Morgan Lewis Technology May-rathon 2018

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This year is our 8th Annual May-rathon and we are offering over 25 in-person and virtual events on topics of importance to our clients including issues of privacy and cybersecurity, new developments in immigration, employment and tax law, fintech, telecom, disruptive technologies, issues in global tech and more.

A full listing and of our tech May-rathon programs can be found at https://www.morganlewis.com/topics/technology-may-rathon

Be sure to tweet **#techMayrathon**

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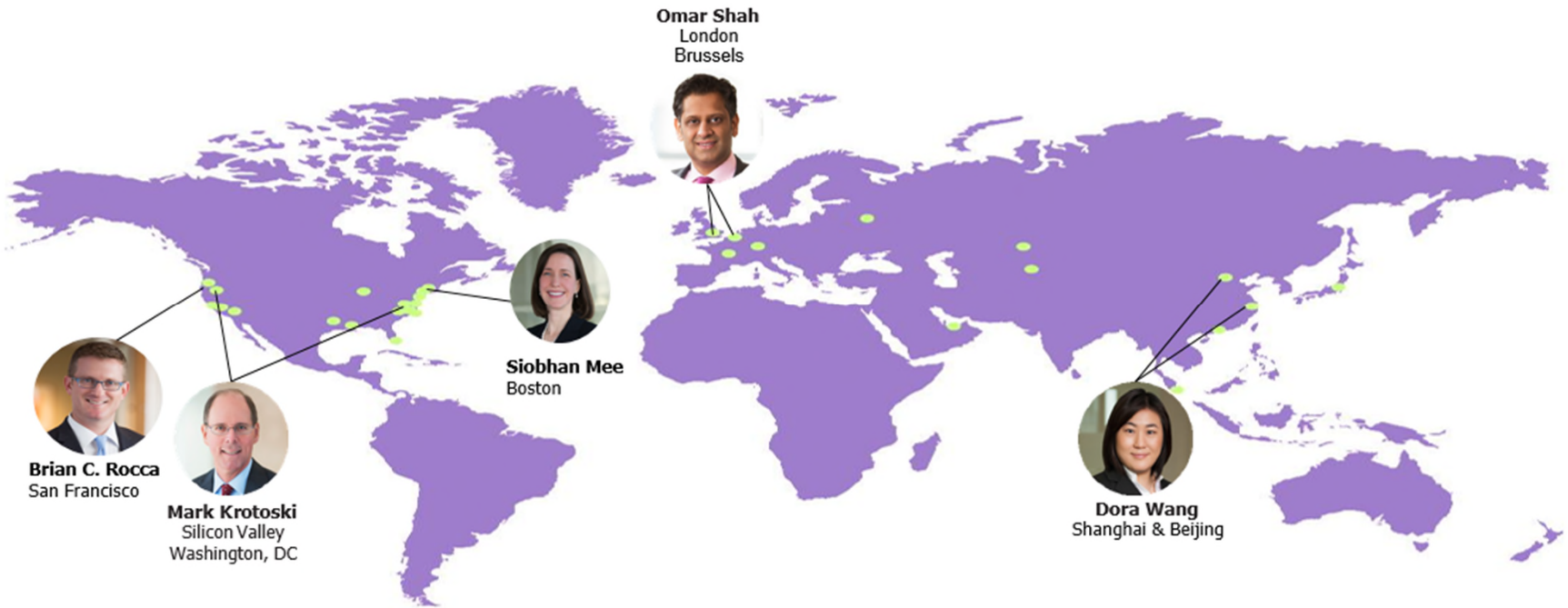
Morgan Lewis

NO-POACHING & AGREEMENTS AND ANTITRUST LAWS: WHAT GLOBAL EMPLOYERS SHOULD KNOW

Mark Krotoski, Brian Rocca, Siobhan Mee, Omar Shah, Dora Wang

May 23, 2018

Presenters


Omar Shah
London
Brussels
Siobhan Mee
Boston
Brian C. Rocca
San Francisco
Mark Krotoski
Silicon Valley
Washington, DC
Dora Wang
Shanghai & Beijing

Topics

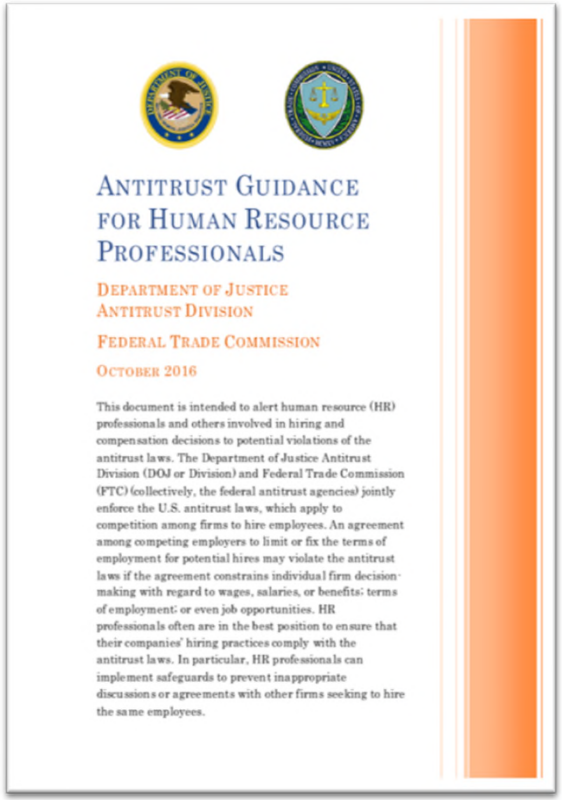
- DOJ Perspectives and Enforcement Issues
- Civil Antitrust Issues
- Labor and Employment Issues
- International Issues
- Questions & Answers

SECTION 01

DOJ PERSPECTIVES AND ENFORCEMENT ISSUES

Antitrust Guidance for HR Professionals

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



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

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

Criminalizing No-Poaching & Wage-Fixing Agreements

- **DOJ and FTC Joint Announcement**
  - **DOJ** for the first time may **criminally investigate and prosecute** employers, including individuals, who enter into certain wage-fixing and no-poaching agreements
  - Application of antitrust law

- ***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"

Criminal Cases Under Investigation

Delrahim Says Criminal No-Poach Cases Are In The Works

By **Matthew Perlman**

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

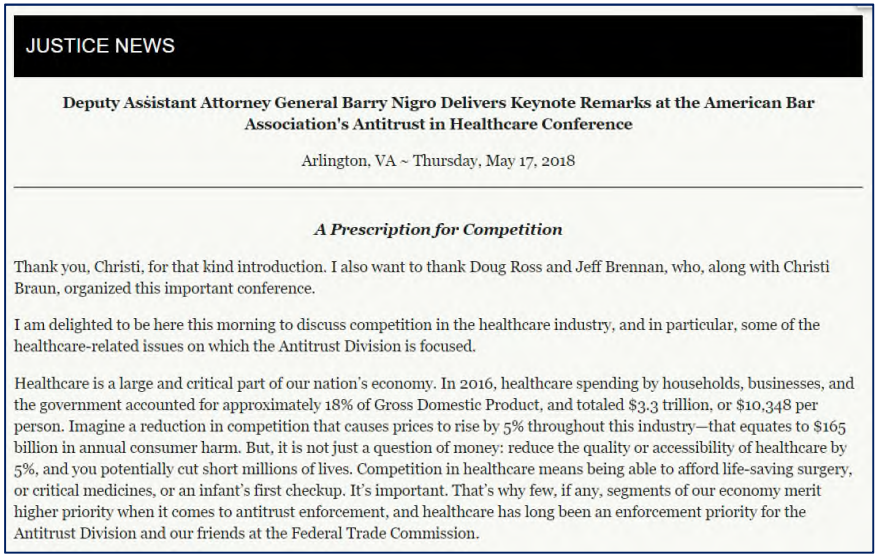
Assistant Attorney General Makan Delrahim laid out the division's recent work and current initiatives while speaking at a conference hosted by the Antitrust Research Foundation at the Antonin Scalia Law School at George Mason University. He pointed to a **joint guidance issued** by the DOJ and Federal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

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

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

Industries

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



JUSTICE NEWS

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

Arlington, VA ~ Thursday, May 17, 2018

A Prescription for Competition

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

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

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

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

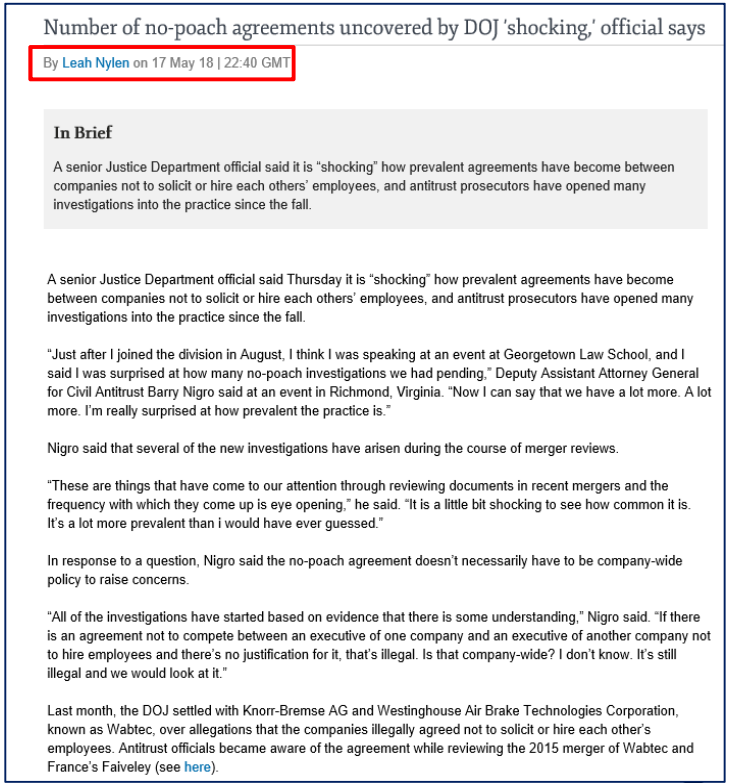
https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar

DOJ Reviewing A "Shocking" Number of Agreements

"A senior Justice Department official said Thursday it is 'shocking' how prevalent agreements have become between companies not to solicit or hire each others' employees, and antitrust prosecutors have opened many investigations into the practice since the fall."

"Now I can say that we have a lot more. A lot more. **I'm really surprised at how prevalent the practice is**."

Deputy Assistant Attorney General for Civil Antitrust Barry Nigro



Number of no-poach agreements uncovered by DOJ 'shocking,' official says

By Leah Nylen on 17 May 18 | 22:40 GMT

In Brief

A senior Justice Department official said it is "shocking" how prevalent agreements have become between companies not to solicit or hire each others' employees, and antitrust prosecutors have opened many investigations into the practice since the fall.

A senior Justice Department official said Thursday it is "shocking" how prevalent agreements have become between companies not to solicit or hire each others' employees, and antitrust prosecutors have opened many investigations into the practice since the fall.

"Just after I joined the division in August, I think I was speaking at an event at Georgetown Law School, and I said I was surprised at how many no-poach investigations we had pending," Deputy Assistant Attorney General for Civil Antitrust Barry Nigro said at an event in Richmond, Virginia. "Now I can say that we have a lot more. A lot more. I'm really surprised at how prevalent the practice is."

Nigro said that several of the new investigations have arisen during the course of merger reviews.

"These are things that have come to our attention through reviewing documents in recent mergers and the frequency with which they come up is eye opening," he said. "It is a little bit shocking to see how common it is. It's a lot more prevalent than i would have ever guessed."

In response to a question, Nigro said the no-poach agreement doesn't necessarily have to be company-wide policy to raise concerns.

"All of the investigations have started based on evidence that there is some understanding," Nigro said. "If there is an agreement not to compete between an executive of one company and an executive of another company not to hire employees and there's no justification for it, that's illegal. Is that company-wide? I don't know. It's still illegal and we would look at it."

Last month, the DOJ settled with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation, known as Wabtec, over allegations that the companies illegally agreed not to solicit or hire each other's employees. Antitrust officials became aware of the agreement while reviewing the 2015 merger of Wabtec and France's Faiveley (see here).

http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=989839&siteid=191&rdir=1

Criminal Penalties: Statutory Maximum

Corporations

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

  [Antitrust Criminal Penalty Enhancement And Reform Act 2004]

- Alternative Fine Provision

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

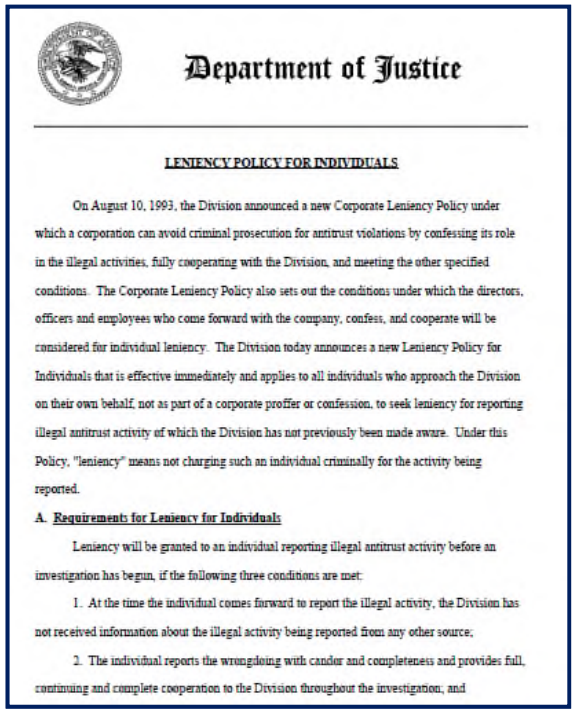
Individuals

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

DOJ Leniency Program

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

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



Department of Justice

LENIENCY POLICY FOR INDIVIDUALS

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

A. Requirements for Leniency for Individuals

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

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

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

Recent DOJ Civil Enforcement Action

- Against "two of the world's largest rail equipment suppliers"
  - German private company and US company, both with US subsidiaries
  - "No-poach" agreements with each other and a third rail equipment supplier based in France acquired in 2016
  - *Per se* unlawful horizontal market allocation agreements

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, April 3, 2018

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

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

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

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

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

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

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

Recommended Steps

- Post–October 2016 conduct
  - "Naked" wage-fixing and no-poaching agreements
- Antitrust compliance training
  - HR professionals, legal and executives
  - Awareness of issues
- Review and modify policies and code of conduct
- Consult experienced antitrust counsel if wrongdoing is detected
  - Consider appropriate steps such as the Leniency Program
  - Other mitigation steps

- Due diligence in mergers and acquisitions
- Best practices in structuring whistleblowing procedures
- Assess international issues and jurisdictions

- Caution areas
  - Information Exchanges
    - Permissible only if carefully designed to conform with antitrust laws
  - Slippery slopes issues
    - Trade associations, conferences, informal meetings

SECTION 02

CIVIL ANTITRUST ISSUES

Civil Enforcement

- Agencies
  - U.S. Department of Justice, Antitrust Division (Sherman Act)
  - Federal Trade Commission (Section 5 of the FTC Act)
  - State Attorneys General
- Remedies
  - Court-ordered injunctive relief
  - Settlement via consent decree; violations of decree can lead to contempt + penalties
- E.g., *High Tech Hiring*

FOR IMMEDIATE RELEASE Friday, September 24, 2010

Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements

Settlement Preserves Competition for High Tech Employees

Private Civil Litigation

- Joint and several liability
- Treble Damages
- Injunctive relief
- Attorneys' Fees & Interest

Court Refused To Approve $324.5 Million Settlement In Workplace Antitrust Class Action

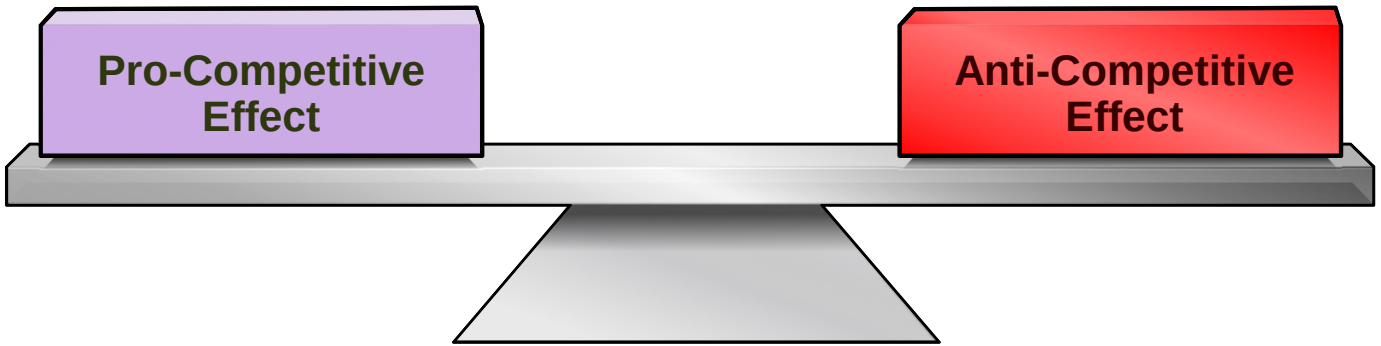
U.S. judge approves $415 mln settlement in tech worker lawsuit

Concerted Conduct

- Is there an agreement?
- If so, does it unreasonably restrain or harm competition?
  - *per se* vs. rule of reason

Rule of Reason Analysis

- Considers the business practice, its purpose, and weighs the pro- and anti-competitive effects



Narrowly Tailored HR-Restrictions May Be Lawful

- Not all recruiting restrictions are illegal; pro-competitive restrictions may include:
  - E.g., narrowly-tailored and short-term restrictions on the recruiting of key employees who are working on a merger, joint venture or specific contract (e.g., audit, outsourcing)
  - 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

DOJ Recently Recognized This Narrow Exception

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.

DOJ-Recognized Examples of Potentially Lawful Restraints

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.

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: 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: 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 component supplier have taken steps to prevent this?

Hypothetical: Tech Collaboration (Continued)

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

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

- Question: Any problems?

Practical Tips

- Make hiring and retention decisions, and create HR policies, independently
- Be aware that competitors for labor do not necessarily compete in same industry
- HR-related restrictions must be tailored and connected to a lawful agreement
- Employees should seek advice / training from Legal…
  - Before agreeing to any restrictions on hiring or compensation issues
  - Before engaging in information exchange and benchmarking activities
  - Before attending industry events and interacting directly with competitors

SECTION 03

LABOR AND EMPLOYMENT ISSUES

Non-Compete and Non-Solicit Agreements 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 necessary to protect an employer's legitimate business interests.
- Potential antitrust implications for agreements with employees, particularly in the resolution of a disputed breach.

Hypothetical: Susie Sales Manager

- Susie is a Sales Manager for Acme Corp., responsible for managing a 15-person sales force. Susie has a one-year employee non-solicit agreement with Acme.
- Susie leaves Acme and starts working for Acme's competitor, Globex.
- Within a week of Susie's departure from Acme, Globex hires Acme's top three producing sales representatives.
- Acme files lawsuit against Susie and Globex seeking injunctive relief and damages.
- As part of resolution, can Globex agree not to solicit any additional employees from Acme?

Guidance from FTC and DOJ on Permissible Non-Solicit Agreements Between *Employers*

Under certain circumstances, two companies may enter into a narrow non-solicitation or no-poaching agreement.

- Antitrust HR Guidance distinguishes "naked" no-poaching agreements from those that are "reasonably necessary to a larger legitimate collaboration between the employers."
- Examples of legitimate collaborations include joint ventures, shared use of facilities, consulting services, outsourcing vendors, and mergers or acquisitions.
- Final Judgment in *US v. eBay* (2014) also carved out non-solicitation agreements "reasonably necessary for the settlement or compromise of legal disputes."

Drafting a Permissible Non-Solicit 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.

More Practical Tips

- ***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

Civil Actions by Employees

- Pizza Hut manager who works in Pennsylvania filed a class action in Texas challenging Pizza Hut's no-poaching agreement between franchises.

  Ion v. Pizza Hut LLC, No. 4:17-cv-00788 (E.D. Tex. Nov. 3, 2017)

- Former employee of Jimmy John's filed a class action in Illinois challenging Jimmy John's no-poaching agreement between franchises as a "naked restraint of competition and a per se violation of the antitrust laws."

  Butler v. Jimmy John's Franchise, LLC, No. 3:18-cv-00133 (S.D. Ill. Jan. 24, 2018)

- Former employee of a Wabtech subsidiary filed a class action in Pennsylvania within days of the DOJ settlement. Counsel for the proposed class explained to *Law360*: "We now pick-up where the Department of Justice left off…. There needs to be a place at the table for the employees that have been harmed here ... to seek compensation, much as with any antitrust litigation in the price-fixing arena."

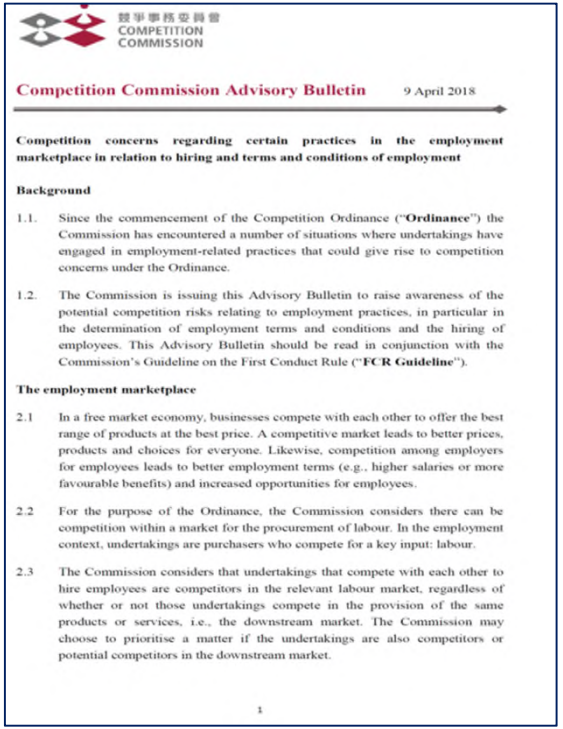
  Carruth V. Knorr-Bremse AG et al., No. 2:18-cv-00469 (W.D. Pa. April 11, 2018)

SECTION 04

INTERNATIONAL ISSUES

International Issues

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



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 non-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
- Increasing acceptance by legal professionals that wage-fixing and non-poaching agreements violate competition laws

Legal Developments in Asia

China	Hong Kong	Japan	Singapore	Taiwan
▪ 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	▪ Advisory Bulletin issued by HK Competition Commission in April 2018 providing guidance ▪ Non-poaching and wage-fixing agreements among employers listed as examples of practices that would contravene HK Competition Ordinance (Sec. 3.4 of Advisory Bulletin)	▪ 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)	▪ General prohibition under Singapore Competition Act against agreements, decisions or concerted practices by object or effect of preventing, restricting or distorting competition	▪ General prohibition under Fair Trade Law of 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)

Enforcement Trends in Asia

China	Hong Kong	Japan	Singapore	Taiwan
▪ In Nov. 2016, 46 private schools in Wenzhou (Zhejiang Province) found to have entered into an agreement containing a non-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	▪ No reported case of penalty imposed on employers for non-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	▪ No reported case of penalty imposed on employers for non-poaching agreements, wage-fixing or exchanging HR information	▪ No reported cases against **employers** for non-poaching/wage-fixing or exchanging HR information ▪ 16 **employment agencies** fined by 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	▪ No reported case of penalty imposed on employers for non-poaching agreements, wage-fixing or exchanging HR information

HR-related Antitrust Issues 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.

HR-related Antitrust Issues 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

Europe – enforcement cases in several sectors

- Ireland – **asset management** – ongoing investigation into alleged no-poaching agreement among 3 Italian firms

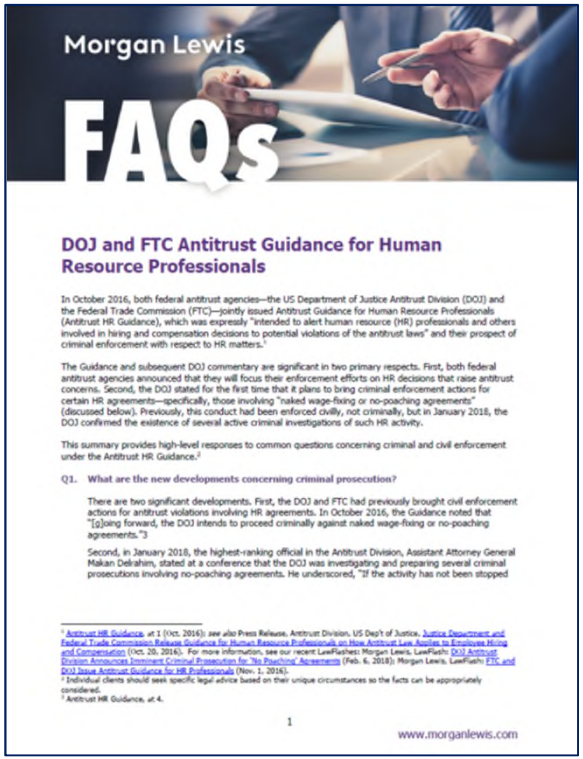
- Netherlands – **hospitals** – no-poaching and wage-fixing agreement among 15 Dutch hospitals held to restrict competition among anaesthesiologists

- Spain – **freight-forwarding** – agreement between 8 road transport forwarding agents on conditions for hiring workers

Europe – penalties and leniency

- Up to 10% of consolidated worldwide turnover under EU law
- Civil damages actions
- Criminal sanctions in e.g. the UK
- Potential exclusion from public procurement contracts
- Leniency programs available similar to US and Asia

Resources


Morgan Lewis

FAQs

DOJ and FTC Antitrust Guidance for Human Resource Professionals

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

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

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

Q1. What are the new developments concerning criminal prosecution?

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

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

[1] Antitrust HR Guidance, at 1 (Oct. 2016); see also Press Release, Antitrust Division, US Dep't of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016). For more information, see our recent LawFlashes: Morgan Lewis, LawFlash: DOJ Antitrust Division Announces Imminent Criminal Prosecution for 'No Poaching' Agreements (Feb. 6, 2018); Morgan Lewis, LawFlash: FTC and DOJ Issue Antitrust Guidance for HR Professionals (Nov. 1, 2016).

[2] Individual clients should seek specific legal advice based on their unique circumstances so the facts can be appropriately considered.

[3] Antitrust HR Guidance, at 4.

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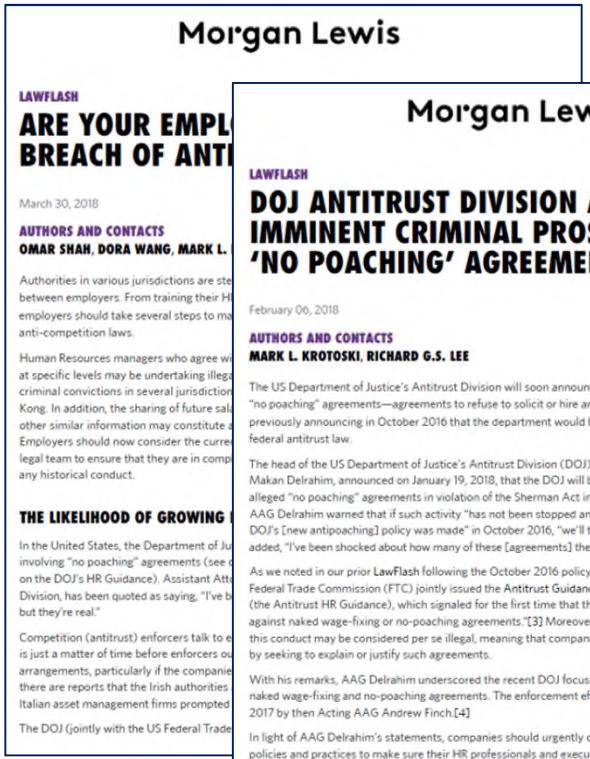
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LAWFLASH

ARE YOUR EMPL
BREACH OF ANTI

March 30, 2018

AUTHORS AND CONTACTS
OMAR SHAH, DORA WANG, MARK L.

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

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

THE LIKELIHOOD OF GROWING

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

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

The DOJ (jointly with the US Federal Trade

Morgan Lewis

LAWFLASH

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

February 06, 2018

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

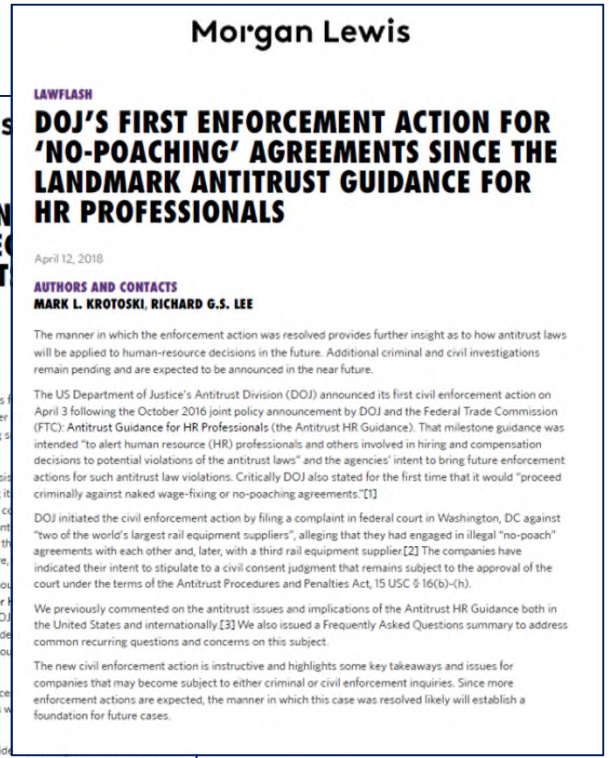
The US Department of Justice's Antitrust Division will soon announce its f
"no poaching" agreements—agreements to refuse to solicit or hire another
previously announcing in October 2016 that the department would bring s
federal antitrust law.

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

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

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

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

DOJ'S FIRST ENFORCEMENT ACTION FOR 'NO-POACHING' AGREEMENTS SINCE THE LANDMARK ANTITRUST GUIDANCE FOR HR PROFESSIONALS

April 12, 2018

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

The manner in which the enforcement action was resolved provides further insight as to how antitrust laws will be applied to human-resource decisions in the future. Additional criminal and civil investigations remain pending and are expected to be announced in the near future.

The US Department of Justice's Antitrust Division (DOJ) announced its first civil enforcement action on April 3 following the October 2016 joint policy announcement by DOJ and the Federal Trade Commission (FTC): Antitrust Guidance for HR Professionals (the Antitrust HR Guidance). That milestone guidance was intended "to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws" and the agencies' intent to bring future enforcement actions for such antitrust law violations. Critically DOJ also stated for the first time that it would "proceed criminally against naked wage-fixing or no-poaching agreements."[1]

DOJ initiated the civil enforcement action by filing a complaint in federal court in Washington, DC against "two of the world's largest rail equipment suppliers", alleging that they had engaged in illegal "no-poach" agreements with each other and, later, with a third rail equipment supplier.[2] The companies have indicated their intent to stipulate to a civil consent judgment that remains subject to the approval of the court under the terms of the Antitrust Procedures and Penalties Act, 15 USC § 16(b)-(h).

We previously commented on the antitrust issues and implications of the Antitrust HR Guidance both in the United States and internationally.[3] We also issued a Frequently Asked Questions summary to address common recurring questions and concerns on this subject.

The new civil enforcement action is instructive and highlights some key takeaways and issues for companies that may become subject to either criminal or civil enforcement inquiries. Since more enforcement actions are expected, the manner in which this case was resolved likely will establish a foundation for future cases.

SECTION 05

QUESTIONS & ANSWERS

Q&A

Thank you for running in the 2018 Technology May-rathon with us.

We would be pleased to answer your questions.

The Q&A tab is located on the bottom right hand side of your screen. Please type your questions in the space provided and click Send.

BIOGRAPHIES

Mark L. Krotoski

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.

Mark L. Krotoski
Silicon Valley | Washington, DC
mark.krotoski@morganlewis.com
+1.650.843.7212
+1.202.739.5024

- 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.

Brian C. Rocca

Brian C. Rocca
San Francisco
brian.rocca@morganlewis.com
+1.415.442.1432
+1.415.442.1001

Brian C. Rocca is managing partner of the Firm's 135-lawyer San Francisco office and leader of its Chambers-ranked California antitrust practice. Brian has worked on antitrust litigation, investigation, and counseling matters in many industries. As a leading lawyer for beverage distributors in California, he handles a wide array of matters related to brand rights, contractual issues, and regulatory compliance. He provides counseling to a prominent trade association relating to alcohol distribution issues.

- Brian has been rated by *Chambers USA* in the antitrust field for six consecutive years.
- He is the only attorney in California recognized by *Super Lawyers* for nine consecutive years (2009–2017) as a "Rising Star" in the area of Antitrust Litigation.

Siobhan E. Mee

Siobhan E. Mee
Boston
siobhan.mee@morganlewis.com
+1.617.951.8265
+1.617.428.6327

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.

Omar Shah

Omar Shah
London | Brussels
omar.shah@morganlewis.com
+44.20.3201.5561
+44.20.3201.5001

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.

Dora Wang

Dora Wang
Shanghai | Beijing
dora.wang@morganlewis.com
+86.21.8022.8576
+86. 21.8022.8599

Dora routinely represents multinational clients in international dispute negotiations, and counsels clients on responses to government investigations in China, the United States, and Europe. She also regularly conducts internal investigations and compliance trainings for US, European, and Chinese multinational companies in both English and Mandarin with native proficiency.

- Dora was involved in US Securities and Exchange Commission (SEC) and US Department of Justice (DOJ) investigations, as well as US federal court proceedings and cross-border civil litigation.
- Dora's practice combines an in-depth knowledge of the legislative and legal developments with a keen understanding of the business environment in Greater China to provide practical and effective strategic counselling to clients.

THANK YOU