



GIBSON DUNN

**Antitrust Update on No-
Poach and Non-Compete
Agreement Enforcement**

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Types of Agreements in the U.S.

- Wage Fixing – a form of price-fixing:
 - § To set salaries at a certain level or within a range,
 - § To increase salaries by an agreed percentage,
 - § To maintain or lower salaries.
- No Poach:
 - § Usually an agreement among competing employers.
 - § No hire agreement regarding employees.
 - § No solicitation of employees.
- Non Compete:
 - § Usually an agreement between employer and employee.
 - § Specific competitors vs. general industry.
 - § Usually of limited duration.



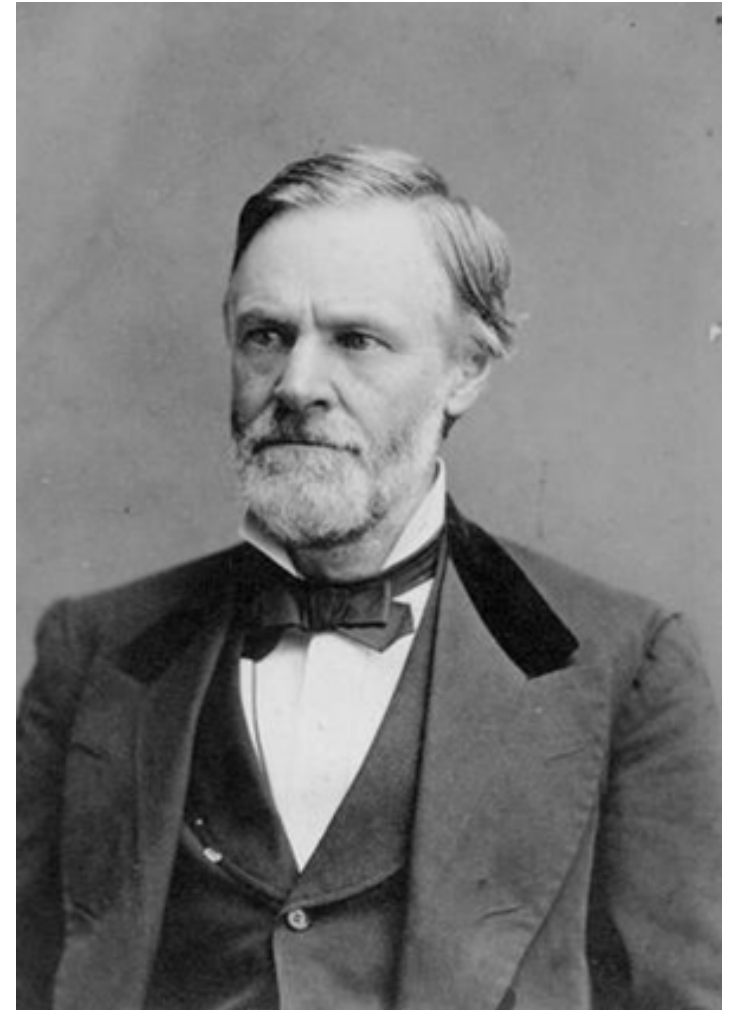
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Background on the U.S. Antitrust Laws

Sherman Act Section 1

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”

15 U.S.C. § 1



Federal Trade Commission Act

“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”

15 U.S.C. § 45

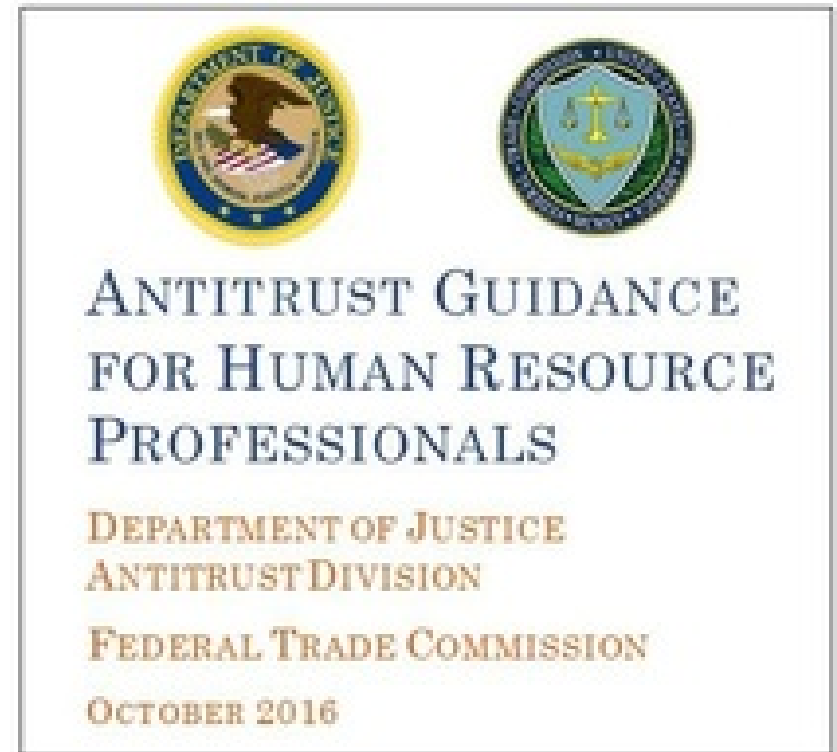


Antitrust Law Standards

- Rule of Reason Analysis:
 - § Balances pro-competitive and anticompetitive effects.
 - § Requires proof of market power and defining a relevant market.
- *Per Se* Analysis:
 - § Anticompetitive effects of the conduct is presumed; no balancing of pro-competitive effects.
- Ancillary Restraints:
 - § Restraints that are “reasonably necessary” to a separate, legitimate, procompetitive integration are analyzed under the rule of reason.

October 2016 Antitrust Guidance for HR Professionals

1. “Naked” no-poach and wage-fixing agreements are *per se* illegal and subject to criminal penalties.
2. Information sharing may violate antitrust laws unless conducted by third parties according to strict criteria.



Antitrust Criminal Penalties

- Imprisonment for up to 10 years.
 - § Limited to *per se* violations like price fixing.
 - § Rarely are terms this long, more typical is one to three years.
- Substantial fines are typical.
- Corporations—up to \$100 million or “twice the gross gain or gross loss.”
- Individuals—up to \$1 million.
- Generally no insurance coverage exists for this type of liability.
- Corporate monitors or probation can be ordered.



Antitrust Damages

- Basic Measures:
 - § Treble damages,
 - § Joint and several liability, and
 - § Credit for amount of other settlements.
- No right to claim contribution from other defendants.



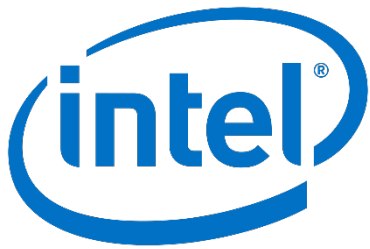
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Current State of No Poach Antitrust Litigation in the U.S.

Considerable Ambiguity In This Area

- Few cases or enforcement actions have reached a decision on the merits, so little precedent to work with.
- Disagreement among some regulators (e.g., DOJ / Washington AG) about the proper standards to apply.
- Defining competitors, labor markets, and competitive effects is extremely fact specific.
- Settlement terms have varied, but penalties have been onerous.
- Despite 2016 Guidance, no criminal prosecutions (yet).

DOJ Enforcement



United States v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar, 1:10-cv-01629 (2010 D.D.C.).

§ Agreement not to cold-call each other's employees.

§ Firms settled with DOJ in consent decree.

§ Follow-on class action settled **without decision on whether conduct was *per se* unlawful or subject to rule of reason.**

Post-Guidance DOJ Enforcement Action

- *United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp.*, 1:18-cv-00747 (2018 D.D.C.)
 - § Alleged agreements not to compete for each other's employees.
 - § DOJ claimed the no-poach agreements were *per se* unlawful horizontal agreements under Section 1 of the Sherman Act.
 - § Settlement Terms: 7-year term; appoint antitrust compliance officer; provide annual compliance certification by C-suite executives; **ongoing oversight by DOJ**; notice to all U.S. employees, recruiting agencies, and rail industry.

Post-Guidance DOJ Positions

- DOJ speeches highlight no-poach, including coming **criminal prosecutions for *per se* violations**.
- Statements of interest in rail supply case, medical school faculty case, and franchise industry cases.
- Key open questions remain:
 - § Who is a competing employer?
 - § When can a no-hire agreement be justified?
 - § Do no-hire agreements actually have to affect any specific worker to be unlawful?

Civil Litigation

- *In Re High-Tech Employees Antitrust Litigation*
§ Class settlements totaling \$435 million.
- *In Re Animation Workers Antitrust Litigation*
§ Class settlements totaling \$170 million.
- *Duke/UNC*
§ UNC settlement for injunctive relief only; Duke settlement for \$54.5 million.
§ DOJ involvement in Duke settlement.
- *In Re Railway Industry Employees*
§ Class settlements totaling \$48.95 million.
- *LG/Samsung case and NFL cheerleaders case*
§ District courts granted motions to dismiss.
§ *LG/Samsung* on appeal to the 9th Circuit ; NFL cheerleaders case affirmed.
- *Franchising Industry Cases*

Washington Attorney General & Other State AG Investigations

- Washington Attorney General Investigation
 - § Over 65 franchise businesses have settled and agreed to remove no-poach provisions from franchise agreements.
 - § Fast food; fitness; automotive services; etc.
 - § Assurances of discontinuance.
 - § Jersey Mike's; settled in August 2019 for \$150,000 and injunctive relief.
 - § **Disagreement with DOJ over whether *per se* or rule of reason applies to no-hire agreements in the franchise context.**
- Other State Attorneys General Investigation
 - § July 2018 letter sent out by coalition of 11 State AGs.
- AG no-poach investigations have mainly been limited to franchising context.

Are No-Poach Agreements Ever Okay?

- What about a joint venture or competitor collaboration?
 - What about with a vendor?
 - What about with a recruiting agency?
 - To reduce risk, any agreement should:
 - § be in writing and signed by all parties;
 - § identify with specificity the agreement to which it is ancillary;
 - § be narrowly tailored to affect only employees who are reasonably anticipated to be directly involved in the agreement;
 - § identify with reasonable specificity the employees who are subject to the agreement; and
 - § contain a specific termination date or event.
- U.S. v. Knorr-Bremse*, 2018 WL 4386565, at *2 (D.D.C. July 11, 2018)

What Should You Do?

- **Question:** A colleague at a firm in your industry suggests, at an informal luncheon, that it might be in your mutual interest not to directly recruit one another's employees. What should you do?

What Should You Do?

- **Question:** A colleague in your industry emails you, suggesting that your companies should agree on an appropriate pay scale for certain job categories. What should you do?

What Should You Do?

- **Question:** Company A and your company are considering entering into a joint venture to develop a new product and, as part of that joint venture, the companies want to agree to a no-hire restriction that applies for a short period to only the specific employees involved in the joint venture. Should you allow this?

What Should You Do?

- **Question:** During a networking event, an HR professional from one of your company's largest customers mentions to you how frustrating it is when recent hires jump ship. The HR professional suggests that your companies agree not to hire each other's employees only within the first year of their employment. What should you do?

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Current State of Non- Compete Antitrust Litigation in the U.S.

Antitrust Analysis of Non-Competes

- Traditional non-compete agreements between employers and employees have rarely amounted to an antitrust violation

§ Vertical

§ Used to protect trade secrets, customer relationships and goodwill

§ Promote investment in employee training and education



State Enforcement

- *WeWork Co.* (2018): Settlement with New York AG required WeWork to release 1400 employees nationwide from non-compete agreements and narrow the scope of hundreds more.
- *Check Into Cash* (2019): Settlement with Illinois AG prohibits Check Into Cash from requiring non-competes for store-level employees.
- *Law360* (2016): Settlement with New York AG requires Law360 to release all but their top executives from non-competes.

wework



LAW360

State Law Changes

- Several states enacted or amended statutes limiting the use and enforcement of non-competes, particularly for low-wage workers. For example:
 - § *Illinois*: Prohibits non-compete agreements with workers who earn less than minimum wage or \$13/hour (whichever is higher).
 - § *Washington*: Prohibits non-compete agreements with workers who earn less than \$100,000 annually.
 - § *Maine*: Prohibits non-compete agreements with workers who earn less than \$49,960.

FTC Workshop



- FTC can regulate “unfair methods of competition” or “unfair or deceptive practices.”
- March 2019: petition for the FTC to initiate rulemaking prohibiting or limiting the use of non-competes in employment agreements.
- January 2020: hearing to determine whether there is a sufficient evidentiary basis.
- At least 2 Commissioners supportive.

FTC Workshop



- Main Concerns:

- § Use of non-competes with no obvious connection to trade secret protection or other legitimate justifications.
- § Use of non-competes with low-wage workers.
- § Non-compete agreements that are overly broad in duration or geography.
- § Failure to clearly disclose non-compete agreements before employment relationship begins.

Take Aways

Ensure non-compete agreements are:

- Justified: protecting trade secrets, legitimate investments in training and education, etc.
- Disclosed: conspicuous agreements negotiated at the time of employment and not buried in an employee handbook.
- Tailored: not overly broad as to time or geography.

Non-Solicitation Provisions

What about non-solicitation provisions?

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International Developments Regarding Antitrust Laws Applied to No Poach and Non- Compete Agreements

European Commission

- To date, the EC has taken no enforcement action in relation to no-poach or non-compete agreements.
 - No senior EC official has indicated in (official) statements that such agreements are of interest.
 - No-poach agreements between competitors are likely to constitute an infringement of Article 101 TFEU.
- § The Notice on Ancillary Restraints relating to mergers states that No Poach agreements have a “comparable” effect to non-compete agreements between companies and are assessed in a “similar way.”

EU Member States

- Limited enforcement against no-poach clauses.
- France:
 - § The President of the French Competition Authority in 2019 announced stricter scrutiny of no-poach agreements in France.
 - § In 2017, as part of a hardcore cartel, three floor covering manufacturers were sanctioned for a no-poach agreement.
- Spain:
 - § In 2010, as part of a hardcore cartel, 8 freight forwarding companies were sanctioned for the coordination of hiring policies.

No-Poach and Non-Compete Enforcement in Asia

- Most Asian jurisdictions have a competition laws prohibiting anticompetitive agreements.
 - § No poach and non-compete likely to be illegal as in US or EU.
- Competition authorities in Japan and Hong Kong issued specific guidelines on anti-competitive hiring practices in 2018.
 - § Regulators in other countries would take enforcement actions using their wide discretion to investigate and sanction anti-competitive agreements.

JFTC and HKCC Guidelines

- Japan Fair Trade Commission (“JFTC”) Report of Study Group on Human Resource and Competition Policy (February 2018):
 - § Non-compete and confidentiality obligations may amount to an “abuse of superior bargaining position” under the Anti-monopoly Act.
 - § No-poach could be problematic under the Anti-monopoly Act, but the JFTC will assess the pro-competitive effects as well.
 - § Wage fixing is problematic in principle (per se treatment).



JFTC and HKCC Guidelines

- Hong Kong Competition Commission (“HKCC”) Advisory Bulletin for HR Professionals (April 2018):
 - § Prioritizes the enforcement of anti-competitive employment practices between actual or potential competitors in a downstream market.
 - § No-poach and wage fixing may amount to market sharing and price fixing, which both have an anti-competitive object (per se treatment).
 - § Sharing competitively sensitive information about hiring practices can amount to a concerted practice.



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Questions

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