



Morgan Lewis

ANTITRUST ENFORCEMENT IN LABOR MARKETS

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Please Note

- **The information** is based on publicly available information and the experience of the presenters and not from any particular case or matter.

Agenda

- Introduction – employment law, antitrust and the labor market
- Restrictive covenant legislation and litigation
- No-poach litigation and enforcement in the US
- Criminal enforcement issues
- Whistleblower retaliation
- EU and other international developments

Employment law, antitrust and the labor market (1)

- Employment and antitrust laws regulate the labor market in different ways
 - Blurring of line between employees and self-employed
 - Employees, “undertakings” and “false self employed”
 - EU Commission consultation on collective bargaining between self-employed
- Post-COVID, governments are seeking to increase labor market mobility and thus competition by banning non-compete and other restrictions in employment laws
 - **UK BEIS consultation; US labor law reform proposals**
- *“Prohibiting the use of non-compete clauses would have the benefit of providing greater certainty for all parties and could have a positive effect on innovation and competition by making it easier for individuals to start new businesses and enabling the diffusion of skills and ideas between companies and regions” (UK BEIS)*

Employment law, antitrust and the labor market (2)

- California's experience has shown that banning non-competes can result employers entering into no poach agreements to restrict labor market competition
 - Changes in employment laws can result in increased antitrust enforcement
- Could California's experience be replicated in Europe and the rest of the United States?
 - **US criminal antitrust enforcement**
 - **Civil antitrust enforcement in the EU**
 - **Criminal antitrust enforcement in the UK**
- How can employers navigate these changes in employment laws while avoiding antitrust enforcement?

RESTRICTIVE COVENANT LEGISLATION AND LITIGATION

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Transatlantic Non-Compete Developments (1)

State Level

- Several states have joined California in prohibiting non-compete clauses.
- New Washington, DC ban on non-competes will take effect as early as March 2021, subject to funding.
- Other states now impose notice and other requirements and prohibit non-compete clauses for low-wage workers.
- In states where there are no statutory restrictions, non-compete clauses generally remain enforceable if certain criteria are met.

Transatlantic Perspective: California

- California Business & Professions Code Section 16600:
“every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”
- Objectives
 - ✓ Encourage fluid mobility in the work force
 - ✓ Help those out of work to rejoin the workforce
 - ✓ Prevent stagnation of earnings
 - ✓ Encourage employees state-wide to develop professionally
- Exception for sale/dissolution of business



Transatlantic Non-Compete Developments (2)

Federal Level



Biden Administration Focus

During the presidential campaign, President Biden issued a “[Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions](#).”

- Goals: Helping “all workers bargain successfully for what they deserve” and checking “the abuse of corporate power over labor.”
- For 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”

Biden Administration Focus

“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.)”

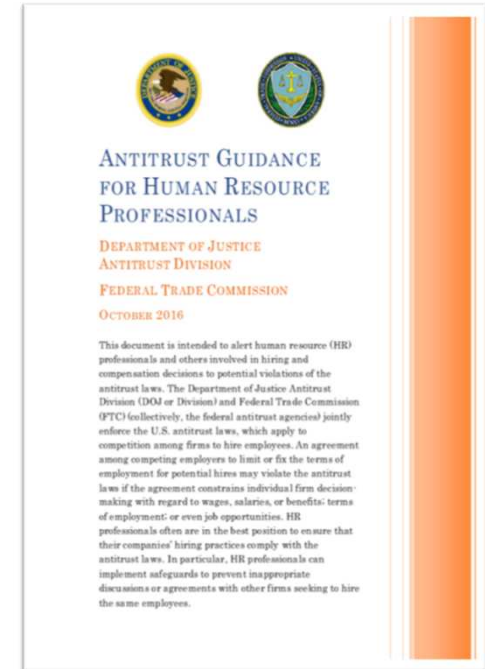
- July 9, 2021 – Executive Order on Promoting Competition in the American Economy.
 - Directs Federal Trade Commission to “address agreements that may unduly limit workers’ ability to change jobs.”

NO-POACH LITIGATION AND ENFORCEMENT IN THE US

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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—October, 2016**

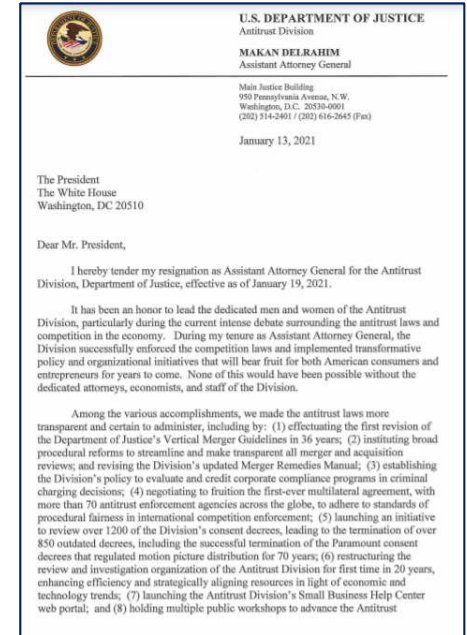
- **DOJ** for the first time will **criminally investigate and prosecute employers**, including individual employees, who enter into certain “naked” wage-fixing and no-poaching agreements

- ***Per se* unlawful**

- Naked wage-fixing
 - Agreement “about employee salary or other terms of compensation, either at a specific level or within a range”
- Naked no-poaching agreements
 - Agreement “to refuse to solicit or hire that other company’s employees”
- “Naked” means not “ancillary” to a legitimate procompetitive venture

Recent DOJ Enforcement Efforts and Program

- DOJ has brought multiple criminal prosecutions for alleged wage-fixing and no-poach agreements in the last year.
- 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.”
- Continues to be a primary focus of the Antitrust Division’s criminal enforcement agenda.



https://secureservercdn.net/166.62.112.219/f51.56e.myftpupload.com/wp-content/uploads/2021/01/Delrahim_Resignation_Ltr.pdf

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



Department of Justice Office of Public Affairs	
FOR IMMEDIATE RELEASE	Tuesday, April 3, 2018
Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees	
Settlement Prohibits Companies from Maintaining Employee “No-Poach” Agreements and Requires Cooperation in Ongoing Antitrust Division Investigation of Such Agreements	
<p>The Department of Justice announced today that it has reached a settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), two of the world’s largest rail equipment suppliers, to resolve a department lawsuit alleging that the companies had for years maintained unlawful agreements not to compete for each other’s employees. The lawsuit further alleges that the companies entered into similar “no-poach” agreements with rail equipment supplier Faiveley Transport S.A. before Faiveley was acquired by Wabtec in November 2016.</p> <p>The Justice Department’s Antitrust Division filed a civil antitrust lawsuit today in the U.S. District Court for the District of Columbia to challenge Knorr and Wabtec’s no-poach agreements. At the same time, the department filed a proposed settlement that, if approved by the court, would resolve the department’s competitive concerns and restore competition for employees, to the benefit of U.S. workers.</p> <p>“The unlawful no-poach agreements challenged today restrained competition for employees and deprived rail industry workers of important opportunities, information, and the ability to obtain better terms of employment,” said Assistant Attorney General Makan Delrahim of the Justice Department’s Antitrust Division. “Today’s settlement will restore competition for employees in the U.S. rail industry.”</p>	

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

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

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 Yarbrow, 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>

DOJ Criminal Wage Fixing Case (Dec. 10, 2020)

- 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>

DOJ Criminal Indictments 2021/2022

- January 7, 2021—Outpatient Healthcare Company (ND Tex)
 - Alleges non-solicitation agreements with two companies
 - Motion to dismiss pending
- March 30, 2021—Healthcare Staffing Company and Executive (D NV)
 - Alleges wage-fixing agreement and agreement “not to recruit”
 - Motion to dismiss denied, without resolving ultimate standard
- April 19, 2021—Executive of Therapist Staffing Company (ED Tex)
 - Wage-fixing
 - Motion to dismiss denied; conduct subject to per se rule
- July 15, 2021—Outpatient Healthcare Company and Executive (D CO)
 - Alleges non-solicitation agreements with three companies
 - Motion to dismiss denied, but not all non-solicitation agreements subject to per se rule
- December 9/16, 2021—Aerospace Engineering Outsourcing Executives (D CT)
 - Alleges hub and spoke conspiracy to “restrict hiring among suppliers”
- January 28, 2022—Home Health Staffing Companies (D ME)
 - Alleges wage-fixing and agreements not to hire

Aerospace Industry: Interplay between Criminal/Civil

- December 9, 2021 – Aerospace executive charged for allegedly participating in a conspiracy to restrict the hiring of engineers and other skilled laborers (i.e., restraint of trade)
- December 14, 2021 – Two proposed employment class actions filed
- December 16, 2021 – Six aerospace executives/managers indicted over alleged conspiracy against poaching
- December 16, 2021 – 3rd and 4th class actions
- December 17, 2021 – 5th and 6th class actions
- December 20, 2021 – 7th class action
- December 22, 2021 – 8th class action
- December 23, 2021 – 9th class action
- December 27, 2021 – 10th class action
- December 28, 2021 – 11th and 12th class actions
- December 29, 2021 – 13th class action
- December 31, 2021 – 14th and 15th class actions
- January 7, 2022 – 16th and 17th class actions
- January 12, 2022 – 18th class action
- January 13, 2022 – 19th and 20th class actions
- January 19, 2022 – 21st class action

In December 2021, the Department of Justice (DOJ) indicted six executives from the various defendants—except Collins Aerospace—citing Pratt & Whitney's role in the illegal no-poach agreement. Through Keller Lenkner's independent investigation, attorneys learned that the wrongdoing alleged in the DOJ indictment and Keller Lenkner's initial complaint is even broader than previously disclosed, leading to the allegations against Collins Aerospace.

WHISTLEBLOWER RETALIATION

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Criminal Antitrust Anti-Retaliation Act

New Federal Anti-Retaliation Protections for Antitrust Whistleblowers

- Non-complicit whistleblowers can report what they reasonably believe to be criminal antitrust violations with remedies in case of employer retaliation
- Consequences for criminal and civil antitrust investigations and cases
- Uses Department of Labor process to enforce anti-retaliation protections

New Law: Dec. 23, 2020

“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.

EU AND OTHER INTERNATIONAL DEVELOPMENTS

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Government consultations

Government changed
previous position due to
COVID-19

- UK BEIS has launched two consultations:
 - Measures to extend the ban on exclusivity clauses in contracts of employment
 - Post-termination non-compete clauses in employment contracts
- Aims:
 - **(1) Exclusivity clauses:** extend protection for low-income workers
 - **(2) Non-compete clauses:** make the UK more attractive to EU entrepreneurs after Brexit by making it harder for employers to stop their employees leaving and setting up in competition
- Previous initiatives:
 - **2014:** the Government consulted on whether the ban on exclusivity clauses in zero hours contracts should be extended to other contracts for low-income workers
 - **2016:** the Government published a [Call for Evidence](#) to understand how and why non-compete clauses are used but concluded that no legislative intervention was required

4 December 2020

Consultations open

26 February 2021

Consultations close

Date TBC

Government response to consultations

Restrictive Covenants (1)

Restraint of trade doctrine

- Any contractual term restricting an employee's activities after termination is **void for being in restraint of trade** and contrary to public policy, **unless** the employer can show that:
 - It has a legitimate proprietary interest that it is appropriate to protect.
 - The protection sought is no more than is reasonable having regard to the interests of the parties and the public interest.

Restraint of trade doctrine promotes **labour mobility** and **free competition** over the protection of proprietary information and property of the employer.

- **Note!** This freedom is subordinated to the worker's freedom of contract.

Restrictive Covenants (2)

Non-compete clauses

- Prevent an employee from joining a competitor within a defined period to protect employer's confidential information, customer connections and goodwill
- Must be reasonable, protect legitimate interests and cannot be too wide



Restrictive Covenants (3)

Practical tips

- Review existing contracts
 - Often not fit for purpose/unsigned/incomplete
- Tailor covenants to specific role
 - Don't use the same template covenant for all employees
- Review restrictions regularly and update if needed around bonus or promotion periods
- Consider impact of releasing/waiving covenants
 - Waiving a covenant for one employee might be used against you in future cases with a different employee
- Don't delay!
 - Gather evidence and try to secure a hearing date ASAP (if required)



Restrictive Covenants (4)

- Post-termination restraints are enforced using equitable remedies i.e. injunctions
- Granted at the discretion of the court

Key Principles



Reasonableness

Legitimate interest

Special treatment for employment covenants

Preventing competition must not be an end in itself

Restrictions must be no wider than necessary



Consultation on non-compete clauses (1)

(1)

Mandatory
compensation

(2)

Ban non-
compete clauses

- BEIS comments that proposed reforms are designed to:
 - Support economic recovery from the impacts of COVID-19
 - Boost innovation
 - Create the conditions for new jobs
 - Increase competition



Consultation on non-compete clauses (2)

Mandatory compensation

- Non-compete provisions enforceable only if employer provides compensation for the duration of the clause
- Similar rules exist in France, Germany, Italy and Spain
- Consultation seeks views on appropriate level of compensation and whether employers should have option to waive clause early



Enhancing Transparency

- Requirement for employers to disclose exact terms of non-compete agreement to employees in writing before they enter the employment relationship

Maximum Periods

- Statutory restrictions on max length of post-termination non-compete clauses
- Provide certainty and prevent employers from enforcing unreasonable lengths
- 3 months, 6 months, 12 months?

Consultation on non-compete clauses (3)

Total ban non-compete clauses?

- California has adopted the broadest approach
- The Government considers this could:
 - Provide greater certainty
 - Increase innovation and competition by making it easier for individuals to start new businesses / increase labour mobility



Other post-termination restrictions?

Impact

- Greater use of gardening leave/other indirect restraints (i.e. forfeiture provisions)
- Maximum allowed period may be used as standard resulting in longer restrictions
- Compensation might act as disincentive to impose clauses with long durations

Consultation on exclusivity clauses

Extending the ban on exclusivity clauses for low-paid workers earning less than the Lower Earnings Limit (£120 a week)

- Exclusivity clauses in zero hours contracts were banned in 2015 (s.27A(3) Employments Rights Act 1996)
- BEIS is revisiting its 2015 decision not to extend the ban to contracts of other low-income workers due to the impact of the Covid-19 pandemic
- Existing ban on zero hours contracts gives employees the right not be unfairly dismissed or subjected to a detriment
- BEIS proposes an exemption by setting an hourly wage cap at an appropriate level
- BEIS comments that the proposed reforms are designed to:
 - Allow low-income workers to secure additional work elsewhere
 - Maximise opportunities for individuals to find new work and drive economic recovery
 - Allow businesses to create jobs with contracts that suit their current circumstances

26% of workers under
Lower Earnings Limit
would like extra work

No Poach Agreements and Antitrust

Increased
scrutiny and
wider antitrust
implications?

Are the UK's proposed reforms part of a broader trend in Europe?

- Across Europe, antitrust agencies have most recently been investigating non-poaching deals in:
 - The automotive industry
 - Schools
 - Recruitment
 - Sport
 - IT employment



No Poach Agreements in Europe

While the European Commission has not previously looked at non-poaching agreements, there is clearly potential for them to fall foul of EU antitrust laws in the same way as other agreements that may be found to restrict competition:

By Object	By Effect	Ancillary Restraints
<ul style="list-style-type: none">• No-poaching or “naked” wage fixing agreements are restrictive by object under EU law• In addition, forward-looking information exchange regarding levels of compensation between competitors is restrictive by object, assuming it reduces strategic uncertainty in the market.<ul style="list-style-type: none">– Such illegal “concerted practices” can arise even where only one party discloses strategic information to a competitor who “accepts” it.	<ul style="list-style-type: none">• Market-wide restrictions such as deferred compensation plans or “bad leaver” provisions may be restrictive by effect if there is an agreement or concerted practice to enforce them	<ul style="list-style-type: none">• Restraints ancillary to e.g. a merger, joint venture or outsourcing may be enforced if they are narrowly defined and limited in time:<ul style="list-style-type: none">• See e.g. the Hungarian investigation featured in the selection of European cases in the following slides

Recent International Cases

- **Romania (2022):** Romania's competition authority has opened an investigation into seven automotive firms for alleged no poach agreements.
- **Spain (2022):** the Catalan competition authority has launched an investigation into an association of private schools for alleged no poach agreements.
- **Hungary (2020):** The Hungarian competition authority fined a recruitment association **€2.8 million** for imposing no poach rules in the association's code of ethics.
- **Portugal (2021):** The Portuguese Competition Authority issued a statement of objections against the Portuguese Professional Football League and 31 of its member clubs for an alleged agreement not to hire players who unilaterally terminated their employment contract with another club invoking issues caused by the pandemic.
- **France (2021):** The Supreme Court ruled on a Charter by which companies active in office and educational supplies agreed not to hire any salesperson employed by another company part of the Charter.
- **Poland (2021):** the Office of Competition and Consumer Protection announced an investigation against the men's basketball league and 16 teams, alleging collusion on "the terms for terminating the players' contracts and agree[ing] to withhold the players' remunerations among themselves."



Recent International Cases

- **Mexico (2021):** the Board of Commissioners of the Federal Economic Competition Commission (COFECE) fined 17 clubs and eight people \$8.5 million (MX\$177.6 million) for colluding by (a) agreeing to maximum wage caps for women players (removing labor competition and deepening the gender pay gap) and (b) segmenting the market for male players (by restricting labor mobility through preventing them from negotiating and signing with new teams).
- **Canada (2021):** the Competition Bureau released its updated Competitor Collaboration Guidelines (CCGs). The CCGs confirm that “purchasing agreements, including employee non-poaching and wage-fixing agreements, may be subject to review under the reviewable matters provisions in” the Competition Act. More recently, on October 20, Commissioner of Competition Matthew Boswell noted that concerns had been identified about “[g]aps in our cartel law, which mean that those conspiracy provisions do not protect workers from egregious agreements between competitors that fix employees’ wages and restrict workers’ job mobility.”
- **Colombia (2021):** the Colombian competition authority, Superintendence of Industry and Commerce (SIC), announced an investigation against the organization that operates professional football leagues (División Mayor del Fútbol Profesional Colombiano), 16 professional soccer teams, and 20 individual club managers and league heads, based on a complaint that they were participating in an alleged no-poach agreement.



A “new era” of cartel enforcement against no poach agreements in Europe? (1)

- EU Executive Vice President Margrethe Vestager said on October 22 2021 that the **European Commission** will for the first time focus on no poach agreements:
- *“Buyer cartels like this one may not raise prices for consumers. But that doesn’t make them some sort of victimless crime. They still make our economy work less efficiently. And they still have direct victims – even if it’s suppliers, not consumers, who suffer. And some buyer cartels do have a very direct effect on individuals, as well as on competition, when companies collude to fix the wages they pay; or when they use so-called “no-poach” agreements as an indirect way to keep wages down, restricting talent from moving where it serves the economy best. And that’s not the only way that an agreement not to poach each other’s staff can create a cartel. There are markets where you can only compete if you have expensive machinery, or costly IP. And then there are those where the key to success is finding staff who have the right skills. So in these cases, a promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market.”*



Impact of
Brexit?

A “new era” of cartel enforcement against no poach agreements in Europe? (2)

- In September 2021, the Portuguese Competition Authority released a policy paper on labor market enforcement.
- It also published a Good Practice Guide entitled “Prevention of Anticompetitive Agreements in the Labor Market,” which sets out the various ways labor market agreements or practices might be viewed as anticompetitive, including:
 - Exchanging sensitive information about remuneration and recruitment of workers (merely exchanging information could be considered anticompetitive depending on the type, level of aggregation and way in which the information is shared),
 - Entering into agreements with other firms about salaries or other forms of compensation of their employees, and
 - Participating in meetings, such as business association meetings, where other companies are present, and in which they discuss wage-fixing and other forms of compensation related to each other’s employees.
- The guidance recommends that firms raise workers’ awareness and conduct internal training, particularly for human resources personnel, to better understand the full list of agreements and practices that may be considered anticompetitive.
- The guidance encourages firms to use the agency’s anonymous complaint portal or apply for leniency via its Leniency Program if they become aware of any potential restrictions on competition.

How can employers navigate these changes in employment laws while avoiding antitrust enforcement?

- **J**oined up approach to managing employees
 - Ensure HR and antitrust teams are aligned on approach
- Use **O**ppportunity to review key agreements and clauses
 - e.g. deferred compensation, good and bad leaver provisions
- Obtain **B**uy-in from senior leadership for comprehensive training for senior management
- Put a full **S**top to unlawful information exchange:
 - Avoid emails like: “*I would be very pleased if your recruiting department would stop doing this,*” AND responses like “*I believe we have a policy of no recruiting from [X] and this is a direct inbound request. Can you get this stopped and let me know why this is happening? I will need to send a response back to [x] quickly so please let me know as soon as you can.*”
- Morgan Lewis has a unique joined up approach to these issues worldwide and its Global Antitrust and Labor & Employment groups would be pleased to assist you.

Biography



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Clay counsels clients on a range of antitrust issues. These include civil and criminal antitrust litigation, as well as merger and nonmerger investigations by the Federal Trade Commission (FTC) and the US Department of Justice (DOJ), and securing merger approvals. He has represented clients in more than 100 antitrust class actions in federal and state court. Clay also counsels clients and litigates issues at the intersection of antitrust and intellectual property law.

Biography



Mark Krotoski

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Mark is a Litigation Partner in the Antitrust 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.

Biography



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Omar 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 intellectual property as well as media/communications, pharmaceutical, transport, financial services, and data privacy regulations. Omar's 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 has described him as a "charming and effective partner who instantly wins the client's confidence and respect."

Biography



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Sabine Smith-Vidal advises French and international companies on labor and employment issues associated with cross-border transactions, mergers, acquisitions, and corporate restructurings. Working closely with her clients, Sabine assists with the establishment of pension plans, employee savings plans, and social plans. She advises corporations on multijurisdictional employment issues, including trade union law, outsourcing, and individual and collective dismissals. In addition, Sabine provides guidance and legal representation in labor dispute litigation. Sabine is the managing partner of Morgan Lewis's Paris office.

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Vishal litigates high-stakes employment cases, including high-profile noncompete, nonsolicit, and trade secret cases. He also has substantial experience managing complex class and collective actions and litigating executive/partnership disputes involving strategic business considerations. Vishal litigates matters at all stages in both state and federal courts across the United States, as well as in arbitration and other alternative dispute mechanisms.

Our Global Reach

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Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

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