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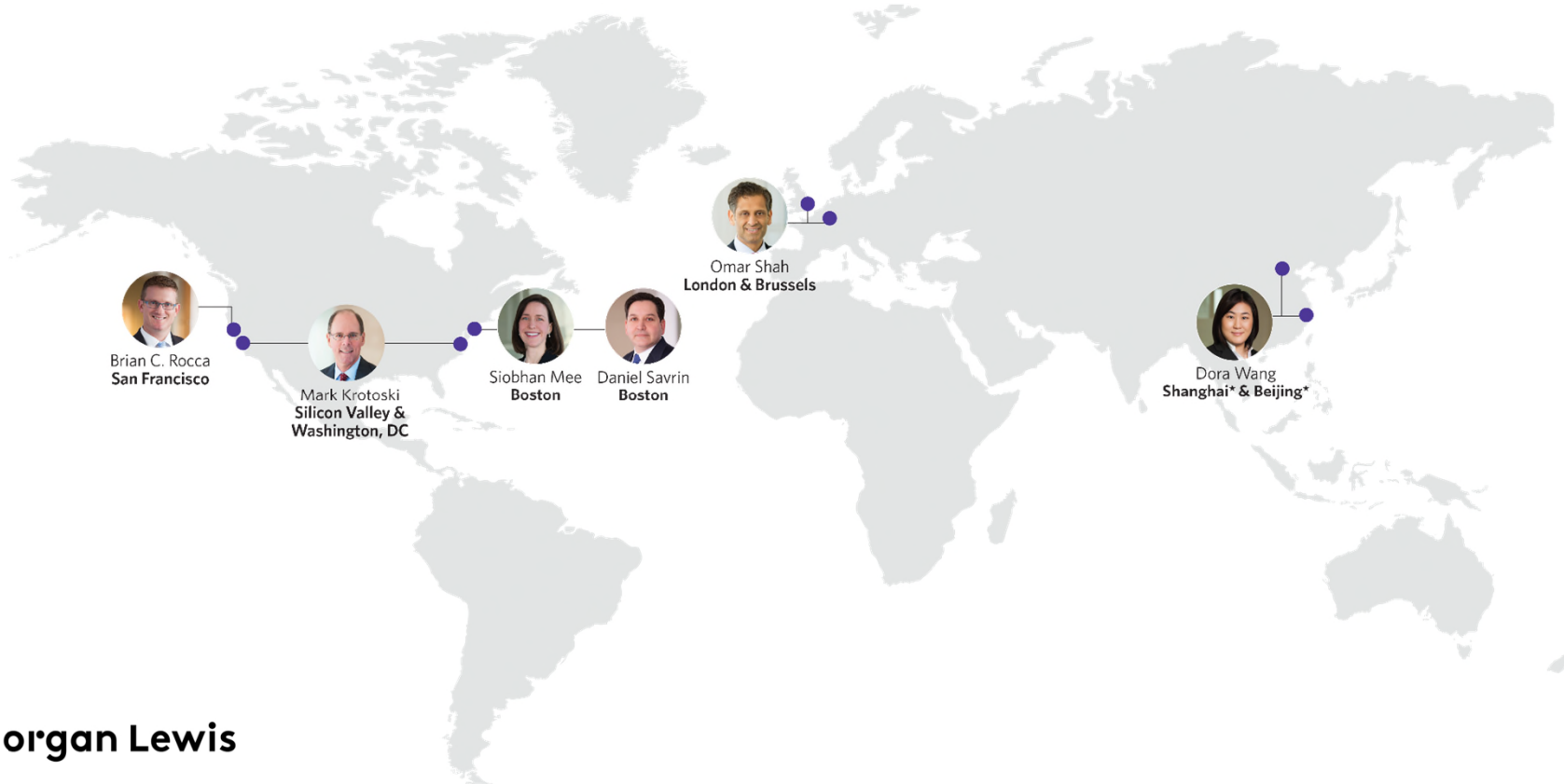
NO-POACHING AND WAGE FIXING AGREEMENTS AND ANTITRUST LAWS:

What global employers should know

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

September 18, 2018

Presenters


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

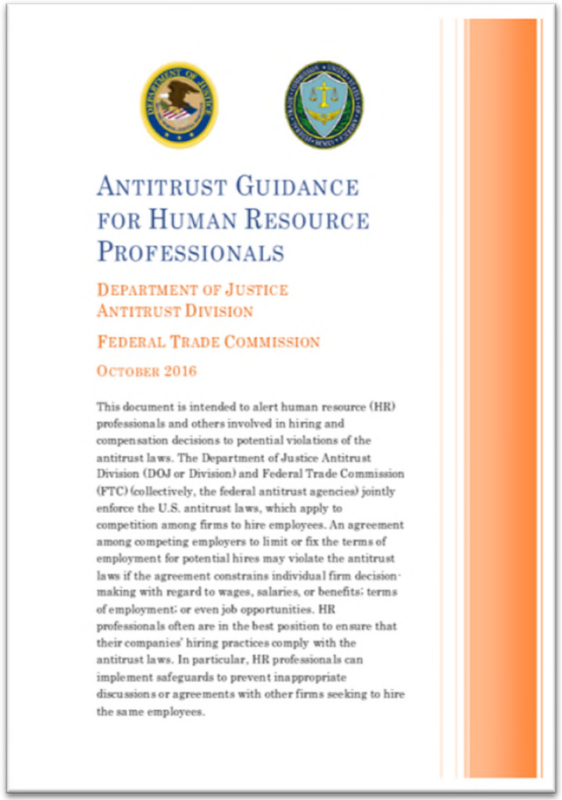
Overview

- Enforcement Background and Context
- Recent Federal and State Enforcement Activity
- Recent Private Litigation and Analysis Of The Key Issues
- Labor and Employment Risk Factor Issues
- Information Sharing Ground Rules
- International Issues
  - including information sharing and risks in data privacy sharing

ENFORCEMENT BACKGROUND AND CONTEXT / RECENT FEDERAL AND STATE ENFORCEMENT ACTIVITY

Antitrust Guidance for HR Professionals

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



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

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

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"

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

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.

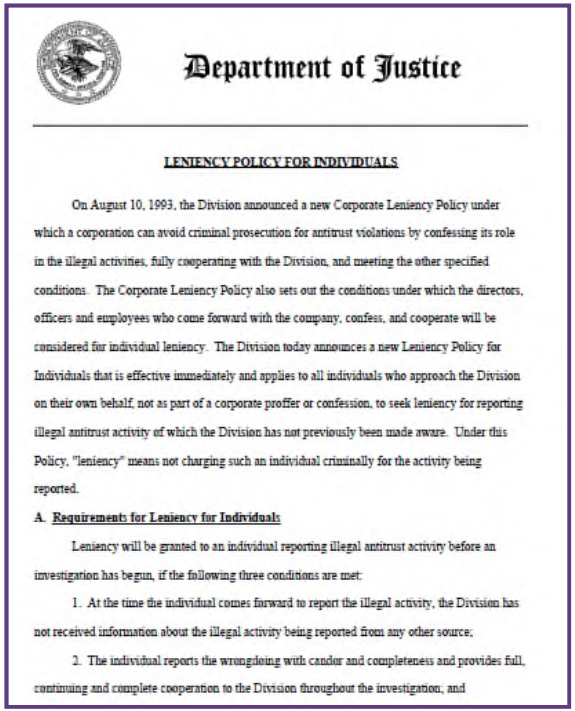
"In the coming couple of months you will see some announcements, and to be honest with you, I've been shocked about how many of these there are, but they're real," Delrahim said at the conference.

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

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

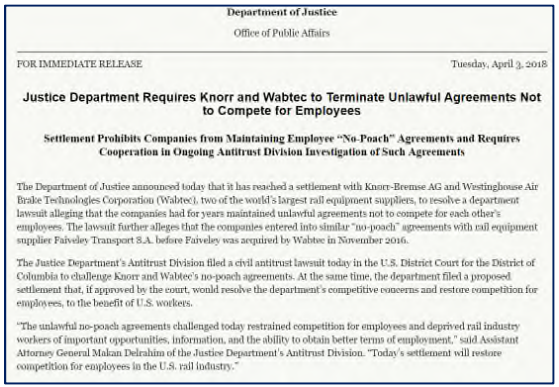
Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

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

April DOJ Civil Enforcement Action

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



Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Tuesday, April 3, 2018

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

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

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

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

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

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

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

FTC Wage Fixing Case

- FTC alleged that therapist staffing companies colluded to fix wages for the purpose of preventing individual therapists from seeking higher compensation at other therapist staffing companies, with the ultimate effect of increasing the companies' profits.
- Proposed consent order
  - Prohibits the therapist staffing company from agreeing to fix wages or sharing compensation information with other firms
  - Requires the submission of periodic compliance reports to the FTC
  - Authorizes the FTC to inspect the company premises and conduct interviews to determine compliance
- After public comment period, FTC will decide whether to finalize the proposed consent order.

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

Parties agreed to lower pay for home-care therapists

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FOR RELEASE

July 31, 2018

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

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

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

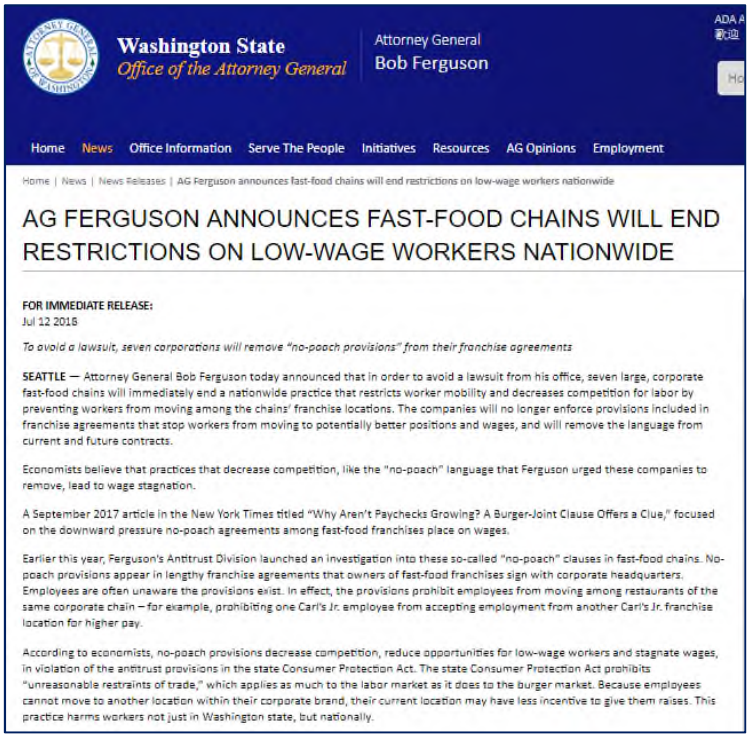
"Just as it is illegal for competitors to agree to fix prices on the products they sell in order to drive prices up, it is illegal for competitors to agree to fix wages or fees paid to workers in order to drive wages down," said Bruce Hoffman, Director of the Bureau of Competition. "All workers are entitled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

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

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

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

Washington State Attorney General



Washington State
Office of the Attorney General
Attorney General
Bob Ferguson

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

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

FOR IMMEDIATE RELEASE:
Jul 12 2018

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

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

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

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

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

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

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Advanced

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

By Christine Powell

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

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

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

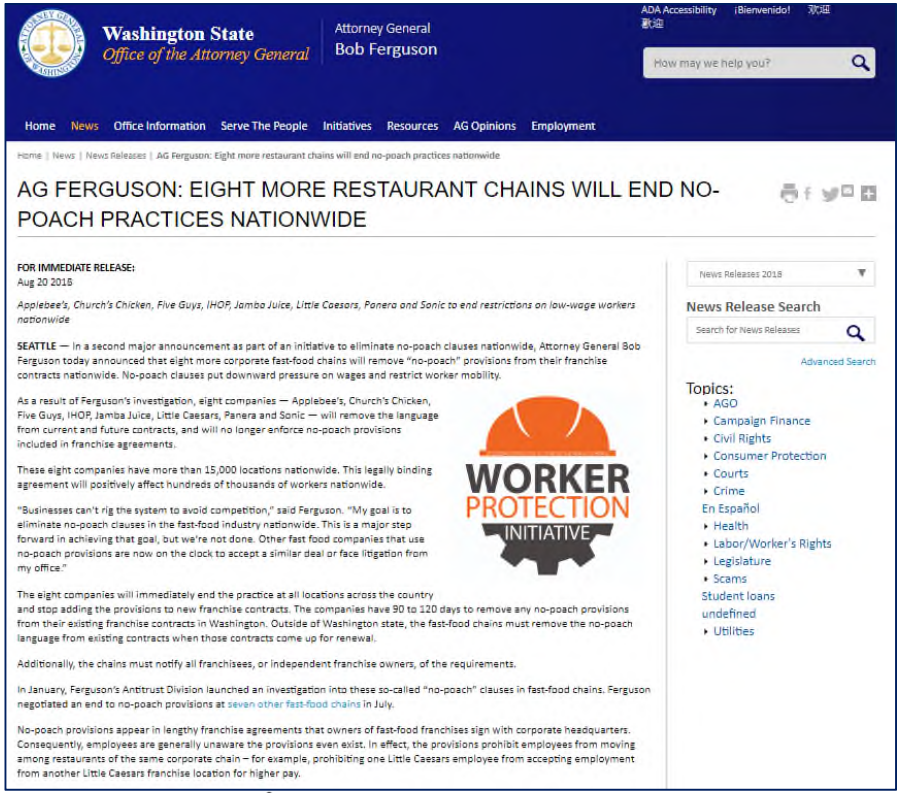
"Companies must compete for workers just like they compete for customers," Ferguson said. "They cannot manipulate the market to keep wages low. My goal is to unrig a system that suppresses wages in the fast-food industry."

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

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

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

Washington State Attorney General



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Home | News | News Releases | AG Ferguson: Eight more restaurant chains will end no-poach practices nationwide

AG FERGUSON: EIGHT MORE RESTAURANT CHAINS WILL END NO-POACH PRACTICES NATIONWIDE

FOR IMMEDIATE RELEASE:
Aug 20 2018

Applebee's, Church's Chicken, Five Guys, IHOP, Jamba Juice, Little Caesars, Panera and Sonic to end restrictions on low-wage workers nationwide

SEATTLE — In a second major announcement as part of an initiative to eliminate no-poach clauses nationwide, Attorney General Bob Ferguson today announced that eight more corporate fast-food chains will remove "no-poach" provisions from their franchise contracts nationwide. No-poach clauses put downward pressure on wages and restrict worker mobility.

As a result of Ferguson's investigation, eight companies — Applebee's, Church's Chicken, Five Guys, IHOP, Jamba Juice, Little Caesars, Panera and Sonic — will remove the language from current and future contracts, and will no longer enforce no-poach provisions included in franchise agreements.

WORKER PROTECTION INITIATIVE

These eight companies have more than 15,000 locations nationwide. This legally binding agreement will positively affect hundreds of thousands of workers nationwide.

"Businesses can't rig the system to avoid competition," said Ferguson. "My goal is to eliminate no-poach clauses in the fast-food industry nationwide. This is a major step forward in achieving that goal, but we're not done. Other fast food companies that use no-poach provisions are now on the clock to accept a similar deal or face litigation from my office."

The eight companies will immediately end the practice at all locations across the country and stop adding the provisions to new franchise contracts. The companies have 90 to 120 days to remove any no-poach provisions from their existing franchise contracts in Washington. Outside of Washington state, the fast-food chains must remove the no-poach language from existing contracts when those contracts come up for renewal.

Additionally, the chains must notify all franchisees, or independent franchise owners, of the requirements.

In January, Ferguson's Antitrust Division launched an investigation into these so-called "no-poach" clauses in fast-food chains. Ferguson negotiated an end to no-poach provisions at seven other fast-food chains in July.

No-poach provisions appear in lengthy franchise agreements that owners of fast-food franchises sign with corporate headquarters. Consequently, employees are generally unaware the provisions even exist. In effect, the provisions prohibit employees from moving among restaurants of the same corporate chain – for example, prohibiting one Little Caesars employee from accepting employment from another Little Caesars franchise location for higher pay.

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https://www.atg.wa.gov/news/news-releases/ag-ferguson-eight-more-restaurant-chains-will-end-no-poach-practices-nationwide

Massachusetts Multi-State Investigation

[redacted] 2018

[redacted]

Re: Request for Information Regarding Franchise Agreements

Dear [redacted],

Our Offices have learned that certain franchise agreements used in our States and the District of Columbia (hereinafter collectively referred to as "States") may contain provisions that impact some employees' ability to obtain higher paying or more attractive positions with a different franchisee. These provisions are known by many terms, including "employee non-competition," "no solicitation," "no poach," "no hire," or "no switching" agreements (hereinafter referred to collectively as "No Poach Agreements"). As their names suggest, these agreements restrict a franchisee's ability to recruit or hire employees of [redacted] and other franchisees of [redacted]. We have reason to believe that [redacted] may be including such provisions in its franchise agreements.

As State Attorneys General, we have a common interest in the economic health of our residents and the communities in which they live. Many of us enforce laws that ensure basic worker protections, such as minimum wage, overtime, and anti-discrimination laws, in addition to consumer protection and antitrust laws. Given these roles, we are concerned about the use of No Poach Agreements among franchisees and the harmful impact that such agreements may have on employees in our States and our state economies generally.[1] By limiting potential job opportunities, these agreements may restrict employees' ability to improve their earning potential and the economic security of their families. These provisions also deprive other franchisees of the opportunity to benefit from the skills of workers covered by a No Poach Agreement whom

[1] "Non-compete Contracts: Economic Effects and Policy Implications," report issued by the Office of Economic Policy, U.S. Department of the Treasury, March 2016. Available at: https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf; and Alan B. Krueger and Orley Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector, (July 18, 2017) found that 80 percent of quick service restaurant franchise contracts (i.e., 32 out of 40) contained no poach provisions.

PRESS RELEASE

AG Healey Leads Multistate Investigation of Worker No-Poach Agreements at National Fast Food Franchises

Ten States and the District of Columbia Sign on to Letter Requesting Information Related to Provisions that Limit Recruitment and Hiring Practices of Franchisees

FOR IMMEDIATE RELEASE:
7/09/2018

Office of Attorney General Maura Healey
The Attorney General's Fair Labor Division

MEDIA CONTACT
Meggie Quackenbush
Phone
(617) 727-2543
Online
Margaret.Quackenbush@state.ma.us

BOSTON — Attorney General Maura Healey today led a coalition of 11 state attorneys general in sending a letter to eight national fast food franchisors about "no-poach" agreements in franchise contracts, which restrict a franchisee's ability to recruit or hire employees of another franchisee of the same chain. Prompted by concerns that these agreements hurt low-wage workers and limit their ability to get better jobs, the state attorneys general have requested information and documents from these companies.

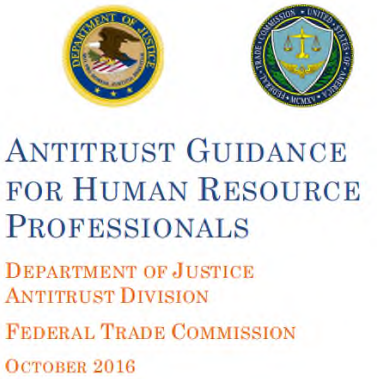
"No-poach agreements unfairly limit the freedom of fast-food and other low-wage workers to seek promotions and earn a better living," said AG Healey. "Our goal through this action is to reduce barriers and empower workers to secure better-paying and higher-skill jobs."

https://www.mass.gov/news/ag-healey-leads-multistate-investigation-of-worker-no-poach-agreements-at-national-fast-food

RECENT PRIVATE LITIGATION AND ANALYSIS OF THE KEY ISSUES

Overview – Recent Developments in Private No-Poach Litigation

- Antitrust Guidance for Human Resource Professionals jointly issued by the Department of Justice and the Federal Trade Commission in October 2016
  - "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 decisionmaking with regard to wages, salaries, or benefits; terms of employment; or even job opportunities."



- The Guidance contemplates both government enforcement and private civil litigation:

  "[I]f an employee or another private party were injured by an illegal agreement among potential employers, that party could bring a civil lawsuit for treble damages (i.e., three times the damages the party actually suffered)."

Private No-Poach Litigation Predated the HR Guidance

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

The Volume of Private Litigation Has Increased

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

Key Takeaways from Recent Litigation

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

An Update on Current No-Poach Litigation: Class Certification Issues

- *Seaman v. Duke University* (M.D.N.C. No. 15-CV-462)
  - Plaintiff, an assistant professor of radiology at Duke, alleged that she applied for a position at the University of North Carolina.
  - She alleged that she was told she was qualified for the position and was the preferred candidate, but in an email, UNC's chief of imaging told her: "I just received confirmation today from the Dean's office that lateral moves of faculty between Duke and UNC are not permitted. . . . There is reasoning for this guideline which was agreed upon between the deans of UNC and Duke a few years back."
  - This email formed the basis of the lawsuit.
  - The court granted class certification for a class of medical faculty workers affected by the no-poach agreement. The court, however, declined to extend the class to non-faculty workers, reasoning that they could not establish that they were similarly situated.
  - UNC settled out of the litigation in January 2018; the litigation against Duke remains on-going.

An Update on Current No-Poach Litigation: Plausibility and Substantiation Required

- *Frost v. LG Electronics* (N.D. Cal. No. 16-CV-5206)
  - Two plaintiffs, both employees of LG, sought employment with Samsung. One plaintiff alleged that he was told by an independent recruiter that LG and Samsung "have an agreement that they won't steal each other's employees." The other plaintiff alleged that he received similar information from an unnamed employee of Samsung.
  - The plaintiffs brought claims under Sherman Act Section 1 and state antitrust laws against LG and Samsung; they sought to represent a class of similarly-situated employees.
  - The court granted the defendants' motion to dismiss under Rule 12(b)(6): "[T]he Court agrees with Defendants that the [complaint] does not contain *any* evidentiary facts regarding the 'specific time, place, or person' involved in the alleged agreement . . . ."
  - Plaintiffs have filed a notice of appeal to the Ninth Circuit.

LABOR AND EMPLOYMENT RISK FACTOR ISSUES

Common Risk Factors

1. Non-Compete Disputes
2. Vendor Relationships and other Business Relationships
3. Trade Association Meetings

Non-Compete Disputes

Common fact pattern:

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

Permissible?

Permissible Non-Solicit Agreements Between Employers

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

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

Requirements for a Permissible Agreement

V. CONDUCT NOT PROHIBITED

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

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

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

Vendor Relationships and other Business Relationships

Common fact pattern:

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

Permissible?

Trade Association Meetings

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

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

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

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

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

INFORMATION SHARING GROUND RULES

Beware of Unlawful Information Exchange

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

Hypothetical 1: Information Exchange

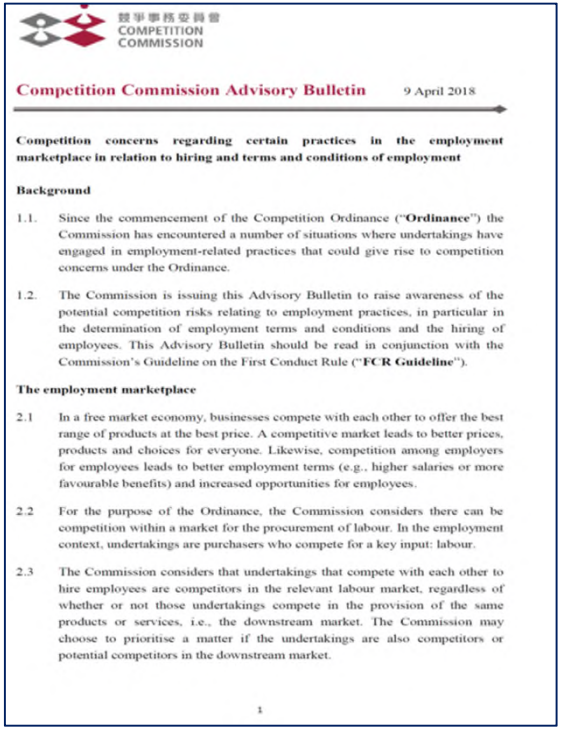
- A software company is redesigning its employee handbook. It drafts the new handbook and other HR policies using the following info:
  - An HR staffer does a phone survey, contacting three main competitors, asking how many weeks of parental leave they each offer
  - A secretary reviews job postings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

INTERNATIONAL ISSUES

INCLUDING INFORMATION SHARING AND RISKS IN DATA PRIVACY SHARING

International Issues

- Hong Kong Competition Commission Guidance (April 2018)
- Japan Fair Trade Commission, Report of Study Group on HR and Competition Policy (Feb. 2018)
- Europe
  - "[C]ourts and competition regulators in Europe (Spain, the Netherlands, and Croatia) have all made major findings in the last eight years against companies in relation to national no-poaching agreements made in the freight forwarding, hospitals, and IT employment sectors"



競爭事務委員會
COMPETITION COMMISSION

Competition Commission Advisory Bulletin 9 April 2018

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

Background

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

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

The employment marketplace

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

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

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

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HR-related Antitrust Risks in Asia

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

Legal Developments in Asia

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

Legal Developments in Asia (cont'd)

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

Legal Developments in Asia (cont'd)

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

Enforcement Trends in Asia

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

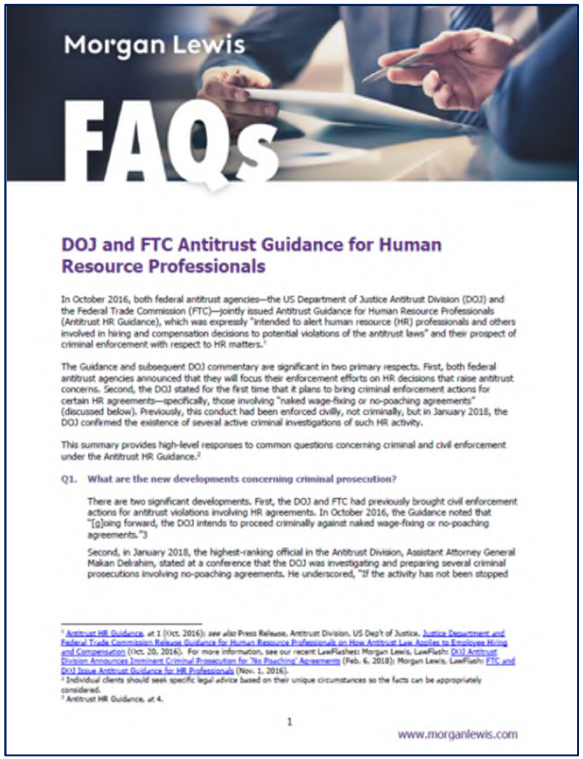
Enforcement Trends in Asia (cont'd)

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

HR Information Sharing – Data Privacy Concerns

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

Resources



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FAQs

DOJ and FTC Antitrust Guidance for Human Resource Professionals

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

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

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

Q1. What are the new developments concerning criminal prosecution?

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

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

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

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

[3] Antitrust HR Guidance, at 4.

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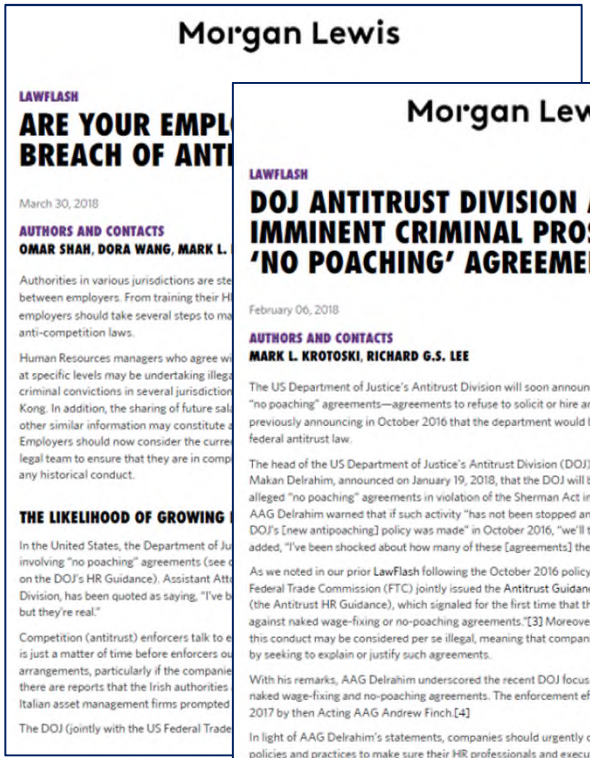

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LAWFLASH

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

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LAWFLASH

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

February 06, 2018

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

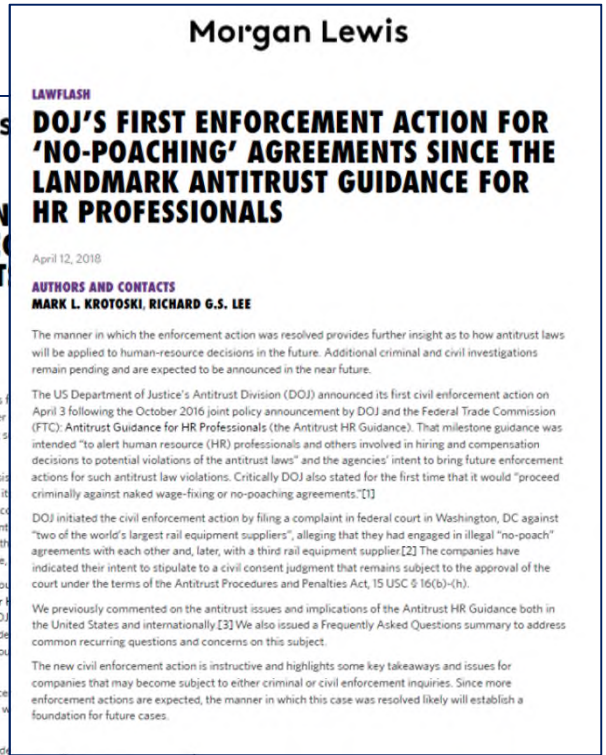
The US Department of Justice's Antitrust Division will soon announce its f
"no poaching" agreements—agreements to refuse to solicit or hire another
previously announcing in October 2016 that the department would bring s
federal antitrust law.

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.

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
  - See the German and Hungarian investigations featured on the next slide

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
- Hungary – **aluminium car parts** – merger agreement between 2 suppliers which included a no-poaching covenant
- Germany – **commercial vehicles** – German courts upheld a no-poaching covenant between 2 distributors not to directly or indirectly hire each others' employees for the duration of, and for 3 years following, a joint distribution agreement between the 2 parties

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

QUESTIONS?

Mark L. Krotoski

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

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

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

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.

Daniel S. Savrin

Daniel S. Savrin
Boston
daniel.savrin@morganlewis.com
+1.617.951.8674
+1.617.428.6310

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

- Daniel has been recognized as a leading litigator and counselor for his experience in handling and trying civil and criminal matters and for his practical and effective approaches to litigating and resolving disputes with government agencies and among private parties.
- He represents major national and international corporations, professionals, and other high-profile clients in litigating and resolving challenging legal problems.

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.

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.

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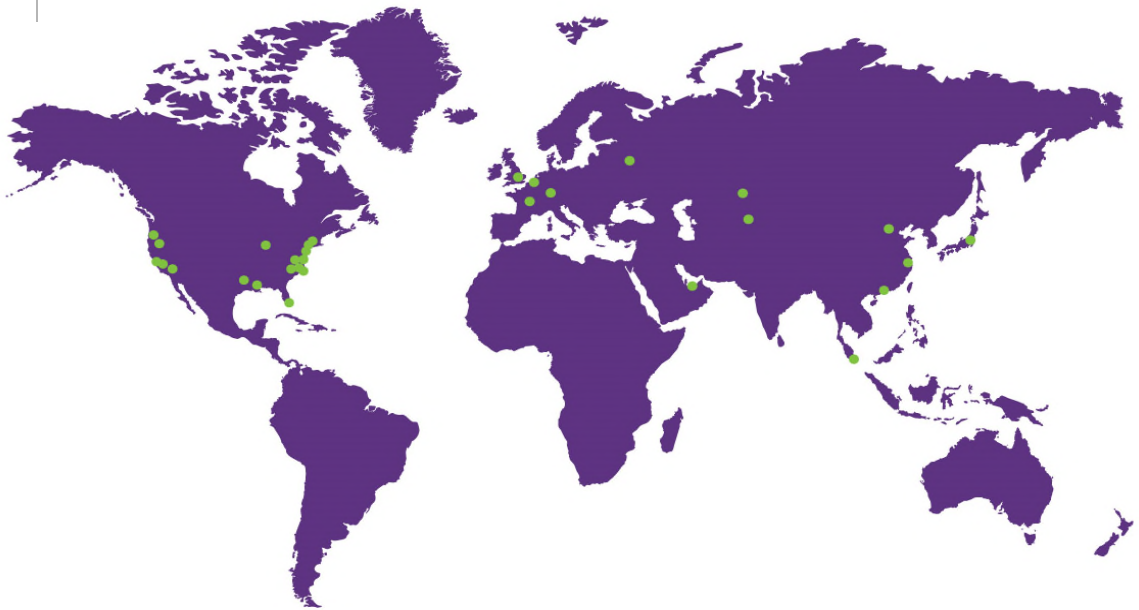

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