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NEW FEDERAL PROTECTIONS FOR
WHISTLEBLOWERS
**WHO REPORT CRIMINAL ANTITRUST VIOLATIONS
AND IMPACT ON LABOR MOBILITY ISSUES**

Speakers: Mark Krotoski, Lincoln Bisbee, Siobhan Mee, Bernie Archbold
January 28, 2021

Presenters



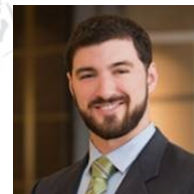
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Overview

- Summary of New Anti-Retaliation Protections for Antitrust Whistleblowers
- DOJ Enforcement Program and Recent Efforts
- Labor Mobility Issues and Focus
- Life of a Whistleblowing Case
- What Makes a Strong Whistleblower Program?
- New Issues Under the New Law
- Antitrust Compliance Program Updates and Review

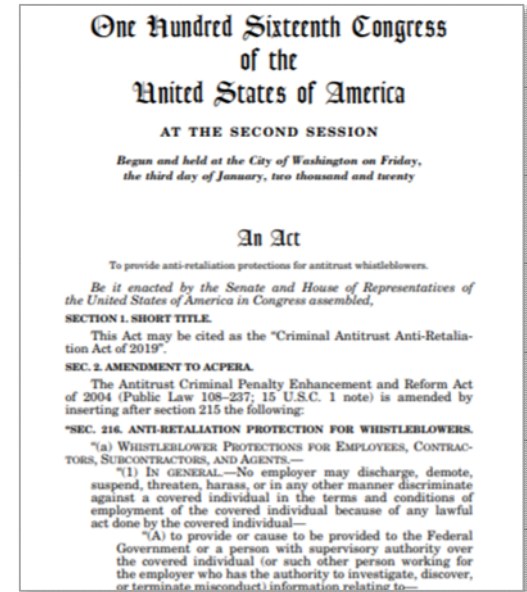
Summary of New Anti-Retaliation Protections for Antitrust Whistleblowers



Criminal Antitrust Anti-Retaliation Act

New Federal Anti-Retaliation Protections for Antitrust Whistleblowers

- Enacted Dec. 23, 2020 [Pub. L. No. 116-257]
- Consequences for criminal and civil antitrust investigations and cases
- Uses Department of Labor process to enforce anti-retaliation protections

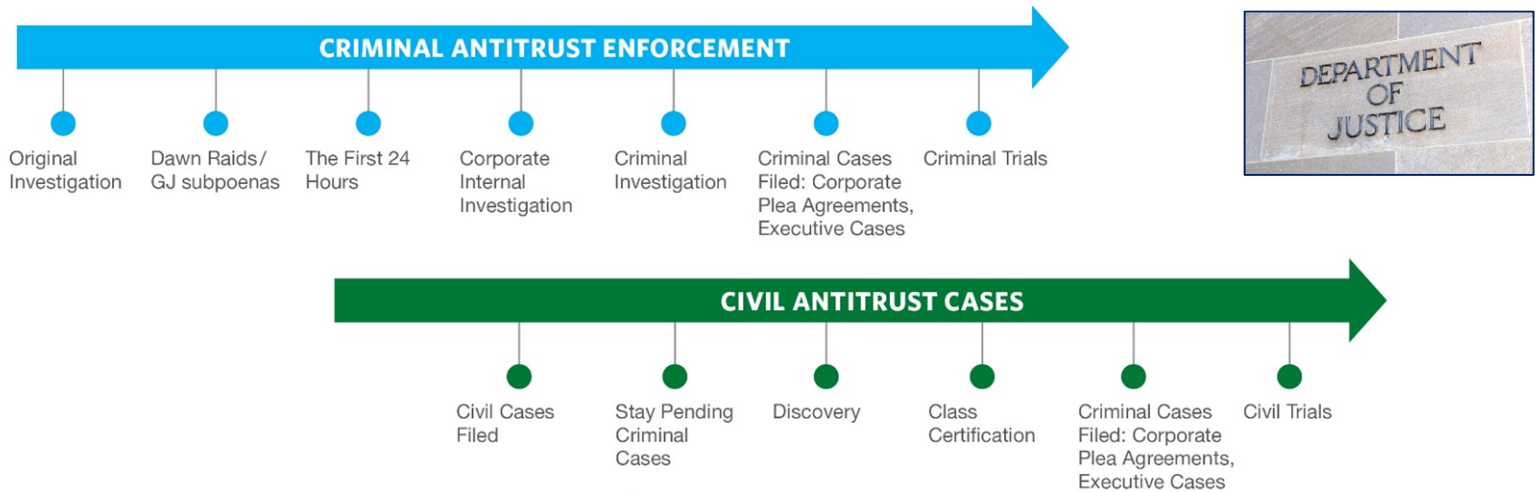


<https://www.congress.gov/116/bills/s2258/BILLS-116s2258enr.pdf>

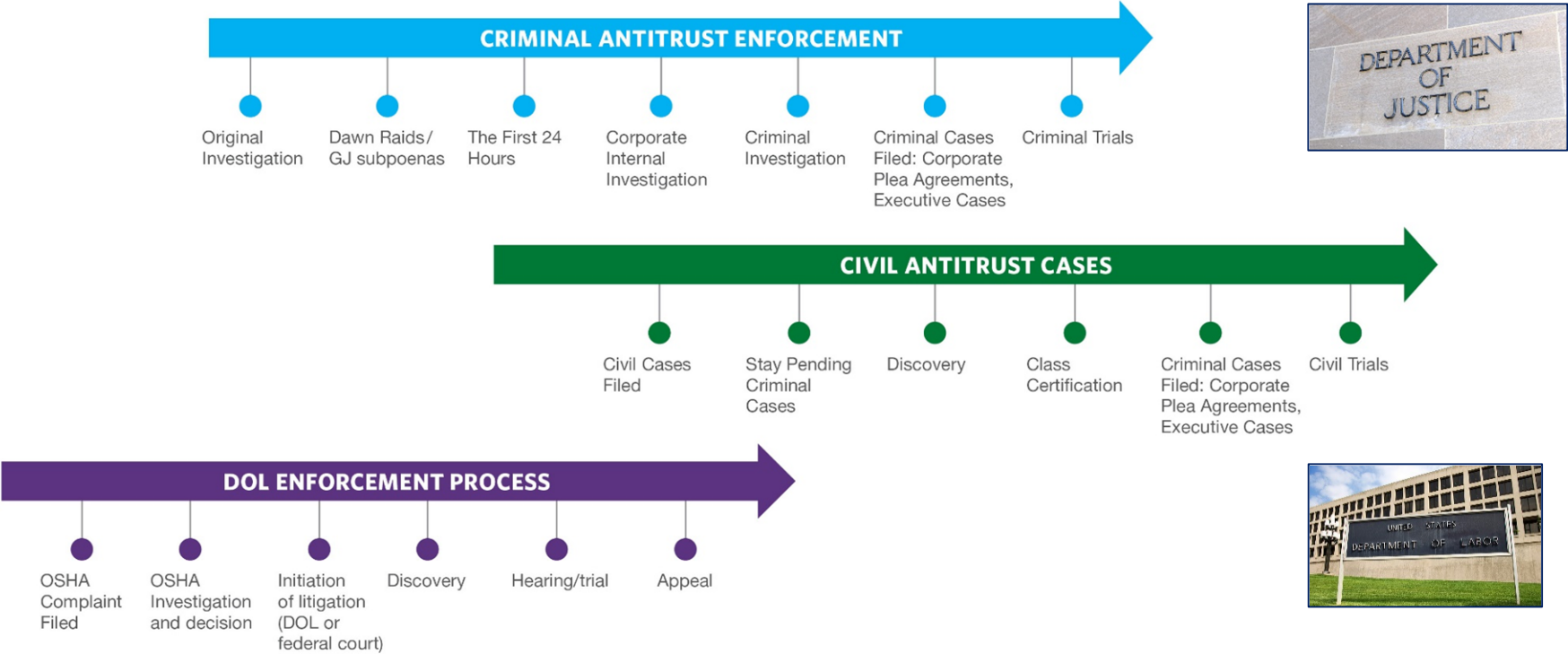
Antitrust Case Phases and Whistleblower Protections



Antitrust Case Phases and Whistleblower Protections

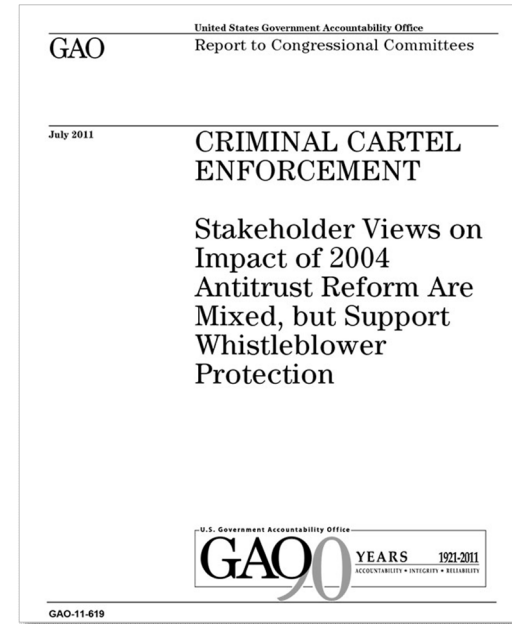


Antitrust Case Phases and Whistleblower Protections



Criminal Antitrust Anti-Retaliation Act

- Government Accountability Office (“GAO”) 2011 report on the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”) recommended new antitrust whistleblower protections.
 - ACPERA civil damages may be reduced to a company granted leniency if the company provides civil plaintiffs with timely, “satisfactory cooperation.”
- Senators Chuck Grassley (R-Iowa) and Patrick Leahy (D-Vermont) introduced antitrust whistleblower legislation each Congress since 2012.
 - Enacted Dec. 23, 2020 [Pub. L. No. 116-257]



<https://www.gao.gov/assets/330/321794.pdf>

Criminal Antitrust Anti-Retaliation Act Legislative History

Senate bill	Congress	Introduction	Senate Action	House Action
S. 2258	116th	July 24, 2019	Oct. 17, 2019 Unanimous consent	Dec. 8, 2020 Unanimous consent Enacted: Dec. 23, 2020
S. 807	115th	April 4, 2017	Nov. 15, 2017 Unanimous consent	Nov. 16, 2017 Received; no further action
S. 1599	114th	June 17, 2015	July 22, 2015 Unanimous consent	July 23, 2015 Received; no further action
S. 42	113th	Jan. 22, 2013	Nov. 4, 2013 Unanimous consent	Nov. 12, 2013 Received; no further action
S. 3462	112th	July 31, 2012	No further action	No action



Criminal Antitrust Anti-Retaliation Act

- **Covered Individuals**

- Employee, contractor, subcontractor, or agent of an employer

- **Protected Conduct**

- Report violation covered individual “**reasonably believes** to be a violation of”
 - Antitrust laws or
 - Another criminal law committed in conjunction with a potential violation of the antitrust laws or DOJ investigation
- Testify, participate, assist
 - Federal Government investigation
 - Federal Government proceeding

New Law:

“No employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against a covered individual in the terms and conditions of employment of the covered individual because of any lawful act” reporting antitrust law violations or assisting a federal investigation.

Criminal Antitrust Anti-Retaliation Act

- **Antitrust Laws**

- Sherman Act, Section 1, 3
- Price fixing, bid rigging, market allocation
- Violation not “construed to include a civil violation of any law that is not also a criminal violation”

- **Reporting To**

- Federal Government
 - Federal regulatory or law enforcement agency; or
 - Any Member of Congress or committee of Congress
- Person with supervisory authority over the covered individual
- Other person working for the employer who has the authority to investigate, discover, or terminate misconduct



Criminal Antitrust Anti-Retaliation Act

- **Exclude**

- Covered individual “**planned and initiated**” a violation or attempted violation of
 - the antitrust laws;
 - another criminal law in conjunction with a violation or attempted violation of the antitrust laws; or
 - An obstruction or attempted obstruction of a DOJ antitrust investigation

- **Note:** Consider and Analyze DOJ Leniency Program

Criminal Antitrust Anti-Retaliation Act

• Department of Labor Enforcement Process

- Complaint is filed with the Occupational Safety and Health Administration
 - Must be filed within 180 days of the alleged retaliation
- OSHA investigates the complaint and issues a decision
- Losing party may request de novo hearing before Administrative Law Judge
 - If no final order is entered within 180 days, complainant can move to federal court
- There is an appellate process following final agency order



Criminal Antitrust Anti-Retaliation Act

What must a complainant prove?

- Framework adopted from Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)
- Prima facie case of:
 1. Protected activity
 2. Adverse action
 3. Contribution factor

Can an employer avoid liability if complainant makes a prima facie case?

- Yes – by showing through clear and convincing evidence that it “would have taken the same unfavorable personnel action in the absence” of the protected activity.

Criminal Antitrust Anti-Retaliation Act

What remedies are available to a prevailing complainant?

- Reinstatement with same seniority status the individual would have had, but for the retaliation
 - Reinstatement orders are immediately effective and not suspended pending appeals
- Back pay, with interest
- Compensation for special damages
- Attorneys' fees and costs (including expert witness fees)

DOJ Enforcement Program and Recent Efforts



Sherman Act

“Every contract, combination in the form of trust or otherwise, or **conspiracy, in restraint of trade or commerce** among the several States, or with foreign nations, is declared to be illegal.”

15 U.S.C. § 1

Prohibits conspiracies “in restraint of trade or commerce”

- Since 1890

Only *per se* violations are prosecuted criminally

- Price fixing
- Bid rigging
- Customer or market allocation
- Production quantity agreements

Sherman Act

Criminal Penalties

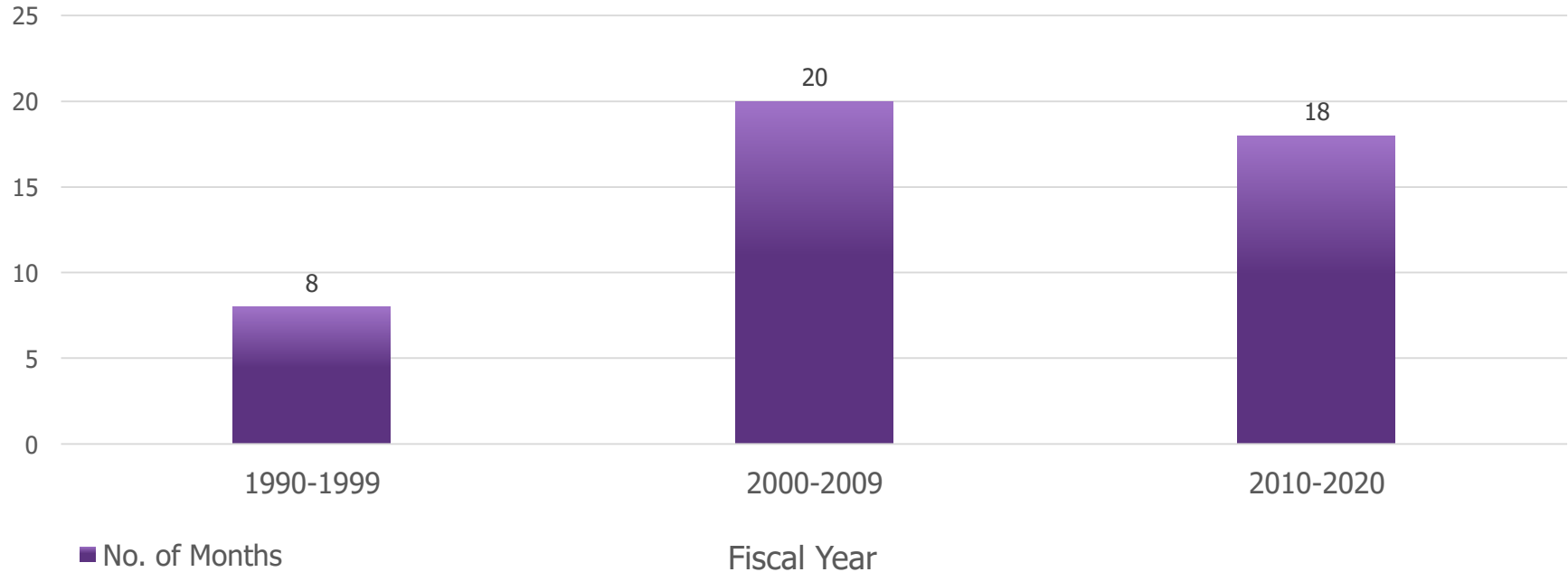
- *Corporate Fine*
 - \$100 million
 - Or “twice the gain or twice the loss from the violation”
- *Executives*
 - Prison term up to 10 years
 - Up to \$1 million fine or “twice the gain or twice the loss from the violation”



Criminal Enforcement Trends



Average Prison Sentence in Months



Recent Sentence



- CEO convicted following jury trial in the Northern District of California on one count of conspiring to fix prices of canned tuna
- Sentenced June 2020 to **40 months** in prison

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, June 16, 2020

Former Bumble Bee CEO Sentenced To Prison For Fixing Prices Of Canned Tuna

Christopher Lischewski, former Chief Executive Officer and President of Bumble Bee Foods LLC, was sentenced to serve 40 months in jail and pay a \$100,000 criminal fine for his leadership role in a three-year antitrust conspiracy to fix prices of canned tuna, the Department of Justice announced.

Lischewski was charged on May 16, 2018, in an indictment returned by a federal grand jury in San Francisco. After a four-week trial in late 2019, he was convicted on the single count of participating in a conspiracy to fix prices of canned tuna. In imposing Lischewski's 40-month prison sentence, the Court found that Lischewski was a leader or organizer of the conspiracy and that it affected over \$600 million dollars of canned tuna sales.

<https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna#:~:text=Christopher%20Lischewski%2C%20former%20Chief%20Executive,the%20Department%20of%20Justice%20announced.>

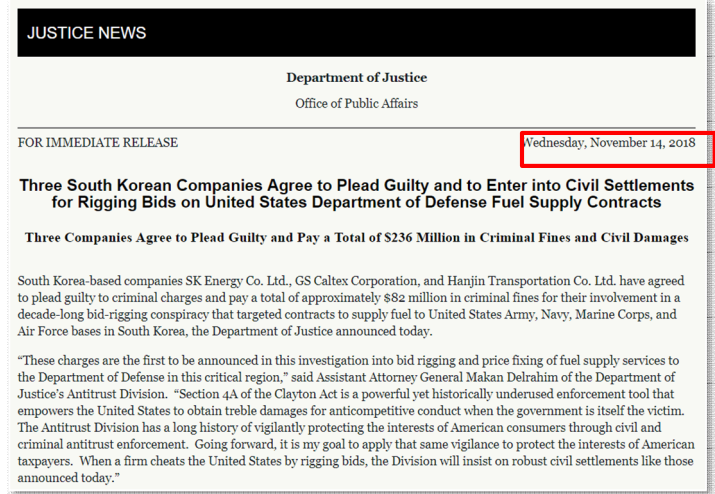
A Whistleblower Spurred Recent DOJ Criminal Enforcement Efforts Before the New Law

- Before the new law, DOJ previously used anonymous tips and relied on non-antitrust whistleblowers
 - The 2018/2019 Korean fuel supply bid-rigging cases started with a whistleblower
- That case maybe an example of what may come from the new antitrust whistleblower protections
 - The new law lacks any sort of whistleblower monetary reward, so it may not be as significant a reporting regime as other whistleblower statutes

Fuel Supply Bid Rigging Case: Nov. 2018



- Initial whistleblower report to Defense Logistics Agency Inspector General
- **3 companies** agree to pay a total of **\$236 million**
 - \$82 million in criminal fines
 - \$154 million in civil damages
- Bid-rigging conspiracy targeting contracts to supply fuel to US Army, Navy, Marine Corps, and Air Force bases in South Korea
- Civil settlement money to the US Government
 - Up to treble damages possible under Section 4A of the Clayton Act



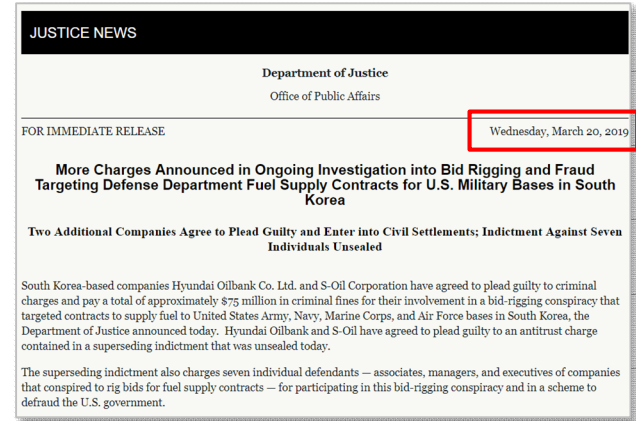
US v. GS Caltex Corporation et al, No. 2:18-cv-1456 (SDOH)

<https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids>

Fuel Supply Bid Rigging Case: March 2019



- **2 additional companies** agree to **pay \$127 million**
 - \$75 million in criminal fines
 - \$52 in civil damages
- **7 individuals charged**
 - Associates, managers, and executives of companies conspiring to rig bids for fuel supply contracts
- **Civil settlements**
 - Antitrust Division's Transportation, Energy, and Agriculture Section
 - Civil Division
 - USAO SD Ohio, Civil Fraud Section



US v. Hyundai Oilbank Co., Ltd & S-Oil Corporation,
No. 2:19-cv-1037 (SDOH)

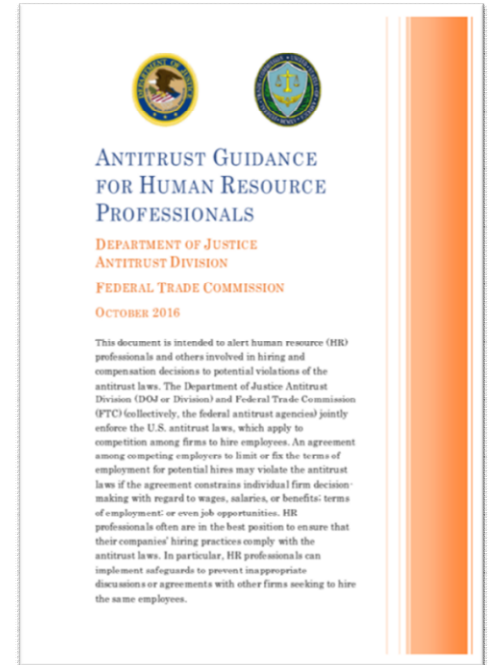
<https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense>

Labor Mobility Issues and Focus



Antitrust Guidance for HR Professionals

- Jointly issued by the Federal Trade Commission (FTC) and the United States Department of Justice (DOJ) in October 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 antitrust or civil liability
 - Provides notice for the first time that the DOJ will pursue certain employment-related agreements criminally, instead of just civilly, as it has historically done

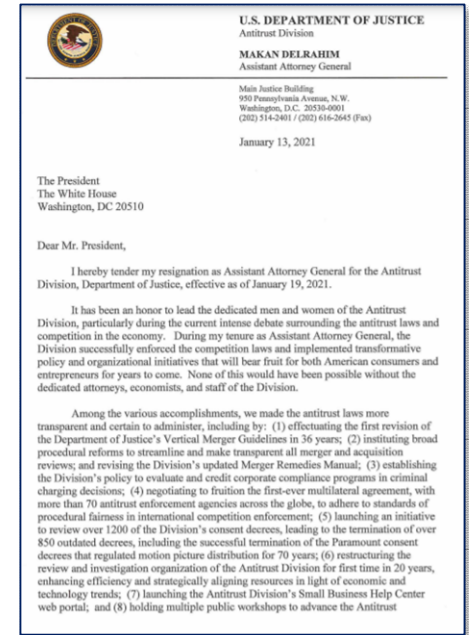


Criminalizing Wage-Fixing & No-Poaching Agreements

- **DOJ and FTC Joint Announcement**
 - **DOJ** for the first time will **criminally investigate and prosecute employers**, including individual employees, who enter into certain “naked” wage-fixing and no-poaching agreements
- ***Per se* unlawful**
 - Naked wage-fixing
 - Agreement “about employee salary or other terms of compensation, either at a specific level or within a range”
 - No-poaching agreements
 - Agreement “to refuse to solicit or hire that other company’s employees”

Recent DOJ Enforcement Efforts and Program

- In the past two months, DOJ announced its first alleged criminal “no poach” and wage-fixing cases.
- Former Assistant Attorney General Makan Delrahim emphasized these cases in his resignation letter (Jan. 13, 2021):
 - “[DOJ] brought the first ever criminal enforcement actions against no-poach and wage-fixing agreements, to protect American workers and deter competitors from colluding to undermine labor markets.”
- DOJ is expected to bring additional criminal no-poach and wage-fixing cases in the near future.



Potential Legal Avenues

- **Criminal Prosecution**

- Against individuals, the company, or both

- **Civil Enforcement**

- Against individuals, the company, or both

- **Private Litigation**

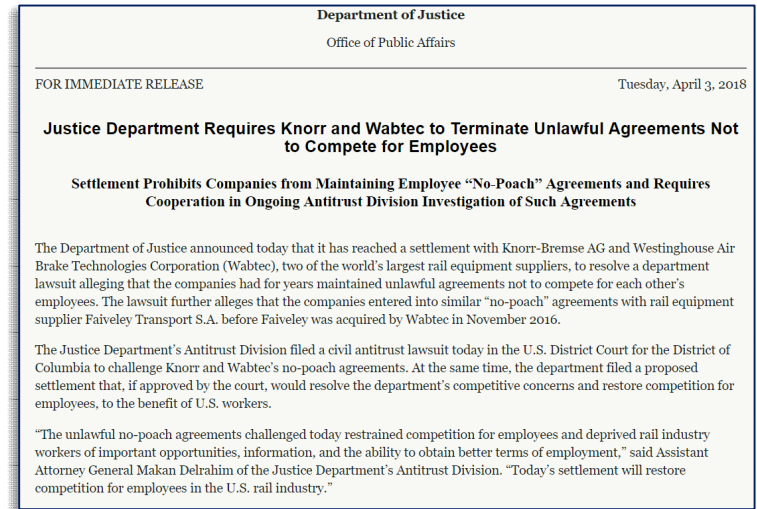
- Subject to treble damages
- Joint and several liability
- Injunctive relief
- Attorneys' fees and interest

- **Potential Plaintiffs**

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

DOJ First Civil Enforcement Action

- *U.S. v. Knorr-Bremse et al.*
 - 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)
- **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

- DOJ Statements of Interest
 - Filed in pending class actions
 - 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

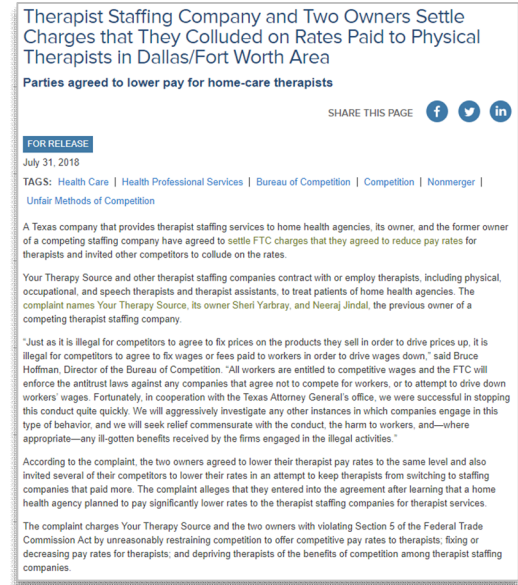
IN RE: RAILWAY INDUSTRY)	
EMPLOYEE NO-POACH ANTITRUST)	Civil No. 2:18-MC-00798-JFC
LITIGATION)	
)	MDL No. 2850
This Document Relates to:)	
ALL ACTIONS)	Judge Joy Flowers Conti

STATEMENT OF INTEREST OF THE UNITED STATES

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FTC Wage Fixing Case (July 31, 2018)

- 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



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

DOJ Criminal Wage Fixing Case (Dec. 10, 2021)

- Former owner of a therapist staffing company indicted
 - Conspiracy to fix prices by lowering the rates paid to physical therapists and physical therapist assistants
 - Obstruction of justice for false and misleading statements and withholding and concealed information during FTC investigation
 - Case pending

Text Communications	
Ind. 1	"Have you considered lowering PTA reimbursement ..."
Ind. 2	"the therapists are overpaid"
Ind. 1	"I think we re going to lower PTA rates to \$45"
Ind. 2	"Yes I agree," "I'll do it with u," "I think the PT's need to go back to 60 Our margins are disappearing."
Ind. 1	"[thumbs up emoji] I feel like if we're all on the same page, there won't be a bunch of flip-flopping and industry may stay stable."

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

Common Risk Scenarios

1. Trade Association Meetings
2. Resolution of Non-Compete Disputes
3. Vendor Relationships and Other Business Relationships

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.

Permissible Non-Solicit Agreements Between Employers

Those 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 Between Employers

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.

Biden Administration Focus



Biden Administration Focus

- During the recent presidential campaign, President Biden issued a "[Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions](#)."
- The goals of the Plan include helping "all workers bargain successfully for what they deserve" and checking "the abuse of corporate power over labor."
- With respect to non-compete clauses and no-poaching agreements, the Plan proposes to "[e]liminate [those] that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers:"

In the American economy, companies compete. Workers should be able to compete, too. But at some point in their careers, 40% of American workers have been subject to non-compete clauses. If workers had the freedom to move to another job, they could expect to earn 5% to 10% more—that's an additional \$2,000 to \$4,000 for a worker earning \$40,000 each year. These employer-driven barriers to competition are even imposed within the same company's franchisee networks. For example, large franchisors [like Jiffy Lube](#) have no-poaching policies preventing any of their franchisees from hiring workers from another franchisee. ***As president, Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category Of trade secrets, and outright ban all no-poaching agreements.*** (Emphasis added.)

Life of a Whistleblowing Case



Life of a Whistleblowing Case

Department of Labor Litigation

- Objection to OSHA decision filed with Office of Administrative Law Judges
- A de novo proceeding is initiated before administrative law judge
- Discovery and pre-hearing litigation commences
- Hearing followed by ALJ decision/order
- Appellate process both within DOL and federal courts of appeals

Federal Court Litigation

- Can be initiated by complainant if DOL has not issued a final decision on complaint within 180 days (other than due to complainant's bad faith)
- Follows standard federal court litigation and appellate processes

What Makes a Strong Whistleblower Program?

1. Multiple ways to report in a safe and secure manner.
 - a. Readily available and easy to use.
 - b. At least one should be anonymous.
2. Formal procedures to investigate and evaluate complaints.
 - a. Qualified, independent investigators.
 - b. Proper record keeping.
 - c. Where appropriate, update whistleblower at conclusion of investigation.
3. Protections for the whistleblowers.
 - a. Ensure no retaliation.
 - b. Measures to protect confidentiality to the extent possible.

New Issues Under the New Law



New Issues Under the New Law

- Considering the DOJ Leniency Program
- Encouraging internal reporting to allow the company to investigate and respond to allegations appropriately
- Anticipating increased scrutiny of no-poaching and wage-fixing agreements under the Biden Administration.
- Anticipated increased of resources for DOL enforcement of whistleblower statutes under the Biden Administration.

New Issues Under the New Law

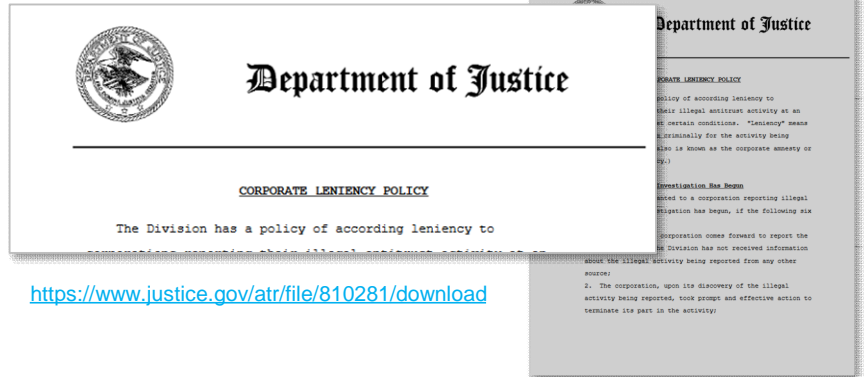


- DOJ new investigative reporting avenue
 - Properly incentivized whistleblowers may report criminal cartel activity
 - Leniency Program
 - Merger investigations
 - Anonymous tips
- Non-complicit whistleblowers can report what they reasonably believe to be criminal antitrust violations with remedies in case of employer retaliation
 - Whistleblowers reports may remove individual or company leniency option

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 & several liability

- **Confidential**
 - Identity of applicant and information provided held in strict confidence
 - Not shared with anyone, including foreign authorities, without applicant's permission



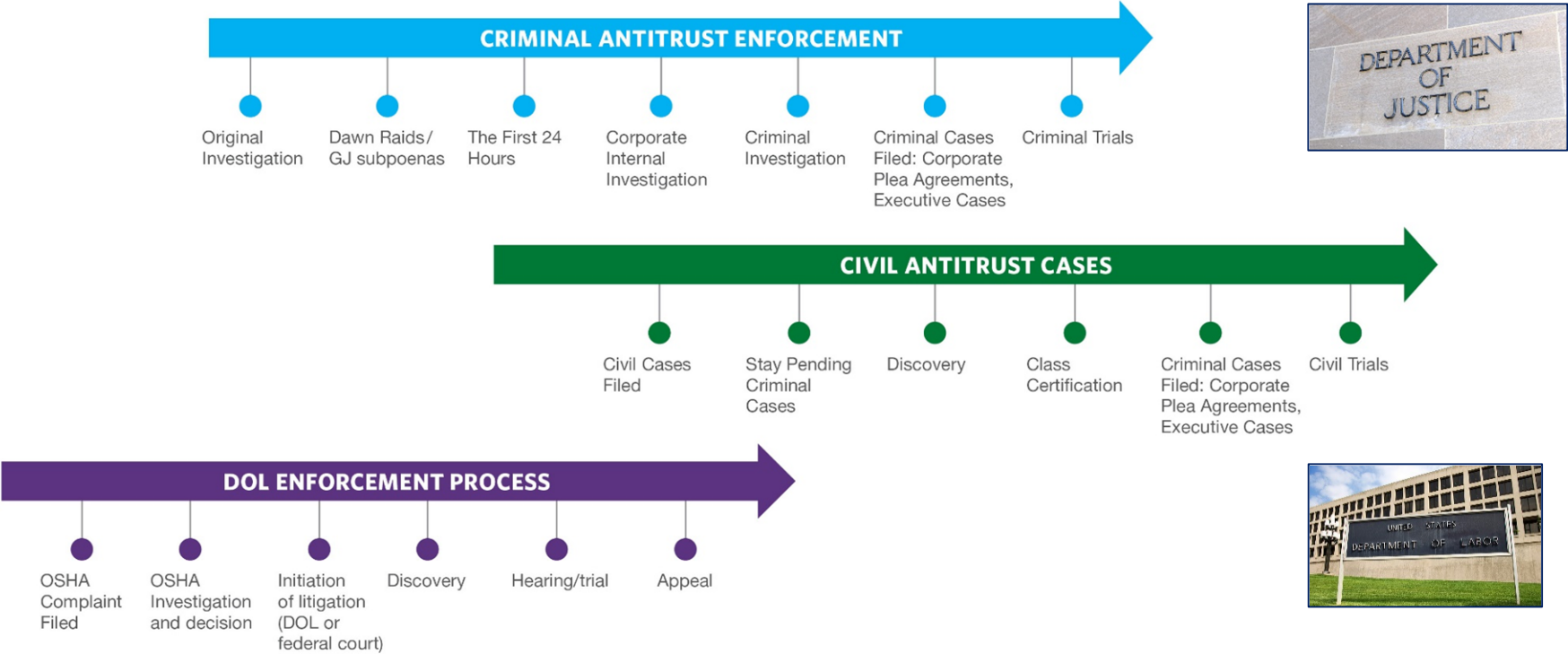
Race to Leniency Under Marker System



- “The Division grants **only one corporate leniency per conspiracy**, and in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency.”
 - Race to be the “First-in-the-Door”
 - Marker system
- “Time is of the essence”
 - “On a number of occasions, the second company to inquire about a leniency application has been beaten by a prior applicant by only **a matter of hours.**”

Frequently Asked Questions About The Antitrust Division’s
Leniency Program And Model Leniency Letters (Jan. 2017) 1-12.100

Antitrust Case Phases and Whistleblower Protections



Encouraging Internal Reporting

- Employee trust incentivizes internal reporting
 - Company retains greatest flexibility to limit exposure after internal reports
 - Reduce likelihood of:
 - executive prison sentences
 - individual and company criminal fines
 - trebled civil damages
 - Gain time to investigate internally / plan defense strategy
- Whistleblower protocol elements
 - Company leadership support (board members / executives)
 - Make retaliation unacceptable
 - Secure / anonymous reporting process
 - Accessible step-by-step reporting instructions
 - Independent investigations
 - Maximize transparency
 - Explain internal reporting benefits

New Issues Under the New Law

- Anticipating increased scrutiny of no-poaching and wage-fixing agreements under the Biden Administration.
- Anticipated increased of resources for DOL enforcement of whistleblower statutes under the Biden Administration.

Antitrust Compliance Program Updates and Review



Steps Companies Can Take Now

- **Update Antitrust Compliance Program**

- Satisfy New Antitrust Division Corporate Compliance Program Elements
- Review internal controls

- **Review and update Whistleblower Program**

- **Determine if you are prepared for a DOJ Investigation?**

- Dawn Raid Preparedness
- Criminal investigations
- Grand Jury Subpoenas
- Various scenarios

- **Training**

- Executives
- Sales
- Contractor's principals, employees, agents and subcontractors
- Employees who interact with customers or competitors (sales, market, customer relations, etc.) should be required to attend
- Emphasize the risk of agreements with competitors, including informal agreements, pose absent a legitimate business justification:
- Explain the potential harms to customers of anticompetitive agreements

New Antitrust Division Compliance Policy



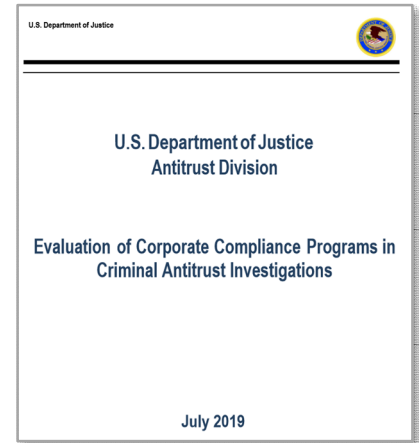
At charging, consider credit for compliance programs

- Possibility of a deferred prosecution agreement when “relevant factors, including the adequacy and effectiveness of the corporation’s compliance program, weigh in favor of doing so.”

At sentencing, an “effective” compliance program may result in

- Three-point reduction in a corporation culpability score under the Sentencing Guidelines
- Recommendation for a lower criminal fine and
- Recommendation on whether to impose probation

Guidance on factors used to evaluate antitrust compliance programs



<https://www.justice.gov/atr/page/file/1181891/download>

Antitrust Compliance Program Factors



- Design and comprehensiveness of the program
- Culture of compliance within the company
- Responsibility for, and resources dedicated to, antitrust compliance
- Antitrust risk assessment techniques
- Compliance training and communication to employees
- Monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program
- Reporting mechanisms
- Compliance incentives and discipline
- Remediation methods

Board and Management Role

- Board and management active role generally essential to the success of an antitrust compliance program
- New policy focuses on board and management leadership on antitrust compliance issues
- Board general duty of oversight to manage risk including antitrust risk
 - *Caremark* duty of oversight under *In Re Caremark International Inc. Derivative Litigation Consolidated Civil Action No. 13670*, 698 A.2d 959 (Del. Sept. 25, 1996), and progeny.

Dawn Raid Preparedness



- **Training:** Are you prepared?
- **Don't obstruct:** Be professional and cooperative.
- **Don't destroy** documents or other evidence.
- **Call counsel** immediately to protect your rights.
- **Keep a record**
 - What is searched, what is taken, who was involved in the search, and persons in focus.
- **Know your rights:**
 - Search limited to the scope of the warrant.
 - You have the right to receive inventory of materials seized.
 - You have the right to withhold or receive back-privileged materials.
 - In US, interviews on substantive topics are voluntary and may be refused. You may insist on counsel being present.
 - In EU, you must answer purely factual questions but may refuse to answer questions to which the answers may be self-incriminating.

Morgan Lewis
DAWN RAID GUIDELINES

GOLDEN RULES
ALERT AND ORGANIZATION

- **Don't obstruct:** Be professional and cooperative.
- **Don't destroy** documents or other evidence.
- **Call counsel** immediately to protect your rights.
- **Keep a record** of what is searched, what is taken, who was involved in the search, and persons in focus.
- **Know your rights:**
 - The search should be limited to the scope of the warrant.
 - You have the right to receive inventory of materials seized.
 - You have the right to withhold or receive back-privileged materials.
 - In the United States, interviews on substantive topics are voluntary and may be refused. You may insist on counsel being present.
 - In the European Union, you must answer purely factual questions but may refuse to answer questions to which the answers may be self-incriminating.

STEP-BY-STEP RESPONSE TO A DAWN RAID

1. **Ask to see** investigators' identification and documents authorizing the search.
 - a. Confirm that your company's premises are permitted to be searched.
 - b. Keep a record of the investigators' names and affiliations.
2. **Call counsel** immediately.
 - a. Ask investigators to wait for counsel to arrive (they may refuse).
 - b. Put counsel in touch by phone with investigators.
3. **Assign a point of contact** to interface with the investigators and organize the response.

- a. Provide a conference room free of business materials and away from business operators for investigators.
- b. Assign individuals to "shadow" investigators.
- c. Interface with outside counsel.

4. **Ensure document preservation:** send out a litigation hold notice immediately and take steps to ensure that all relevant evidence is preserved—regardless of location.
5. **"Shadow" the search**—assign someone to follow each investigator.
 - a. This person should be trained to understand the right of both the company and individuals.
 - b. Ensure that company employees are cooperating with the search.
 - c. Keep a record of all items searched and seized.
 - d. Involve external counsel for any questions regarding privilege.
6. **Make copies of all materials seized**—one copy for investigators and one copy for company files.
7. **Protect privileged materials** by objecting to the seizure of any privileged material and agreeing to a procedure to ensure that any privileged materials seized are returned. Involve outside counsel in this exercise.
8. **Do not break seals** where the investigators have sealed the company's premises (e.g., overnight).

HOW WE CAN HELP

If you need assistance with more detailed dawn raid guidelines or training, contact a Morgan Lewis lawyer listed below:

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Other Resources

- **FAQ**


- **Background Articles**

- Law Flash: New Federal Protections for Whistleblowers Who Report Criminal Antitrust Violations and Impact On Labor Mobility Issues (Dec. 28, 2020), <https://www.morganlewis.com/pubs/2020/12/new-federal-protections-for-whistleblowers-who-report-criminal-antitrust-violations-and-impact-on-labor-mobility-issues>
- Double-Check Whistleblower Programs to Prep for Antitrust Anti-Retaliation Act, Bloomberg Law (Jan. 7, 2021), <https://www.morganlewis.com/-/media/files/document/2021/double-check-whistleblower-programs-to-prepare-for-antitrust-anti-retaliation-act.pdf>
- Prospects Improve for Enactment of the Criminal Antitrust Anti-retaliation Act Of 2019, Competition Policy International (Dec. 15, 2019), <https://www.morganlewis.com/pubs/2019/12/prospects-improve-for-enactment-of-the-criminal-antitrust-anti-retaliation-act-of-2019-competition-policy-international>

- **Statute**

- Criminal Antitrust Anti-Retaliation Act, Pub. L. No. 116-257, <https://www.congress.gov/116/bills/s2258/BILLS-116s2258enr.pdf>

Morgan Lewis



FAQ'S

on the Criminal Antitrust Anti-Retaliation Act of 2019's Implications for **CORPORATE WHISTLEBLOWER AND CORPORATE COMPLIANCE PROGRAMS**

On December 23, 2020, the Criminal Antitrust Anti-Retaliation Act (the "Act") became law after three prior failed attempts at enactment between 2012 and 2020. The Act establishes protections for whistleblowers who report—either internally to a supervisor or individually with investigative authority, or externally to a federal regulatory or law enforcement agency or a member of Congress—what they reasonably believe to be criminal antitrust violations, crimes ancillary to criminal antitrust violations, or obstruction of DOJ criminal antitrust investigations. These protections are unavailable if the whistleblower "planned and initiated" the underlying crime or attempted crime.¹

The Act incentivizes "Covered Individuals" to report criminal antitrust violations by providing new protections against employer retaliation. This new reporting option may bring to DOJ's attention criminal antitrust violations that previously went undetected or that were detected later. Companies can help protect against greater liability and antitrust exposure by (i) implementing an effective whistleblowers program that encourages Covered Individuals to report suspected criminal antitrust violations internally, rather than to the government, and (ii) ensuring their antitrust compliance program satisfies the requirements set out in the Antitrust Division's July 2019 criteria for "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations."² Implementing these two best practices provides companies with the greatest flexibility when responding to allegations of criminal antitrust violations.

¹ Criminal Antitrust Anti-Retaliation Act of 2019, Pub. L. No. 116-257 (2020). For background on the Act, see Mark L. Krotoski & Bernard W. Archibald, Prospects Improve for Enactment of the Criminal Antitrust Anti-retaliation Act Of 2019, Competition Policy International (Dec. 15, 2019), <https://www.morganlewis.com/pubs/2019/12/prospects-improve-for-enactment-of-the-criminal-antitrust-anti-retaliation-act-of-2019-competition-policy-international>.

Questions



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Mark L. Krotoski is a Litigation Partner in the Anitrust Practice Group and 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 handling 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; white collar and government investigations; cybersecurity and privacy matters; trade secret; fraud matters.

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Lincoln O. Bisbee represents employers in a broad array of complex employment cases throughout the United States. As co-leader of the firm's whistleblower and retaliation taskforce, he routinely defends whistleblower cases under a variety of statutes both in court and before the US Department of Labor. Lincoln's practice also includes wage and hour class and collective actions, discrimination and employment tort claims, trade secret and non-compete litigation, and other significant employment disputes. In addition to representing clients in all phases of litigation at the trial court and appellate levels, Lincoln frequently advises clients on highly sensitive employment matters, litigation avoidance, and crisis management.

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Siobhan E. Mee represents companies and individuals in complex employment litigation matters, including noncompetition lawsuits, discrimination cases, and whistleblower actions. She also advises employers in connection with internal and government investigations. Her recent work includes defending a biotech company in litigation brought by its former CEO who claimed entitlement to a substantial ownership interest in the company, conducting an internal investigation into alleged fraud and other compliance issues raised by a whistleblower, and obtaining injunctive relief against a client's former sales team to prevent their breach of restrictive covenants and misappropriation of trade secrets. Siobhan is the leader of the labor and employment practice for the Boston office.

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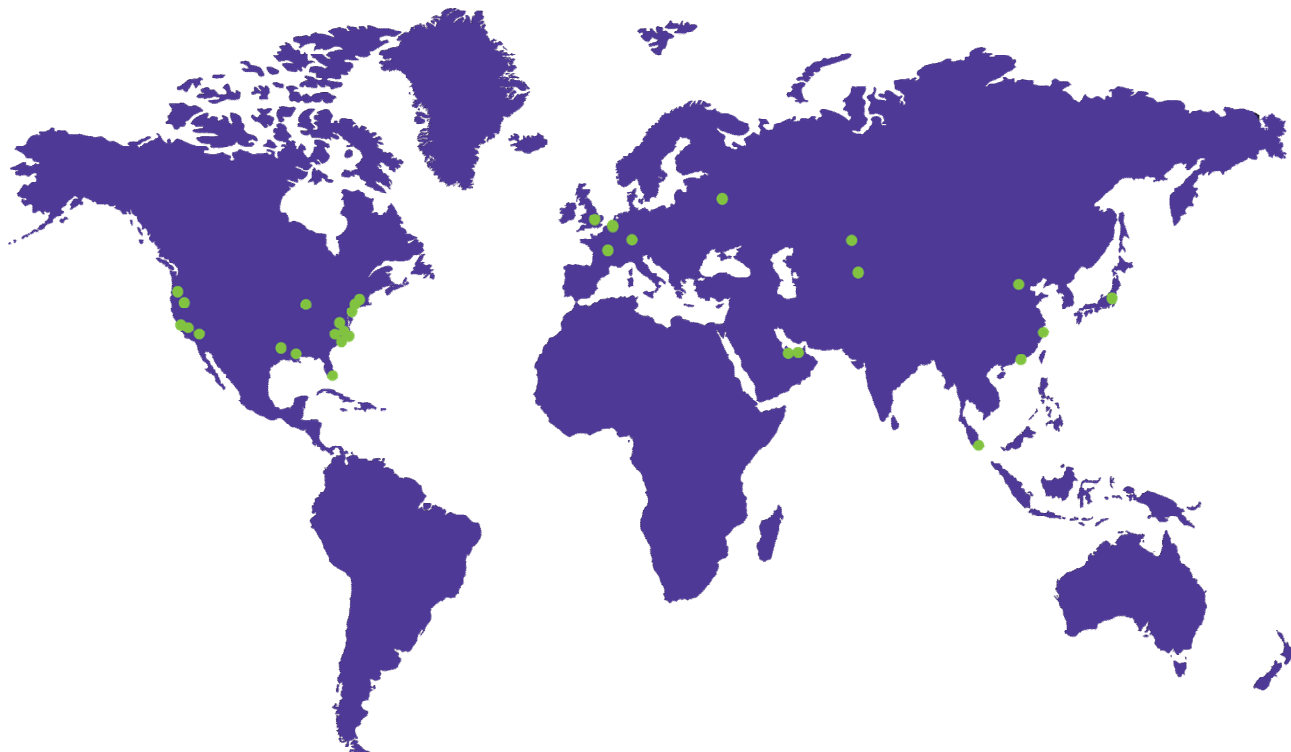
Bernard W. Archbold represents US and international clients in a variety of transactional antitrust matters including mergers, acquisitions, and joint ventures as well as in governmental investigations, civil antitrust litigations, and criminal cartel cases. Bernard conducts transaction-specific antitrust due diligence and works on premerger notification under the Hart-Scott-Rodino Act, international merger control, and merger investigations by the Federal Trade Commission and US Department of Justice.

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