Antitrust Division filed a civil antitrust lawsuit today in the U.S. District Court for the District of Columbia to challenge Knorr and Wabtec's no-poach agreements. At the same time, the department filed a proposed settlement that, if approved by the court, would resolve the department's competitive concerns and restore competition for employees, to the benefit of U.S. workers.

"The unlawful no-poach agreements challenged today restrained competition for employees and deprived rail industry workers of important opportunities, information, and the ability to obtain better terms of employment," said Assistant Attorney General Makan Delrahim of the Justice Department's Antitrust Division. "Today's settlement will restore competition for employees in the U.S. rail industry."

- Consent Judgment Terms
  - Seven-year term
  - Appoint antitrust compliance officer
  - Annual compliance certification by CEO or CFO and General Counsel
  - DOJ may "inspect and copy" records and obtain interviews
  - Notice to all US employees, recruiting agencies, rail industry
  - Ongoing cooperation with DOJ

https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete

Ancillary Restraints

- Hiring restrictions can be lawful if reasonably necessary to a legitimate collaboration
  - Examples: M&A, due diligence, joint venture, contracts with consultants
- *U.S. v. Knorr-Bremse et al.*
  - Allows "reasonable" agreements not to solicit, recruit, or hire employees if ancillary to a legitimate business collaboration
  - Any ancillary agreements must:
    1) Be in writing and signed by all parties
    2) Identify the agreement to which it is ancillary
    3) Be narrowly tailored to affect only employees who are directly involved
    4) Identify the employees who are subject to the agreement
    5) Contain a specific termination date or event

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NEW EMPHASIS BY ANTITRUST AGENCIES

Antitrust Agency Enforcement

- *FTC v. Debes Corp.* (1992)
  - Boycott of temporary nurse registries by nursing homes
- *FTC v. Council of Fashion Designers* (1995)
  - Agreement to reduce fees and compensation for models by fashion designers
- DOJ/FTC Healthcare Statements (1996)
  - "If an exchange among competing providers of . . . cost information results in an agreement among competitors as to . . . the wages to be paid to health care employees, that agreement will be considered unlawful per se"
- *U.S. v. Arizona Hospital and Healthcare Association et al.* (2007)
  - Joint salary-setting by 100+ Arizona hospitals (through a GPO) for per diem and traveling nurse services
- *U.S. v. Adobe Systems et al.* (2010); *U.S. v. Lucasfilm* (2010); *U.S. v. eBay* (2012)
  - Agreement not to cold call, not to make counteroffers under certain circumstances, or to provide notification when making employment offers to each other's employees among tech companies
- *U.S. v. Knorr-Bremse et al.* (2018)

Private Civil Litigation

- *Cason Merenda v. VHS of Michigan* (2006)
  - Wage fixing and improper information sharing among eight Michigan hospitals for nurse salaries
  - More than $90 million in settlements
- *High Tech Employee Antitrust Litigation* (2011)
  - Follow-on litigation from *U.S v. Adobe*
  - More than $400 million in settlements
- *Animation Works Antitrust Litigation* (2014)
  - Follow-on litigation from *U.S. v. Lucasfilm*
  - More than $100 million in settlements
- *Seaman v. Duke University and University of North Carolina* (2015)
  - Alleged agreement not to hire each other's medical school faculty, physicians, nurses, and skilled medical staff
- *Carruth v. Knorr-Bremse et al.* (2018)
  - Follow-on litigation from *U.S. v. Knorr-Bremse et al.*

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INFORMATION EXCHANGES

Information Exchanges

- Information sharing about terms and conditions of employment can be legal under certain conditions
- May be lawful if:
  1) A third party manages the exchange
  2) The information exchanged is relatively old
  3) The information is aggregated to protect the identity of the sources
  4) There are enough sources of data to prevent competitors from linking data to a source
- Also may be lawful if exchanged in the course of merger discussions

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OTHER AREAS OF ENFORCEMENT

State Attorneys General

Washington State
Office of the Attorney General

Attorney General
Bob Ferguson

Home | News | Office Information | Serve The People | Initiatives | Resources | AG Opinions | Employment

Home | News | News Releases | AG Ferguson announces fast-food chains will end restrictions on low-wage workers nationwide

AG FERGUSON ANNOUNCES FAST-FOOD CHAINS WILL END RESTRICTIONS ON LOW-WAGE WORKERS NATIONWIDE

FOR IMMEDIATE RELEASE:
Jul 12 2018

To avoid a lawsuit, seven corporations will remove "no-poach provisions" from their franchise agreements

SEATTLE — Attorney General Bob Ferguson today announced that in order to avoid a lawsuit from his office, seven large, corporate fast-food chains will immediately end a nationwide practice that restricts worker mobility and decreases competition for labor by preventing workers from moving among the chains' franchise locations. The companies will no longer enforce provisions included in franchise agreements that stop workers from moving to potentially better positions and wages, and will remove the language from current and future contracts.

Economists believe that practices that decrease competition, like the "no-poach" language that Ferguson urged these companies to remove, lead to wage stagnation.

A September 2017 article in the New York Times titled "Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue," focused on the downward pressure no-poach agreements among fast-food franchises place on wages.

Earlier this year, Ferguson's Antitrust Division launched an investigation into these so-called "no-poach" clauses in fast-food chains. No-poach provisions appear in lengthy franchise agreements that owners of fast-food franchises sign with corporate headquarters. Employees are often unaware the provisions exist. In effect, the provisions prohibit employees from moving among restaurants of the same corporate chain – for example, prohibiting one Carl's Jr. employee from accepting employment from another Carl's Jr. franchise location for higher pay.

According to economists, no-poach provisions decrease competition, reduce opportunities for low-wage workers and stagnate wages, in violation of the antitrust provisions in the state Consumer Protection Act. The state Consumer Protection Act prohibits "unreasonable restraints of trade," which applies as much to the labor market as it does to the burger market. Because employees cannot move to another location within their corporate brand, their current location may have less incentive to give them raises. This practice harms workers not just in Washington state, but nationally.

LAW360 A LexisNexis Company

7 Fast-Food Chains End No-Poach Clauses That Bind Workers

By Christine Powell

Share us on:

Law360 (July 12, 2018, 6:27 PM EDT) -- Seven major fast-food chains including Carl's Jr., Buffalo Wild Wings and McDonald's have agreed to end the practice of preventing their employees from moving among franchise locations through the use of so-called no-poach clauses, under a deal announced Thursday by Washington State Attorney General Bob Ferguson's office.

In addition to the three chains, Jimmy John's, Cinnabon, Auntie Anne's and Arby's will immediately cease on a nationwide basis the enforcement of the no-poach clauses contained in their franchise contracts, and will also remove the language from current and future contracts, Ferguson's office said in a statement.

Such clauses prevent, for example, a McDonald's employee from taking a higher-paying job at another McDonald's franchise location, and economists believe they end up decreasing competition, hampering employee mobility and stagnating wages, the statement said.

"Companies must compete for workers just like they compete for customers," Ferguson said. "They cannot manipulate the market to keep wages low. My goal is to unrig a system that suppresses wages in the fast-food industry."

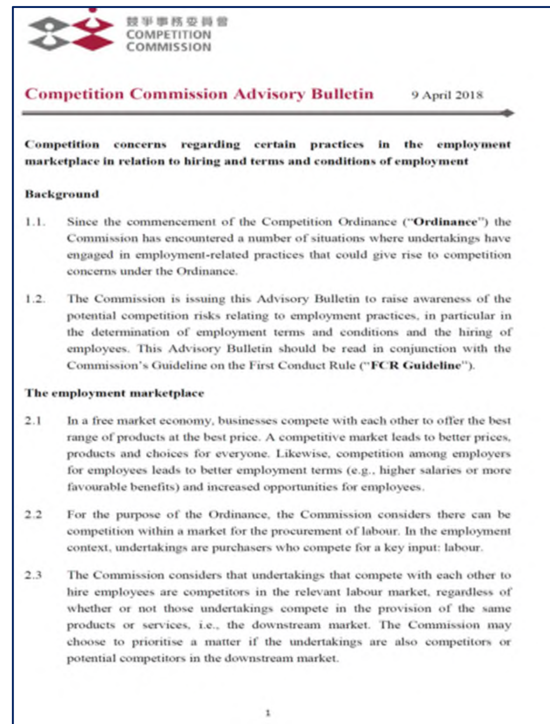
The agreement cuts off litigation that Ferguson's office intended to pursue against the seven chains, based on an investigation into the no-poach clauses launched by the office's antitrust division earlier this year, according to the statement.

The lawsuits would have alleged violations of antitrust provisions of Washington's Consumer Protection Act.

https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers

International Issues

- Hong Kong Competition Commission Guidance (April 2018)
- Japan Fair Trade Commission, Report of Study Group on HR and Competition Policy (Feb. 2018)
- Europe
  - "[C]ourts and competition regulators in Europe (Spain, the Netherlands, and Croatia) have all made major findings in the last eight years against companies in relation to national non-poaching agreements made in the freight forwarding, hospitals, and IT employment sectors"



COMPETITION
COMMISSION

Competition Commission Advisory Bulletin 9 April 2018

Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment

Background

1.1. Since the commencement of the Competition Ordinance ("**Ordinance**") the Commission has encountered a number of situations where undertakings have engaged in employment-related practices that could give rise to competition concerns under the Ordinance.

1.2. The Commission is issuing this Advisory Bulletin to raise awareness of the potential competition risks relating to employment practices, in particular in the determination of employment terms and conditions and the hiring of employees. This Advisory Bulletin should be read in conjunction with the Commission's Guideline on the First Conduct Rule ("**FCR Guideline**").

The employment marketplace

2.1 In a free market economy, businesses compete with each other to offer the best range of products at the best price. A competitive market leads to better prices, products and choices for everyone. Likewise, competition among employers for employees leads to better employment terms (e.g., higher salaries or more favourable benefits) and increased opportunities for employees.

2.2 For the purpose of the Ordinance, the Commission considers there can be competition within a market for the procurement of labour. In the employment context, undertakings are purchasers who compete for a key input: labour.

2.3 The Commission considers that undertakings that compete with each other to hire employees are competitors in the relevant labour market, regardless of whether or not those undertakings compete in the provision of the same products or services, i.e., the downstream market. The Commission may choose to prioritise a matter if the undertakings are also competitors or potential competitors in the downstream market.

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FAST BREAK

KEY ISSUES AND RECOMMENDED STEPS

What to Watch For

- No court has held that no-poach or wage-fixing agreements are a *per se* violation
  - "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *U.S. v. Topco Assocs.*
  - Many settlements under the *per se* standard over the years
- No jury has found a defendant criminally liable for a no-poach or wage-fixing agreement

Tips

- Educate everyone involved in the hiring process about the antitrust laws
- Can have a unilateral policy not to hire from competitors
  - But should document the policy and not request or suggest that a competitor adopt the same policy
- If a restriction is ancillary to a legitimate collaboration:
  - Document the procompetitive justifications
  - Ensure that the restriction is narrowly tailored (covers only the necessary employees)
- Other means for the company to protect itself
  - Non-compete and non-solicitation clauses
- Can still be a violation if the agreement is…
  - Not in writing ("handshake" agreement)
  - Between one or more non-profits
  - Between companies that do not compete in the sale of their products
  - Through a third-party intermediary (consultant)
  - About benefits (health insurance, 401Ks, gym memberships), not salary
  - About a salary range, rather than a specific number

Recommended Steps

- Post–October 2016 conduct
  - "Naked" wage-fixing and no-poaching agreements
- Antitrust compliance training
  - HR professionals, legal and executives
  - Awareness of issues
- Review and modify policies and code of conduct
- Consult experienced antitrust counsel if wrongdoing is detected
  - Consider appropriate steps such as the Leniency Program
  - Other mitigation steps
- Due diligence in mergers and acquisitions
- Best practices in structuring whistleblowing procedures
- Assess international issues and jurisdictions
- Caution areas
  - Information Exchanges
    - Permissible only if carefully designed to conform with antitrust laws
  - Slippery slope issues
    - Trade associations, conferences, informal meetings

DOJ Warning

- "Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy."
  - DOJ Division Update, Spring 2018 (April 10, 2018)

FAST BREAK

RESOURCES

Resources

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FAQs

DOJ and FTC Antitrust Guidance for Human Resource Professionals

In October 2016, both federal antitrust agencies—the US Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC)—jointly issued Antitrust Guidance for Human Resource Professionals (Antitrust HR Guidance), which was expressly "intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws" and their prospect of criminal enforcement with respect to HR matters.[1]

The Guidance and subsequent DOJ commentary are significant in two primary respects. First, both federal antitrust agencies announced that they will focus their enforcement efforts on HR decisions that raise antitrust concerns. Second, the DOJ stated for the first time that it plans to bring criminal enforcement actions for certain HR agreements—specifically, those involving "naked wage-fixing or no-poaching agreements" (discussed below). Previously, this conduct had been enforced civilly, not criminally, but in January 2018, the DOJ confirmed the existence of several active criminal investigations of such HR activity.

This summary provides high-level responses to common questions concerning criminal and civil enforcement under the Antitrust HR Guidance.[2]

Q1. What are the new developments concerning criminal prosecution?

There are two significant developments. First, the DOJ and FTC had previously brought civil enforcement actions for antitrust violations involving HR agreements. In October 2016, the Guidance noted that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."3

Second, in January 2018, the highest-ranking official in the Antitrust Division, Assistant Attorney General Makan Delrahim, stated at a conference that the DOJ was investigating and preparing several criminal prosecutions involving no-poaching agreements. He underscored, "If the activity has not been stopped

[1] Antitrust HR Guidance, at 1 (Oct. 2016); see also Press Release, Antitrust Division, US Dep't of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016). For more information, see our recent LawFlashes: Morgan Lewis, LawFlash: DOJ Antitrust Division Announces Imminent Criminal Prosecution for 'No Poaching' Agreements (Feb. 6, 2018); Morgan Lewis, LawFlash: FTC and DOJ Issue Antitrust Guidance for HR Professionals (Nov. 1, 2016).
[2] Individual clients should seek specific legal advice based on their unique circumstances so the facts can be appropriately considered.
[3] Antitrust HR Guidance, at 4.

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ARE YOUR EMPL
BREACH OF ANTI

March 30, 2018

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Authorities in various jurisdictions are ste
between employers. From training their H
employers should take several steps to ma
anti-competition laws.

Human Resources managers who agree wi
at specific levels may be undertaking illega
criminal convictions in several jurisdiction
Kong. In addition, the sharing of future sal
other similar information may constitute a
Employers should now consider the curre
legal team to ensure that they are in comp
any historical conduct.

THE LIKELIHOOD OF GROWING

In the United States, the Department of Ju
involving "no poaching" agreements (see
on the DOJ's HR Guidance). Assistant Att
Division, has been quoted as saying, "I've b
but they're real."

Competition (antitrust) enforcers talk to e
is just a matter of time before enforcers ou
arrangements, particularly if the companie
there are reports that the Irish authorities
Italian asset management firms prompted

The DOJ (jointly with the US Federal Trade

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DOJ ANTITRUST DIVISION AN
IMMINENT CRIMINAL PROSE
'NO POACHING' AGREEMENT

February 06, 2018

AUTHORS AND CONTACTS
MARK L. KROTOSKI, RICHARD G.S. LEE

The US Department of Justice's Antitrust Division will soon announce its f
"no poaching" agreements—agreements to refuse to solicit or hire another
previously announcing in October 2016 that the department would bring s
federal antitrust law.

The head of the US Department of Justice's Antitrust Division (DOJ), Assis
Makan Delrahim, announced on January 19, 2018, that the DOJ will bring it
alleged "no poaching" agreements in violation of the Sherman Act in the co
AAG Delrahim warned that if such activity "has not been stopped and cont
DOJ's [new antipoaching] policy was made" in October 2016, "we'll treat th
added, "I've been shocked about how many of these [agreements] there are,

As we noted in our prior LawFlash following the October 2016 policy annou
Federal Trade Commission (FTC) jointly issued the Antitrust Guidance for H
(the Antitrust HR Guidance), which signaled for the first time that the DOJ
against naked wage-fixing or no-poaching agreements."[3] Moreover, unde
this conduct may be considered per se illegal, meaning that companies cou
by seeking to explain or justify such agreements.

With his remarks, AAG Delrahim underscored the recent DOJ focus conce
naked wage-fixing and no-poaching agreements. The enforcement efforts w
2017 by then Acting AAG Andrew Finch.[4]

In light of AAG Delrahim's statements, companies should urgently conside
policies and practices to make sure their HR professionals and executives have not engaged in conduct that could be considered a no-poaching or wage-fixing agreement. The DOJ has made clear that engagement in such conduct or agreements after October 2016 when the policy was first announced may be criminally investigated and prosecuted.

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LAWFLASH

DOJ CONFIRMS ACTIVE 'NO-POACHING' CRIMINAL INVESTIGATIONS IN HEALTHCARE AND OTHER INDUSTRIES

May 22, 2018

AUTHORS AND CONTACTS
MARK L. KROTOSKI, RYAN KANTOR

A series of recent statements highlight the continuing enforcement by the US Department of Justice to focus on "no-poaching" and wage-fixing agreements with more enforcement actions expected to be announced in the near future.

The Antitrust Division at the US Department of Justice (DOJ) publicly acknowledged once again last week that active criminal investigations involving "no-poaching" agreements are underway. The most recent statement clarifies that a number of these criminal investigations are targeting companies in the healthcare industry.

In general, DOJ and the Federal Trade Commission (FTC) have described "no-poaching" agreements as agreements "with individual(s) at another company to refuse to solicit or hire that other company's employees." In addition, DOJ and the FTC are scrutinizing wage-fixing agreements, described as agreements "with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range."[1]

At an Antitrust in Healthcare Conference on May 17, Deputy Assistant Attorney General Bernard (Barry) A. Nigro noted that the Antitrust Division plans to bring criminal cases to redress antitrust violations in the healthcare industry for no-poaching agreements. As he explained:

> Combatting rising healthcare prices has been, and under the new Administration will continue to be, a priority for the Division. **We are investigating other potential criminal antitrust violations in this [health care] industry**, including market allocation agreements among healthcare providers and **no-poach agreements restricting competition for employees. We believe it is important that we use our criminal enforcement authority to police these markets**, and to promote competition for all Americans seeking the benefits of a competitive healthcare marketplace.[2]

Mr. Nigro's speech was the latest in a series by Antitrust Division leaders highlighting pending criminal

Resources

- DOJ/FTC Antitrust Guidance for Human Resource Professionals (2016)
  - https://www.justice.gov/atr/file/903511/download
- *U.S. v. Knorr-Bremse and Wabtec* (2018)
  - https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete
- DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care (1996)
  - https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements_of_antitrust_enforcement_policy_in_health_care_august_1996.pdf

FAST BREAK

QUESTIONS AND ANSWERS

Thanks!

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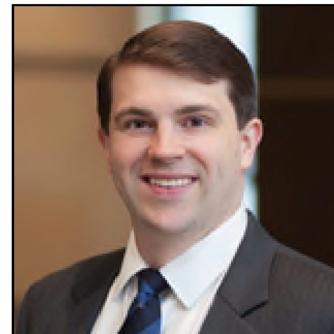

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Please join us for next month's webinar:

"*Fast Break*: Stark Lessons for Physician Practice Acquisitions"

Featuring Al Shay and Eric Knickrehm

- August 23, 3:00 PM (EST)