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NO-POACHING AND WAGE FIXING AGREEMENTS AND ANTITRUST LAWS

Mark Krotoski, Daniel Savrin, Brian Rocca, Omar Shah, Vishal Shah, Dora Wang

May 1, 2019

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Overview

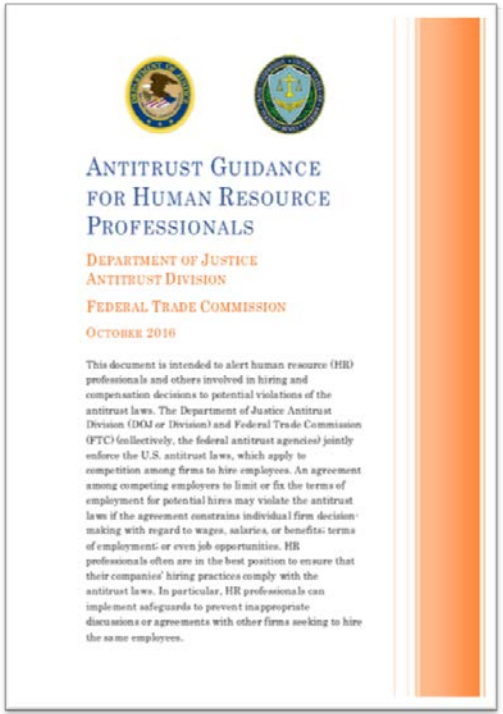
- Recent enforcement developments
- Labor and Employment Risk Factor Issues
- Evolving perspectives on standard of review in civil litigation
  - Per Se vs. Quick Look vs. Rule of Reason
- Rule of reason analysis and the narrow tailoring of HR restraints
- Update on EU law/enforcement issues
- Perspectives from Asia
  - Noncompete and no-poaching in strategic alliances

RECENT ENFORCEMENT DEVELOPMENTS AT DOJ, FTC, AND STATES

“No Poach” Enforcement Updates

- US Department of Justice (DOJ) and Federal Trade Commission (FTC) Joint Guidance **Oct. 2016**
  - DOJ announces for the first time that naked agreements will be criminally prosecuted

- **2018**: Active area of enforcement and litigation
- **2019**: Continued focus and activity



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.

Criminal Investigations

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.

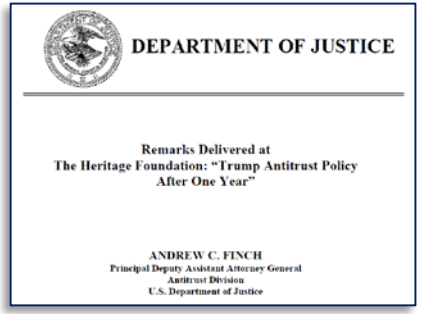
"In the coming couple of months you will see some announcements, and to be honest with you, I've been shocked about how many of these there are, but they're real," Delrahim said at the conference.

Link: https://www.law360.com/articles/1003788/print?section=competition

“No Poach” Enforcement Updates

- Jan. 23, 2018, Principal Deputy Assistant Attorney General Andrew Finch speech
  - “the Division expects to pursue **criminal charges**” for agreements that began after October 2016, as well as for agreements that began before but continued after that date.”

- ABA Spring Meeting Focus



DEPARTMENT OF JUSTICE

Remarks Delivered at
The Heritage Foundation: “Trump Antitrust Policy
After One Year”

ANDREW C. FINCH
Principal Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

NO MORE NO-POACH: THE ANTITRUST DIVISION CONTINUES TO INVESTIGATE AND PROSECUTE “NO-POACH” AND WAGE-FIXING AGREEMENTS

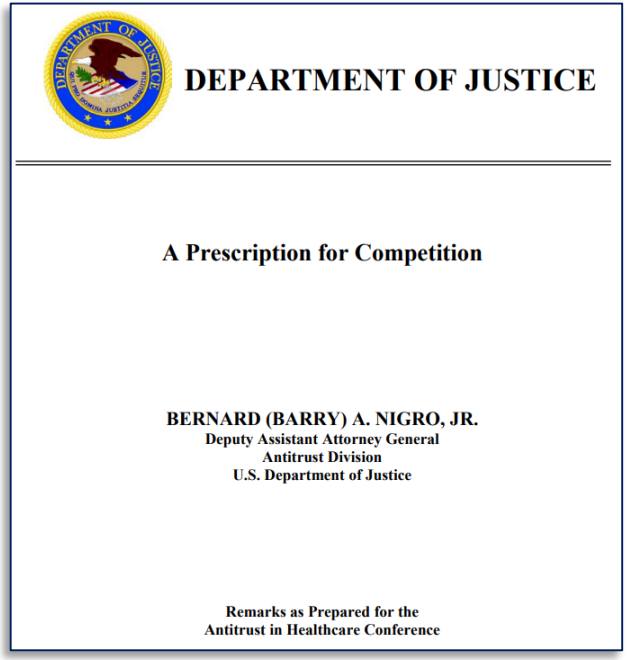
Division Update Spring 2018

The Antitrust Division protects labor markets and employees by actively pursuing investigations into so-called “no-poach” and wage-fixing agreements between employers. When companies agree not to hire or recruit one another’s employees, they are agreeing not to compete for those employees’ labor. The same rules apply when employers compete for talent in labor markets as when they compete to sell goods and services. After all, workers, like consumers, are entitled to the benefits of a competitive market. 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.

https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements

“No Poach” Enforcement Updates

- May 2018, Deputy Assistant Attorney General Barry Nigro speech
  - “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.”



DEPARTMENT OF JUSTICE

A Prescription for Competition

BERNARD (BARRY) A. NIGRO, JR.
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for the
Antitrust in Healthcare Conference

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

2019 ABA Spring Meeting Update

- “[T]he Division protects labor markets and employees by actively investigating and challenging unlawful no-poach and wage-fixing agreements between employers.
- “When companies agree not to hire or recruit one another’s employees, they are agreeing not to compete for those employees’ labor.
- “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.
- “Under the antitrust laws, the same rules apply when employers compete for talent in labor markets as when they compete to sell goods and services.”

DOJ First Civil Enforcement Action

- ***U.S. v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation***
  - Civil action 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

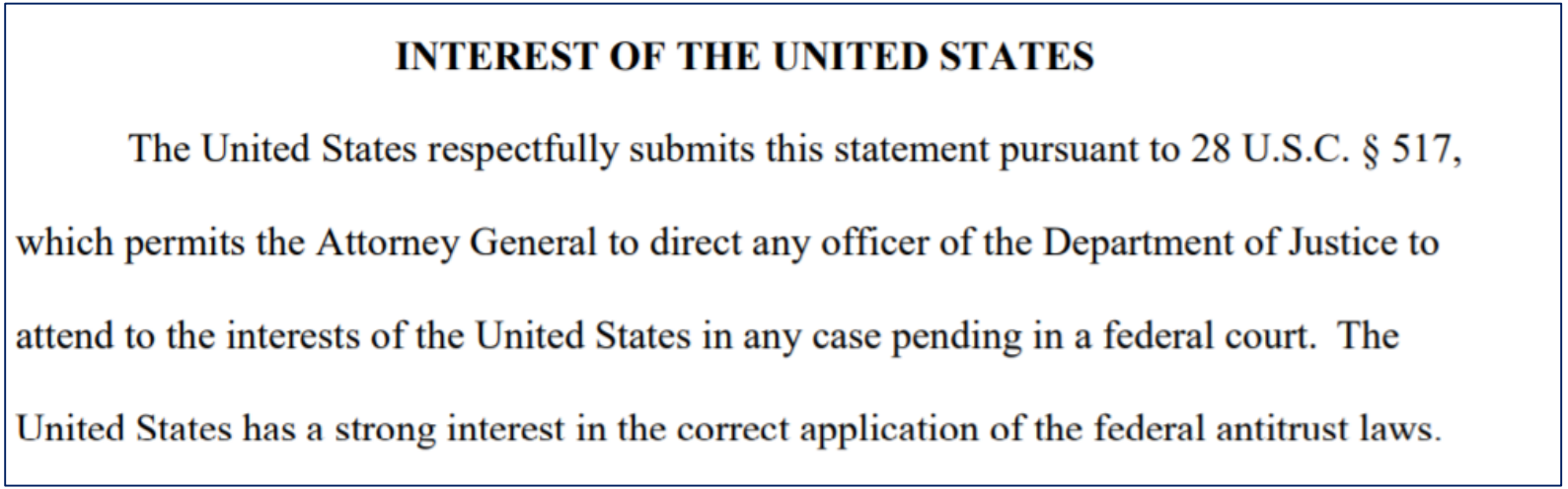
- Exercising **prosecutorial discretion**, DOJ will bring civil enforcement actions for "no-poach agreements that were formed and terminated before" the 2016 Guidance.
- The "no-poach agreements were discovered by the Division and terminated by the parties **before October 2016**, prompting the Division to resolve its competition concerns through a civil action."

Consent Judgment

- Seven-year term
- Antitrust compliance officer
- Annual compliance certification
- 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

DOJ Statements of Interest



INTEREST OF THE UNITED STATES

The United States respectfully submits this statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. The United States has a strong interest in the correct application of the federal antitrust laws.

- Filed in pending class actions and private actions

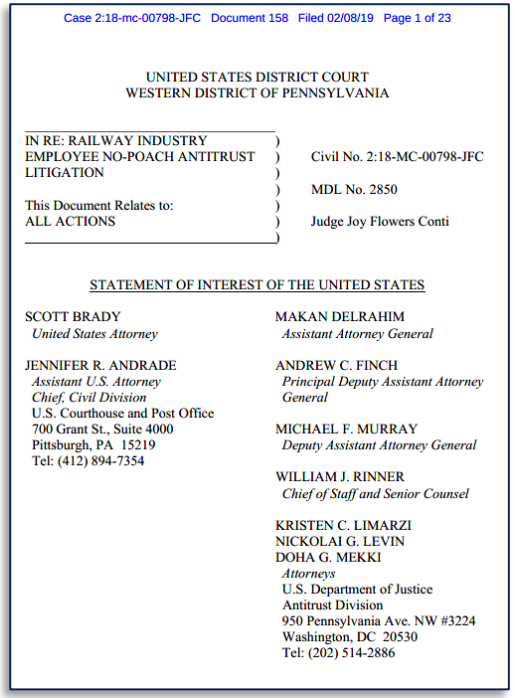
https://www.justice.gov/atr/case-document/file/1141756/download

DOJ Statements of Interest

- *In Re: Railway Industry Employee No-poach Antitrust Litigation*

- Urge Court to "reject defendants' argument that, as a matter of law, all no-poach agreements must be analyzed under the rule of reason."

- "[N]o-poach agreements among competing employers are ***per se*** **unlawful** unless they are reasonably necessary to a separate legitimate business transaction or collaboration among the employers, in which case the rule of reason applies."



Case 2:18-mc-00798-JFC Document 158 Filed 02/08/19 Page 1 of 23

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

IN RE: RAILWAY INDUSTRY EMPLOYEE NO-POACH ANTITRUST LITIGATION	Civil No. 2:18-MC-00798-JFC
	MDL No. 2850
This Document Relates to: ALL ACTIONS	Judge Joy Flowers Conti

STATEMENT OF INTEREST OF THE UNITED STATES

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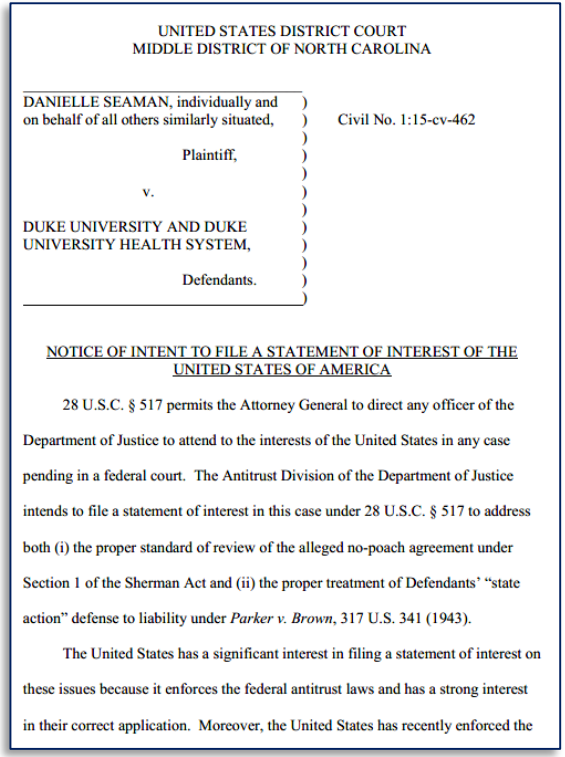
https://www.justice.gov/atr/case-document/file/1131056/download

DOJ Statements of Interest

- *Seaman, et al. v. Duke University and Duke University Health System*
- Private action alleging universities agreed not to poach each other's medical school faculty.
- DOJ Statement of Interest March 7, 2019.
- Asks Court to apply the per se rule if it finds a naked no-poach agreement.
  - Customer- and Market-Allocation Agreements Are Per Se Unlawful
  - No-Poach Agreements Between Competing Employers Allocate Employees Within A Labor Market
  - Ancillary No-Poach Agreements Are Not Per Se Unlawful
  - Disagrees With Request To Apply The Full Rule Of Reason



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

DANIELLE SEAMAN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

DUKE UNIVERSITY AND DUKE UNIVERSITY HEALTH SYSTEM,

Defendants.

Civil No. 1:15-cv-462

NOTICE OF INTENT TO FILE A STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

28 U.S.C. § 517 permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. The Antitrust Division of the Department of Justice intends to file a statement of interest in this case under 28 U.S.C. § 517 to address both (i) the proper standard of review of the alleged no-poach agreement under Section 1 of the Sherman Act and (ii) the proper treatment of Defendants' "state action" defense to liability under *Parker v. Brown*, 317 U.S. 341 (1943).

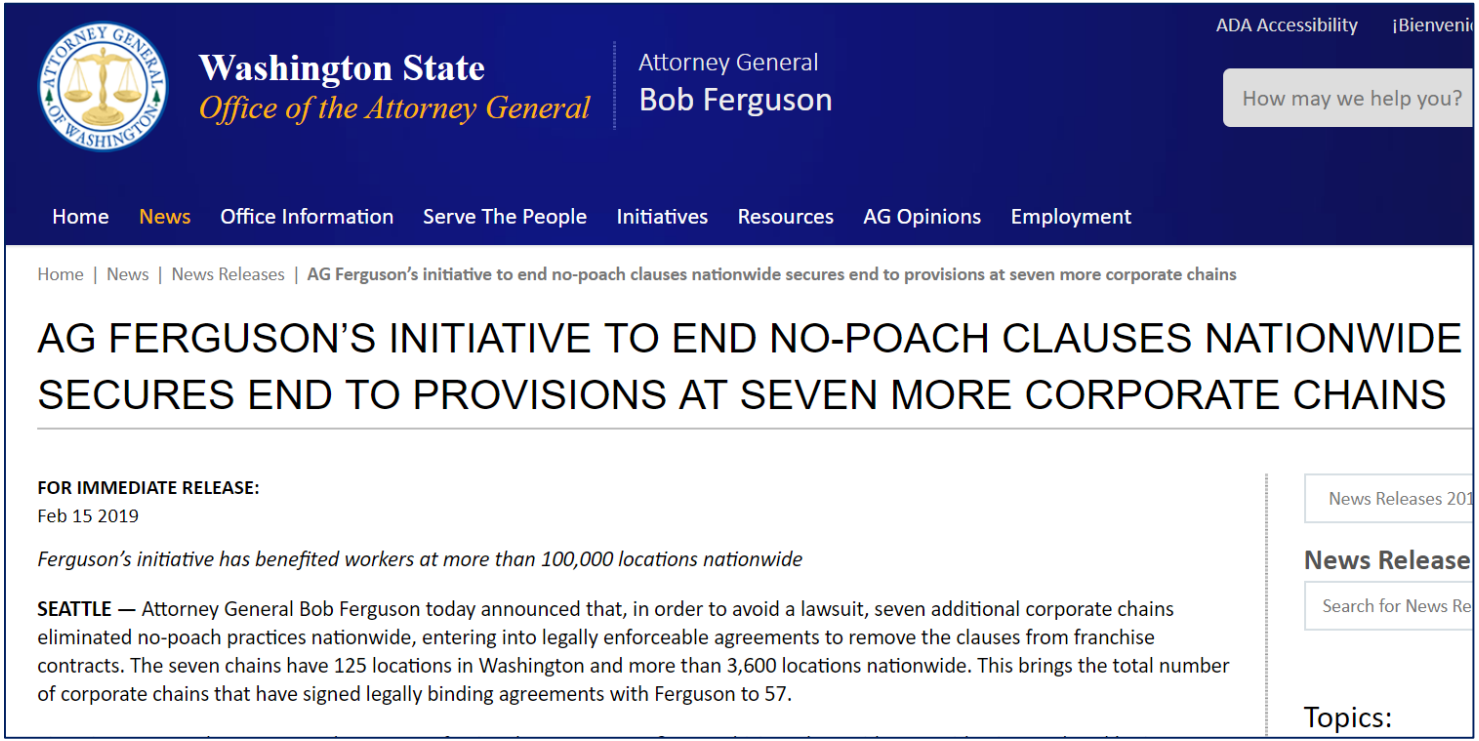
The United States has a significant interest in filing a statement of interest on these issues because it enforces the federal antitrust laws and has a strong interest in their correct application. Moreover, the United States has recently enforced the

https://www.justice.gov/atr/case-document/file/1141756/download

DOJ Statements of Interest Summary

- DOJ Position
  - Consider relationship of entities
    - Whether a single entity
      - Can be separate entities capable of conspiring
  - Per se rule applies to naked, horizontal no-poach agreements between rival employers
  - Alleged agreement is subject to the rule of reason so long as it is ancillary and reasonably necessary to the legitimate collaboration
    - Court should weigh the anticompetitive effects against the procompetitive benefits of no-poach agreements that qualify as either vertical or ancillary restraints
    - “Quick-look” form of rule of reason analysis is inapplicable
  - Cases subsequently dismissed by the parties in some recent cases
    - No court ruling on the merits

State AG Enforcement



Washington State
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Bob Ferguson
ADA Accessibility ¡Bienveni
How may we help you?
Home News Office Information Serve The People Initiatives Resources AG Opinions Employment
Home | News | News Releases | AG Ferguson's initiative to end no-poach clauses nationwide secures end to provisions at seven more corporate chains

AG FERGUSON'S INITIATIVE TO END NO-POACH CLAUSES NATIONWIDE SECURES END TO PROVISIONS AT SEVEN MORE CORPORATE CHAINS

FOR IMMEDIATE RELEASE:
Feb 15 2019

Ferguson's initiative has benefited workers at more than 100,000 locations nationwide

SEATTLE — Attorney General Bob Ferguson today announced that, in order to avoid a lawsuit, seven additional corporate chains eliminated no-poach practices nationwide, entering into legally enforceable agreements to remove the clauses from franchise contracts. The seven chains have 125 locations in Washington and more than 3,600 locations nationwide. This brings the total number of corporate chains that have signed legally binding agreements with Ferguson to 57.

News Releases 201
News Release
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https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-secures-end-provisions-0

FTC Wage Fixing Case

- FTC alleged that therapist staffing companies colluded to fix wages for the purpose of preventing individual therapists from seeking higher compensation at other therapist staffing companies, with the ultimate effect of increasing the companies' profits.

- Consent order
  - Prohibits company from agreeing to fix wages or sharing compensation information with other firms
  - Requires periodic compliance reports to the FTC
  - Authorizes the FTC to inspect the company premises and conduct interviews to determine compliance

Therapist Staffing Company and Two Owners Settle Charges that They Colluded on Rates Paid to Physical Therapists in Dallas/Fort Worth Area

Parties agreed to lower pay for home-care therapists

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FOR RELEASE

July 31, 2018

TAGS: Health Care | Health Professional Services | Bureau of Competition | Competition | Nonmerger | Unfair Methods of Competition

A Texas company that provides therapist staffing services to home health agencies, its owner, and the former owner of a competing staffing company have agreed to settle FTC charges that they agreed to reduce pay rates for therapists and invited other competitors to collude on the rates.

Your Therapy Source and other therapist staffing companies contract with or employ therapists, including physical, occupational, and speech therapists and therapist assistants, to treat patients of home health agencies. The complaint names Your Therapy Source, its owner Sheri Yarbray, and Neeraj Jindal, the previous owner of a competing therapist staffing company.

"Just as it is illegal for competitors to agree to fix prices on the products they sell in order to drive prices up, it is illegal for competitors to agree to fix wages or fees paid to workers in order to drive wages down," said Bruce Hoffman, Director of the Bureau of Competition. "All workers are entitled to competitive wages and the FTC will enforce the antitrust laws against any companies that agree not to compete for workers, or to attempt to drive down workers' wages. Fortunately, in cooperation with the Texas Attorney General's office, we were successful in stopping this conduct quite quickly. We will aggressively investigate any other instances in which companies engage in this type of behavior, and we will seek relief commensurate with the conduct, the harm to workers, and—where appropriate—any ill-gotten benefits received by the firms engaged in the illegal activities."

According to the complaint, the two owners agreed to lower their therapist pay rates to the same level and also invited several of their competitors to lower their rates in an attempt to keep therapists from switching to staffing companies that paid more. The complaint alleges that they entered into the agreement after learning that a home health agency planned to pay significantly lower rates to the therapist staffing companies for therapist services.

The complaint charges Your Therapy Source and the two owners with violating Section 5 of the Federal Trade Commission Act by unreasonably restraining competition to offer competitive pay rates to therapists; fixing or decreasing pay rates for therapists; and depriving therapists of the benefits of competition among therapist staffing companies.

https://www.ftc.gov/news-events/press-releases/2018/07/therapist-staffing-company-two-owners-settle-charges-they

LABOR AND EMPLOYMENT RISK FACTOR ISSUES

Common Risk Factors

1. Restrictive Covenant Disputes
2. Vendor Relationships and Other Business Relationships
3. Trade Association Meetings

Restrictive Covenants *with Employees*

Antitrust HR Guidance "does not address the legality of specific terms contained in contracts between an employer and an employee, including non-compete clauses."

- Non-compete and non-solicit agreements between employers and their *employees* continue to be governed by state law.
- In a majority of states, they generally are enforceable if they are reasonably limited to be necessary to protect an employer's legitimate business interests.
- Potential antitrust implications for agreements with employees, particularly in the resolution of a disputed breach.

Considerations from the Past Year

- "Janitor Rule" (*Medix Staffing v. Dumrauf*, No. 17-C-6646 (N.D. Ill. 2018))
- *AMN Healthcare v. Ava Healthcare*, No. D071924, 2018 WL 5669154 (Nov. 1, 2018)
- The Massachusetts Noncompetition Agreement Act
  - Applies to such agreements entered into on or after October 1, 2018
  - Minimum requirements for the enforceability of noncompetition agreements covering all private sector employees and independent contractors
  - Generally limits duration to one-year, requires "garden leave" or other pay, and bars noncompetes for certain types of workers, like lower-wage employees

Non-Compete Disputes

Common fact pattern:

- Employee A with a non-solicit agreement leaves Company 1 for a competitor, Company 2.
- Shortly after, Company 2 hires several of the employee's former direct reports.
- Company 1 seeks injunction in court.
- Evidence doesn't look good for Company 2.
- To resolve the case, Company 1 wants commitment from Company 2 that it won't hire away, or poach, any more employees.

Permissible?

Permissible Non-Solicit Agreements *between Employers*

Agreements that are “reasonably necessary to a larger legitimate collaboration between the employers,” including:

- ✓ Agreements “reasonably necessary for the settlement or compromise of legal disputes”
- ✓ Joint ventures
- ✓ Shared use of facilities
- ✓ Consulting services
- ✓ Outsourcing vendors
- ✓ Mergers or acquisitions

Requirements for a Permissible Agreement

V. CONDUCT NOT PROHIBITED

A. Nothing in Section IV shall prohibit a Defendant from attempting to enter into, entering into, maintaining, or enforcing a reasonable Agreement not to solicit, recruit, or hire employees that is ancillary to a legitimate business collaboration.

B. All Agreements not to solicit, recruit, or hire employees described in Paragraph V(A) that a Defendant enters into, renews, or affirmatively extends after the date of entry of this Final Judgment shall:

1. be in writing and signed by all parties thereto;
2. identify, with specificity, the Agreement to which it is ancillary;
3. be narrowly tailored to affect only employees who are reasonably anticipated to be directly involved in the Agreement;
4. identify with reasonable specificity the employees who are subject to the Agreement; and
5. contain a specific termination date or event.

Vendor Relationships and Other Business Relationships

Common fact pattern:

- Company hires IT services provider.
- Both company and IT services provider are concerned about the other's access to their top talent.
- To address concerns, they enter into agreement not to hire each other's employees.

Permissible?

Trade Association Meetings

Question (from Q&A in the Antitrust Guidance):
I am a new HR professional, and I am attending my first professional conference next week. What should I watch out for to avoid violating antitrust law?

DOJ/FTC Answer:
You should not enter into agreements about:

- *employee compensation,*
- *other terms of employment, or*
- *employee recruitment*

with other HR professionals who work at competitors, meaning other companies that compete for the same types of employees.

Also, avoid discussing specific compensation policies or particular compensation levels with HR professionals who work for competitors.

EVOLVING PERSPECTIVES ON STANDARD OF REVIEW IN CIVIL LITIGATION:

PER SE VS. QUICK LOOK VS. RULE OF REASON

Private No-Poach Litigation Predated the HR Guidance

- *In re: High-Tech Employee Antitrust Litigation* (N.D. Cal. No. 11-CV-2509-LHK)
  - Filed May 2011
  - Class claims brought by current and former employees against: Adobe Systems, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar.
  - Plaintiffs allege: "Defendants' senior executives entered into an interconnected web of express agreements to eliminate competition among them for skilled labor. This conspiracy included: (1) agreements not to recruit each other's employees; (2) agreements to notify each other when making an offer to another's employee; and (3) agreements that, when offering a position to another company's employee, neither company would counteroffer above the initial offer."
  - Settled in September 2015 for $415 million.
- Another example: *Cason-Merenda v. VHS of Michigan, Inc.* (E.D. Mich. No. 06-CV-15061) – class action brought by nurses alleging that Detroit-area hospitals entered into no-poach agreements; settled for $90 million in 2016 after ten years of litigation.

The Volume of Private Litigation Has Increased

- The volume of private civil litigation has increased since the issuance of the HR Guidance, reflecting increased scrutiny and interest among potential plaintiffs and the plaintiffs' bar.
- Potential factors motivating private litigation trends:
  - Joint and several liability under the antitrust laws – each defendant is independently liable for the full extent of the injuries stemming from the alleged wrongdoing
  - Treble damages
  - Attorneys' fees and interest
  - Injunctive relief

The Applicable Standard of Review Remains Unsettled

- Per Se Illegality
  - Certain categories of restraints, such as horizontal price restraints among competitors, are deemed illegal *per se* without any inquiry into their anticompetitive effects or consequences.

- Rule of Reason
  - The Rule of Reason looks at the challenged restraint holistically and weighs its anticompetitive consequences against potential procompetitive benefits.

- Quick Look
  - The "Quick Look" consists of abbreviated rule of reason analysis. The plaintiff need only show a form of market injury. The Quick Look test is applied where the challenged restraint is not one that is automatically subject to the *per se* standard, but is highly likely to produce anticompetitive effects.

Key Takeaways from Recent Litigation

- Private civil lawsuits stemming from no-poach agreements have affected a variety of industries and sectors. The trend is not industry-specific and similar lawsuits are likely to affect other industries as well.
- Claims may be brought under both federal and state competition laws.
- Fundamental questions remain whether courts will deem no-poach agreements illegal *per se* in the context of private, civil lawsuits. One federal court in Illinois has given an early indication that at least some courts may not do so.
- Other interesting questions remain regarding class certification and the extent to which courts will certify broad classes of employees, as opposed to more narrow classes of particular types of employees. In *Seaman v. Duke University* (M.D.N.C. No. 15-CV-462), for example, the court approved a narrower class than the class for which the plaintiff sought certification, reasoning that faculty and non-faculty employees were not similarly situated and that their claims would involve divergent proof.
- Plaintiffs that have been able to allege the existence of a no-poach arrangement through identified policies or statements of the defendants have generally survived motions to dismiss (*Duke University*).
- On the other hand, where the plaintiff could not point to a tangible policy, but only to circumstantial evidence of a no-poach arrangement, the *Frost v. LG Electronics* (N.D. Cal. No. 16-CV-5206) court granted the defendants' motion to dismiss.
- Given the significant stakes of antitrust litigation, many employers that currently use no-poach agreements are voluntarily eliminating them.

Import of Recent Department of Justice Statements of Interest

- The DOJ has filed statements of interest in a number of cases challenging no-poach agreements.
  - *In re: Railway Industry Employee No-Poach Antitrust Litig.*, 2:18-mc-00798 (W.D. Pa. Feb. 8, 2019) (DOJ argues in a statement of interest that naked horizontal no-poach agreements in the railroad industry should be subject to *per se* scrutiny).
  - *Seaman v. Duke University*, 15-cv-00462 (M.D.N.C. Mar. 7, 2019) (DOJ argues in its statement of interest that, if the court finds that a horizontal no-poach agreement was a naked restraint, the *per se* rule should apply).
  - In cases involving alleged vertical no-poach agreements the DOJ has argued that the rule of reason, rather than the quick look test, should apply.
    - Where there are allegations of agreements among horizontal parties or so-called hub-and-spoke agreements, however, the DOJ has urged application of the *per se* standard.

RULE OF REASON ANALYSIS AND THE NARROW TAILORING OF HR RESTRAINTS

Basic Elements

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

Basic Elements

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

- The “agreement” element:
  - Can be express or implied, written or oral
  - Even an understanding about “playing nice” can be interpreted as an agreement
  - Opportunities for collusion may include industry meetings, information exchanges, or bilateral communications with a competitor

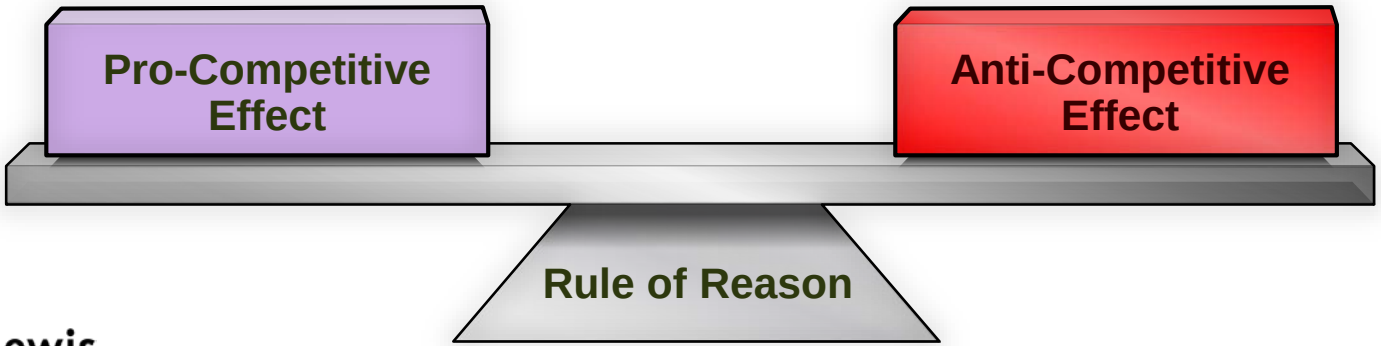
Basic Elements

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

  - ***Per se*** : Conduct so "pernicious" the only question is whether it happened

    vs.

  - **Rule of Reason** : Weighs an agreement's pro- and anti-competitive effects



DOJ-Recognized Examples of Rule of Reason Analysis

V. CONDUCT NOT PROHIBITED

A. Nothing in Section IV shall prohibit the Defendant and any other person from attempting to enter into, entering into, maintaining or enforcing a no direct solicitation provision, provided the no direct solicitation provision is:

1. contained within existing and future employment or severance agreements with the Defendant's employees;
2. reasonably necessary for mergers or acquisitions, consummated or unconsummated, investments, or divestitures, including due diligence related thereto;
3. reasonably necessary for contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers;
4. reasonably necessary for the settlement or compromise of legal disputes; or
5. reasonably necessary for (i) contracts with resellers or OEMs; (ii) contracts with providers or recipients of services other than those enumerated in paragraphs V.A.1 - 4 above; or (iii) the function of a legitimate collaboration agreement, such as joint development, technology integration, joint ventures, joint projects (including teaming agreements), and the shared use of facilities.

DOJ-Recognized Examples of Rule of Reason Analysis

V. CONDUCT NOT PROHIBITED

A. Nothing in Section IV shall prohibit a Defendant from attempting to enter into, entering into, maintaining, or enforcing a reasonable Agreement not to solicit, recruit, or hire employees that is ancillary to a legitimate business collaboration.

B. All Agreements not to solicit, recruit, or hire employees described in Paragraph V(A) that a Defendant enters into, renews, or affirmatively extends after the date of entry of this Final Judgment shall:

1. be in writing and signed by all parties thereto;
2. identify, with specificity, the Agreement to which it is ancillary;
3. be narrowly tailored to affect only employees who are reasonably anticipated to be directly involved in the Agreement;
4. identify with reasonable specificity the employees who are subject to the Agreement; and
5. contain a specific termination date or event.

How Does the Rule of Reason Work?

Step 1: Plaintiff bears initial burden of proving an agreement has substantially adverse effect on competition

Step 2: Burden then shifts to defendant to produce evidence of procompetitive virtues of the conduct

Step 3: Plaintiff then must show the conduct is not reasonably necessary to achieve the stated objectives, or that the anticompetitive effects nonetheless outweigh the procompetitive virtues

How Does the Rule of Reason Work?

Step 1: Plaintiff bears initial burden of proving an agreement has substantially adverse effect on competition

Question:	How elaborate must the initial analysis be?
Answer:	Hotly contested issue!
	- Direct evidence of actual harm may be enough
	- Otherwise, indirect evidence of market power is required

How Does the Rule of Reason Work?

Step 2: Burden then shifts to defendant to produce evidence of procompetitive virtues of the conduct

Question: What sort of justification works?

Answer: Wide array of procompetitive virtues

- Increased output
- Lower prices
- Increased efficiency
- Innovation / increase quality
- New products/services, increased consumer choice

How Does the Rule of Reason Work?

Step 3: Plaintiff then must show the conduct is not reasonably necessary to achieve the stated objectives, or that the anticompetitive effects nonetheless outweigh the procompetitive virtues

Question: How does this balancing play out?

Answer: Not much guidance!

- Intent does not really matter (although it may color the evidence)
- May involve fact disputes and/or battle of the experts
- Contemporaneous evidence is powerful
- Narrow tailoring is key

Key Reminders / Practical Tips

- HR-related restrictions must be tailored and connected to a lawful agreement
- ***Non-solicit*** agreements are probably safer than ***no-hire*** agreements
- Consider express carve-outs to help demonstrate the tailored nature of the provision, e.g.:
  - "Nothing in this agreement shall prevent a party from hiring a candidate who responds to a public job posting."
- Targeted provisions (in scope and duration) are always more defensible
  - Scope: Does a provision really need to apply to ***all*** job titles?
  - Duration: ***Months*** are better than ***years***
- Add antitrust training to traditional HR / employment trainings
  - Develop a "sensor network" within the Legal and HR teams so everyone understands the new nexus between antitrust and HR

Key Reminders / Practical Tips (Continued)

- Restrictions would need to be viewed as necessary to achieve the pro-competitive purpose of the merger, acquisition or lawful joint venture (called an "ancillary restraint")
  - Should be pre-approved by Legal Department!

Beware of Unlawful Information Exchange

- Direct exchange of HR-related information may be perceived as facilitating an implied agreement not to compete
- However, not all HR-related exchanges are illegal
- Safe Harbor Guidelines:
  - a neutral third party manages the exchange
  - the exchange involves info that is historic (backward-looking)
  - the info is aggregated to protect the identity of underlying sources
  - enough sources aggregated to prevent competitors from linking data to specific sources

Hypothetical 1: Information Exchange

- A software company is redesigning its employee handbook. It drafts the new handbook and other HR policies using the following info:
  - An HR staffer does a phone survey, contacting three main competitors, asking how many weeks of parental leave they each offer
  - A secretary reviews job postings on LinkedIn and industry websites to see job descriptions and compiles the information into a master chart
  - An in-house paralegal attends a law firm presentation and takes notes of how best to draft an employee arbitration clause
  - A compensation analyst refers to a study compiled by a third-party research firm, which provides average compensation data for certain job titles.
- Question: Any problems?

Hypothetical 2: Tech Collaboration

- A device manufacturer is collaborating with a component supplier on a next generation device. The collaboration involves cutting-edge technology and requires the sharing of valuable IP. In the midst of the project, the device manufacturer recruits and hires 3 of the top 5 engineers working on the project for the supplier.
- Question: Could the supplier have taken steps to prevent this?

Hypothetical 2: Tech Collaboration (Continued)

- The component supplier is angry and sues the device manufacturer. Eventually the parties settle. In the settlement, the parties include this:

  "For a period of 10 years, each party agrees to not hire any employee of the other."

- Question: Any problems?

UPDATE ON EU LAW/ENFORCEMENT ISSUES

How are no-poach agreements treated in Europe? (1)

- No-poaching or “naked” wage fixing agreements are restrictive **by object** under EU law (similar to per se in the US)

- In addition, forward-looking information exchange regarding levels of compensation between competitors is restrictive **by object**, assuming it reduces strategic uncertainty in the market.
  - Such illegal “concerted practices” can arise even where only one party discloses strategic information to a competitor who “accepts” it, in which case the competitor will be deemed to have accepted the information (and adapted its market strategy accordingly), unless it responds with a clear statement that it does not wish to receive the information.

How are no-poach agreements treated in Europe? (2)

- Market-wide restrictions such as deferred compensation plans may be restrictive **by effect** (similar to rule of reason) if there is an agreement or concerted practice to enforce them

- Restraints **ancillary** to e.g. a merger, joint venture or outsourcing may be enforced if they are narrowly defined and limited in time
  - See e.g. the Hungarian investigation featured in the selection of European cases in the following slides

Deferred compensation agreements

- **Anti-competitive effects of deferred compensation agreements**
  - Some jurisdictions require compensation in order for non-compete clauses to be enforceable (e.g. France and Germany).
  - Potential concern regarding **deferred compensation agreements** which require that an employee's deferred compensation is forfeited if they move to a competitor following termination.
  - **Net effect** may be that competition between firms is limited if several individuals have the same clause in the same industry.
  - Employee who forfeits compensation in this manner and is not made whole by his new employer may raise a formal complaint to a competition authority, which could result in an investigation.
  - Whether the agreement in question constituted an infringement would then likely depend on an economic analysis of the market to determine (i) whether competitors were foreclosed from access to skilled employees; and then (ii) whether the individual agreement appreciably contributed to that foreclosure.

Ancillary agreements not to solicit

- **European Commission Notice on Ancillary Restraints**
  - To obtain the full value of the assets being transferred in a transaction, buyer must be afforded some protection against competition to gain customer loyalty and assimilate know-how.
  - Non-solicitation clauses therefore guarantee the full value of the transferring assets.
  - However, they are only justified when their (i) **duration** (ii) **geographical scope** (iii) **subject matter** and (iv) **the persons subject to them** do not exceed what is **reasonably necessary** to implement the concentration.
  - Clauses justified for up to **three years** (when goodwill **and** know-how is transferred).
  - Clauses justified for up to **two years** (when **only goodwill** is included).

European cases (1)

- European cases:

  - **Ireland – asset management - 2018:** Central Bank of Ireland reportedly investigating alleged no-poach agreement between three Italian asset management firms.

  - **France – floor coverings - 2017:** Three PVC and linoleum floor coverings manufacturers fined a total of **€302 million** for entering into a gentleman's agreement not to solicit each other's employees and exchanging information relating to salaries and bonuses of their staff.

  - **Hungary – aluminium cart parts - 2016:** Two aluminium car part suppliers included a no-poach covenant in their merger agreement. Investigation now closed after the regulator accepted commitments to reduce the clause to three years.

  - **Italy – modelling agencies - 2016:** The Italian NCA fined eight modelling agencies a total of **€4.5 million** for wage fixing agreements.

European cases (2)

- European cases (cont.):

  - **Croatia – IT sector - 2015:** Gemicro allegedly concluded no-poach agreements with leasing companies that were its buyers, with provisions that prevented (i) the employment of any former Gemicro employee; and (ii) buyers from entering into agreements with competitors of Gemicro if their personnel were former employees of Gemicro. Regulator accepted commitments to eliminate the constraints.

  - **Spain – freight-forwarding - 2010**: Eight companies in the road transport freight forwarding industry were fined **€14 million** for concluding no-poach agreements that prevented parties from hiring employees working for a competitor without prior approval.

  - **Netherlands – hospitals - 2010:** Agreement between 15 Dutch hospitals preventing hospitals from re-hiring, for a 12-month period, employees who had terminated their contracts with one of the hospitals, was found to have an anti-competitive effect.

Future Enforcement in Europe

- **Increased scrutiny?**
  - Isabelle de Silva (head of France's competition authority) stated on 5 March 2019 that *"in terms of litigation, we plan to look more closely at collusive practices affecting the employment market, like no-poach agreements".*
  - Margarida Matos Rosa (president of Portugal's competition authority) stated on 28 March 2019 that *"there is a lot of positive scope for action"* regarding no-poach agreements. Likely to publish best practices paper in due course.

Sanctions for infringement

- **Civil vs. Criminal Treatment**
  - To date, no criminal charges levied against companies who have concluded no-poach agreements in Europe.

- **Criminal treatment is possible in the UK**
  - Criminal treatment is conceivable in the UK under the cartel offence:
    - **six months** imprisonment and fine (**£5,000** for offences committed before 12 March 2015 and **unlimited** for offences on or after 12 March 2015) if tried and convicted in magistrates court; and
    - **five year** imprisonment and **unlimited** fine if tried and convicted in crown court.

- **Director Disqualification**
  - Under the Company Directors Disqualification Act, the court must make a competition **disqualification** order on the application of the CMA or a sectoral regulator if:
    - the company of which the individual is a director has committed a breach of competition law; and
    - the court considers that his or her conduct as a director makes him or her unfit to be concerned in the management of company.

Other issues concerning competition in labour markets (1)

- **Is EU competition law applicable to the gig economy?**
  - Collective bargaining – including the setting of prices and minimum contractual safeguards – is a fundamental right enshrined in EU law despite its inherently anti-competitive nature. This is justified on social policy objectives.
  - However, individuals working in the gig economy may be classed as “self-employed”, and therefore as “undertakings” under EU competition law, and consequently do not have the ability to undertake collective bargaining despite having the characteristics of precarious workers rather than the stereotypical conception of the “self-employed” (e.g. doctors/entrepreneurs).

Other issues concerning competition in labour markets (2)

- **Evidence that national competition authorities perceive cartels among the self-employed as targets for enforcement action.**

  - **Netherlands - the Dutch orchestra case – 2007**
    - Dutch Competition Authority challenged an agreement that established a minimum wage for substitute musicians on the basis that it violated EU competition law. Hague Regional Court of Appeal referred questions to ECJ.
    - ECJ: Agreements entered into within the framework of collective bargaining between employers and **employees** are intended to improve employment and working conditions and are excluded from the scope of Article 101(1).
    - ECJ: A collective agreement between employers and **self-employed** service providers **cannot be excluded** from Article 101(1).
    - ECJ clarified that employees includes the **"false self-employed"** - service providers who are in a comparable situation to employees. This would **not include** many individuals working in the gig economy who are engaged in novel types of work for which no clear equivalents in terms of salaried labour exist. Some freelancers are therefore subject to same competition rules as utility companies or high-tech giants and subject to the same rules and prohibitions.
  - **Ireland – voiceover actors – 2003**
    - Irish competition authority decided that self-employed voiceover actors should not set tariffs or contract terms collectively.
    - Agreement breached Irish competition law as it established level of fees for services provided and therefore constituted price-setting.

Other issues concerning competition in labour markets (3)

- **Legislative change?**
  - **31 May 2017**: Irish Parliament adopted the Competition Amendment Bill which aims to introduce exemptions from competition law for certain self-employed workers.
  - The Act introduces two new categories of worker – a "**false self-employed worker"** and a **"fully dependant self-employed worker".** The Competition Act will not apply to collective bargaining and agreements in respect of those categories of worker.
    - **False self employed**: an individual who (i) performs for a person the same activity/service as an employee of that same person; (ii) has a relationship of subordination with that person; (iii) does not share in other person's commercial risk; (iv) has no independence regarding schedule and place or manner of work; and (v) forms an integral part of the other person's undertaking.
    - **Fully dependent self-employed**: an individual who performs services for another person under a contract and whose main income in respect of the performance of such services is derived from not more than two persons.
  - Extends collective bargaining rights to vulnerable workers who do not fit the classic employee definition. It explicitly includes voiceover actors, session musicians and freelance journalists.

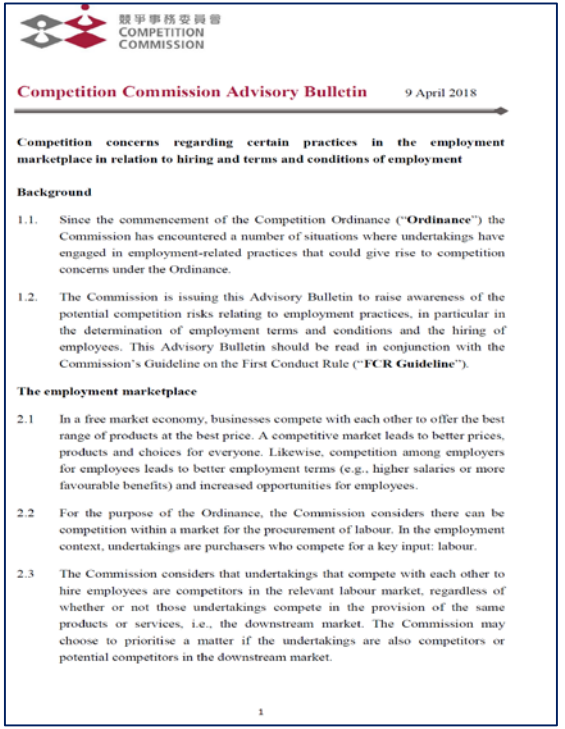
Practical advice – which firms have greatest risk on labour issues?

- Courts and competition regulators in Europe have made major findings in the following sectors:
  - Freight forwarding
  - Hospital
  - IT
  - Floor coverings
  - Car part supplier
  - Asset Management

PERSPECTIVES FROM ASIA:
NONCOMPETE AND NO-POACHING IN STRATEGIC ALLIANCES

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 no-poaching agreements made in the freight forwarding, hospitals, and IT employment sectors"



競爭事務委員會
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.

1

HR-related Antitrust Risks in Asia

- Considerable pressure on employers to engage in wage-fixing or no-poaching agreements in some of the Asian countries:
  - high turnover rate and increasing HR-related costs in an employee-friendly jurisdiction
  - competitive labor market for talent and specialized workforce
- Growing concerns expressed by competition authorities and increased enforcement activism against unfair competition and restraint of trade
- Increased acceptance by legal professionals that wage-fixing and no-poaching agreements or sharing of sensitive HR information violate competition laws

Legal Developments in Asia

- China
  - General prohibition of agreements, decisions or concerted actions eliminating or restricting competition or otherwise constitute unfair competition under PRC Amended Anti-Unfair Competition Law and Anti-Monopoly Law
  - Broad discretion of regulators to impose penalties on companies for engaging in unfair competition
- Hong Kong
  - Advisory Bulletin issued by HK Competition Commission in April 2018 providing guidance
  - No-poaching and wage-fixing agreements or sharing of sensitive HR information among employers listed as examples of practices that would contravene HK Competition Ordinance (Sec. 3.4 of Advisory Bulletin)

Legal Developments in Asia (cont'd)

- Japan
  - General prohibition under Japan Anti-Monopoly Act against unreasonable restraint of trade through contract, agreement or other means
  - Japan Fair Trade Commission, Report of Study Group on Human Resource and Competition Policy (Feb. 2018)
- Singapore
  - General prohibition under Singapore Competition Act against agreements, decisions or concerted practices by object or effect of preventing, restricting or distorting competition

Legal Developments in Asia (cont'd)

- Taiwan
  - General prohibition under Fair Trading Law in Taiwan against concerted actions that limit competition (such as an agreement among competitors limiting the price, quantity, counterparty, etc. that may affect the market order)
- India
  - General prohibition under Indian Competition Act against anti-competitive agreement
  - Non-solicitation clause between two commercial parties that does not prohibit lateral hiring was held valid by court (Wipro Ltd. v. Beckman Coulter)
  - India's competition authority closed several employment-related cases (such as predatory hiring, non-compete clauses) by characterizing them as employment issues
  - Although the Indian Competition Act does not expressly cover no-poaching or wage-fixing agreements, some legal professionals in India hold the view that these practices may fall within the purview of the Indian Competition Act and foreign competition law jurisprudence and might impact the development of Indian competition law in this regard

Enforcement Trends in Asia

- China
  - In November 2016, 46 private schools in Wenzhou (Zhejiang Province) were found to have entered into an agreement containing a no-poaching clause
  - Some legal professionals view it as violating anti-monopoly law while local education bureau encouraged it
  - No report of invalidation of such agreement or penalty imposed on the schools
- Hong Kong
  - No reported case of penalty imposed on employers for no-poaching agreement, wage-fixing or exchanging HR information
  - Several human resources trade associations warned by Competition Commission in 2016 that publication of industry-specific salary forecasts could violate HK Competition Ordinance

Enforcement Trends in Asia (cont'd)

- Japan
  - No reported case of penalty imposed on employers for no-poaching agreements, wage-fixing or exchanging HR information
- Singapore
  - No reported cases against employers for no-poaching/wage-fixing or exchanging HR information
  - 16 employment agencies fined by Competition Commission in 2011 for fixing the salary of new Indonesian Foreign Domestic Workers ("FDWs"), which is a component of the placement fee charged to the employers of such FDWs
- Taiwan
  - No reported case of penalty imposed on employers for no-poaching agreements, wage-fixing or exchanging HR information
- India
  - No reported case of penalty imposed on employers for no-poaching agreements, wage-fixing or exchanging HR information

HR Information Sharing – Data Privacy Concerns

- Pursuant to the PRC Cybersecurity Law ("CSL"), which took effect on June 1, 2017, companies must explicitly inform their employees of the types of information to be collected, the method, the purpose and the scope of data collection and use, and obtain their express consent before collecting, using, processing or transferring any personal information.
- Laws in other Asian jurisdictions such as Hong Kong, Singapore, Japan, Taiwan and India have similar requirements and prohibit unauthorized use or sharing of personal information.
- HR documents (e.g., employment contract) often contain employees' personal information (e.g., address, ID, salaries, position). These types of information, by themselves or combined with other information, can identify an individual, and therefore are protected under relevant data protection laws in Asia.
- Disclosing sensitive HR information to other companies in the same industry without the employee's consent may violate data protection laws in relevant Asian jurisdictions and result in civil, administrative or even criminal liabilities.

HR-related Antitrust Risks in China

- General prohibition of agreements, decisions or concerted actions eliminating or restricting competition or otherwise constitute unfair competition under PRC Amended Anti-Unfair Competition Law and Anti-Monopoly Law ("AUCL")
- Broad discretion of regulators to impose penalties on companies for engaging in unfair competition
  - Growing concerns expressed by competition authorities and increased enforcement activism against unfair competition and restraint of trade
  - Amended Article 2(2) of AUCL: prohibits unfair competition that disrupts order in the marketplace and undermines public interests
- Enforcement cases:
  - In November 2016, 46 private schools in Wenzhou (Zhejiang Province) were found to have entered into an agreement containing a no-poaching clause
  - Some legal professionals view it as violating anti-monopoly law while local education bureau encouraged it
  - No report of invalidation of such agreement or penalty imposed on the schools to date

Legacy No-Poaching Agreements

- Due to the opening of the Chinese market and increased diversification and expansion of economic activities in China, M&A transactions, business divestitures or restructuring are on the rise. Competitors may have historical connections or legacy no-poaching agreement that are still in effect.
- No-poaching agreements are often in the form of “gentlemen’s agreement.”
- Legacy no-poaching agreements might not be easy to identify, for they are often not memorialized in writing or formal HR policies, but the agreement between “friendly competitors” is nevertheless implemented in the hiring practices of these companies.
- HR personnel do not usually receive training on this topic and often lack awareness of how such agreement could create legal exposure.
- No-poaching agreements cannot be used in lieu of non-compete agreements to mitigate the costs of enforcing non-compete agreements under the PRC Labor Contract Law.

QUESTIONS?

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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.

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Daniel S. Savrin represents businesses in high-stakes civil and criminal litigation in federal and state courts and in the defense of government investigations with a focus on antitrust, consumer protection, and white collar criminal matters. He is a leader of the firm's consumer protection defense and automotive industry initiatives.

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Brian C. Rocca focuses on antitrust and complex litigation matters. He is managing partner of the firm's 135-lawyer San Francisco office and leader of the firm's Chambers-ranked California antitrust practice. Brian has worked on litigation, investigation, and counseling matters in many industries, with particular emphasis on technology and internet-based services. In 2017, Brian was named one of the "Top 40" lawyers in California under the age of 40 by the San Francisco and Los Angeles Daily Journal, and was named by Law360 as one of only five "Rising Star" competition lawyers globally.

Biography

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Omar Shah represents clients in complex global cartel and anticorruption investigations and civil proceedings for damages for breach of antitrust laws, as well in merger control procedures and on antitrust matters, particularly those involving the intersection of competition law with media/communications regulation. His practice involves representing clients before UK, EU, and other competition authorities, courts, and tribunals and in commercial and regulatory litigation proceedings, including judicial reviews. Chambers UK 2016 describes him as a "charming and effective partner who instantly wins the client's confidence and respect." Omar is admitted in England & Wales and Ireland only.

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Vishal H. Shah defends employers in labor and employment matters, including both single-plaintiff litigation and nationwide class actions. Vishal practices in both state and federal courts across the United States. His experience includes fact discovery, electronic discovery, taking and defending depositions, motion practice and argument, evidentiary hearings, expert discovery, trial preparation, and appellate briefing.

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Dora Wang advises multinational corporations in a broad range of industries on complex cross-border litigation and commercial dispute resolution, regulatory and compliance matters, government and internal investigations, and employment disputes. Dora regularly works with companies on matters involving Anti-Corruption laws (US Foreign Corrupt Practices Act, UK Bribery Act, and local anti-corruption requirements), antitrust/competition laws, cybersecurity and data privacy laws, due diligence in mergers and acquisitions, compliance audit and policy formulation and implementation, anti-money laundering legislations, and contentious employment matters such as labor arbitration and collective bargaining negotiations.

THANK YOU

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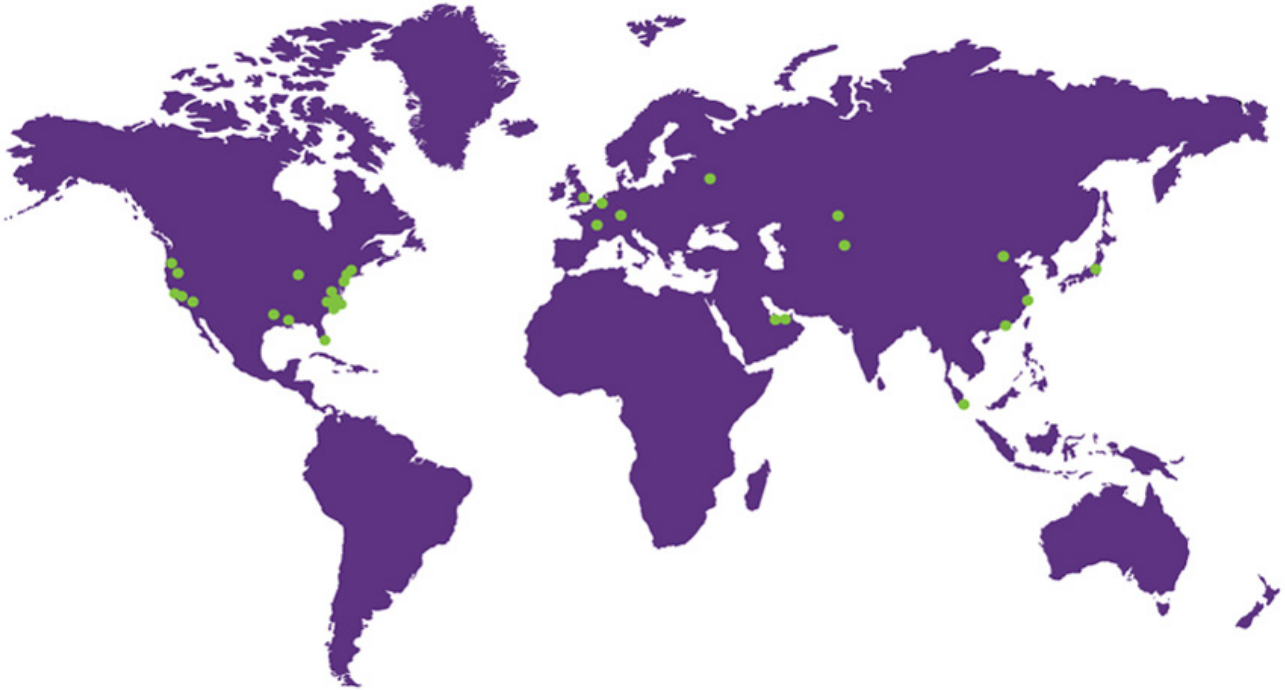

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