

Are your employment practices compliant with antitrust and non-compete laws?

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Introduction

A recent confluence of federal antitrust enforcement, state legislation and the Biden administration's focus on labor markets has prompted many companies to revisit both their antitrust and human resource (HR) compliance efforts and existing non-compete and non-solicitation policies, agreements and clauses.

Since the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) issued joint "Antitrust Guidance for Human Resource Professionals" in 2016,¹ the DOJ has repeatedly expressed its commitment to enforcing antitrust laws against employers that participate in anticompetitive conduct in the U.S. labor market.

The part of the Guidance that received the most attention is the DOJ warning that it "intends to proceed criminally against naked wage-fixing or no-poaching agreements."

Recently, the DOJ has brought wage-fixing and no-poach cases, including its first criminal no-poach cases, and has filed amicus briefs in private civil actions involving competition for labor. While these DOJ efforts began at the end of the Obama administration and continued through the Trump administration, this focus on employment seems certain to continue during the Biden administration.

During his 2020 presidential campaign, President Biden criticized no-poach agreements on Twitter, insisting that "companies should have to compete for workers just like they compete for customers. We should get rid of non-compete clauses and no-poaching agreements that do nothing but suppress wages."²

At the same time that antitrust enforcement against no-poach agreements is reaching a zenith, several states and the District

of Columbia are enacting legislation to prohibit employers from entering into no-poach agreements with competitors and from including no-rehire and non-compete clauses in employment contracts.

Given federal and state focus on competition in the labor market, employers must remain vigilant and ensure that their hiring practices comply with the antitrust laws and applicable non-compete legislation.

DOJ and FTC no-poach and wage-fixing guidance and focus on labor and workers

- *Antitrust Guidance for Human Resource Professionals*: In October 2016, the DOJ and FTC provided guidance intended to alert HR professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws.³
- The Guidance says an individual likely is breaking the antitrust laws if he or she:
 - (1) agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements); or
 - (2) agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called no-poach agreements).⁴
- The part of the Guidance that received the most attention is the DOJ warning that it "intends to proceed criminally against naked wage-fixing or no-poaching agreements."⁵
- *Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets*: In this 2020 document, the DOJ and FTC warned that "COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis."⁶

DOJ antitrust division and FTC enforcement in labor markets

- DOJ civil no-poach enforcement: The DOJ has pursued civil no-poach enforcement since the Obama administration.
- The 2016 Guidance stated that “in the past few years, the DOJ brought three civil enforcement actions against technology companies that entered into ‘no poach’ agreements with competitors. In all three cases, the competitors agreed not to cold call each other’s employees. In two cases, at least one company also agreed to limit its hiring of employees who currently worked at a competitor. All three cases ended in consent judgments against the technology companies.”⁷
- On April 3, 2018, the Antitrust Division filed a civil antitrust lawsuit against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. (Wabtec), and simultaneously filed a civil settlement. The complaint alleged that these companies reached naked no-poach agreements beginning as early as 2009 and continuing until at least 2015, in violation of Section 1 of the Sherman Act.⁸
- DOJ criminal no-poach and wage-fixing enforcement: The DOJ recently filed its first several criminal no-poach and wage-fixing cases.⁹ For example, on Jan. 7, 2021, the DOJ announced a grand jury indictment of Surgical Care Affiliates LLC (SCA) and a related entity, which own and operate outpatient medical care centers across the country.¹⁰ The indictment alleges SCA violated Section 1 of the Sherman Act by agreeing with competitors to not solicit senior-level employees. It marks the DOJ’s first-ever criminal no-poach case. A motion to dismiss the indictment on grounds that the alleged non-solicitation agreement is not a *per se* violation of the Sherman Act is currently under consideration by the court.
- DOJ amicus briefs: The DOJ has filed amicus briefs in private civil actions involving competition in the labor market. “As part of the Division’s expanded amicus program, the United States filed the statements of interest in order to provide a more fulsome exposition of how Section 1 of the Sherman Act applies to agreements between employers not to compete for employees.”¹¹
- Railway industry: After the DOJ settlement with Knorr-Bremse AG and Wabtec, employees of the companies filed 15 private actions, which were subsequently consolidated. The DOJ filed a statement of interest to express its view that a naked no-poach agreement is a type of horizontal market allocation that should be assessed under the *per se* rule.¹² The district court relied on the DOJ’s statement of interest in determining that the plaintiffs had sufficiently alleged that the no-poach agreements were a *per se* violation of antitrust laws.¹³
- Medical schools: On March 7, 2019, “the Division filed a statement of interest in a private no-poach case alleging that Duke University and the University of North Carolina entered into an agreement not to poach each other’s medical school faculty. . . . The United States urged the Court to apply the *per se* rule if it finds that Duke and UNC entered into a naked

no-poach agreement. It also argued that, based on the allegations in the operative complaint, the Court should not find that defendant Duke University has derivative immunity from antitrust liability if the Court finds that it entered into an unlawful agreement in violation of Section 1 of the Sherman Act.”¹⁴ The case ended in a settlement that required Duke to pay \$54.5 million.¹⁵

- Fast-food franchises:
 - On March 8, 2019, the DOJ filed statements of interest in three related fast-food franchise no-poach cases, arguing that the rule of reason should apply but noting that “franchise no-poach agreements may be subject to the *per se* treatment if (a) franchisors and franchisees compete for the same employees or (b) franchisees were to agree with each other directly not to hire employees. The DOJ added that even if the agreement were not vertical, the rule of reason would still apply because the no-poach provision was ancillary to a legitimate franchise agreement.”¹⁶
 - On Dec. 7, 2020, the DOJ filed an amicus brief in a fast-food franchise no-poach case in the Eleventh Circuit, arguing that, at least as to hiring, franchisees operate as independent economic actors and are therefore capable of conspiring under the antitrust laws.¹⁷
- FTC cases: “The FTC has brought two cases relating to competition for employment. One was against Debes Corp. for entering into agreements to boycott temporary nurses’ registries in order to eliminate competition among the nursing homes for the purchase of nursing services. The FTC also brought a case against the Council of Fashion Designers of America and the organization that produces the fashion industry’s two major fashion shows for attempting to reduce the fees and other terms of compensation for models. Both cases ended in consent judgments.”¹⁸

State law

There has been a recent trend toward limiting or banning non-compete, no-rehire and no-poach clauses. No-poach agreements, discussed above, can include non-solicitation agreements. Other terms are generally described as follows:

- No-rehire: Employer bans employees from seeking future employment with that employer.
- Non-compete: Employer bans employees from starting a company or going to work for a competitor for a certain period after leaving that employer.

Recent state developments:

- California: On August 3, 2020, the California Supreme Court extended California Business and Professions Code Section 16600 to non-compete agreements between businesses.
- District of Columbia: On March 16, 2021, the District of Columbia’s Ban on Non-Compete Agreements Amendment Act of 2020 took effect, although the law is unlikely to be

applicable until the fall of 2021 when the District's next budget is approved. The new law prohibits non-compete provisions in employment contracts and imposes affirmative duties on employers to inform employees of the law. It also prohibits employers from restricting employees from "moonlighting," i.e., working for another employer while the employee is also working for the employer.

- **Pennsylvania:** On April 29, 2021, the Supreme Court of Pennsylvania ruled that a no-poach agreement between trucking companies was unenforceable and went against public policy. According to the court, "the no-hire provision undermines free competition in the labor market in the shipping and logistics industry, which creates a likelihood of harm to the general public."¹⁹
- **Oregon:** On May 21, 2021, Senate Bill 169 was signed into law, further strengthening Oregon's restrictions on non-compete agreements. In addition to shortening the maximum duration of employee non-compete agreements from 18 down to 12 months and pegging the compensation threshold to employees whose annual salary at the time of termination exceeds \$100,533 (adjusted for inflation), the bill provides that non-compete agreements that do not comply with the statutory provisions are "void and unenforceable," not simply voidable.²⁰
- **Nevada:** On May 25, 2021, Nevada amended the Nevada Unfair Trade Practice Act to bar non-compete agreements with hourly wage employees.²¹
- **Illinois:** On May 31, 2021, the Illinois General Assembly passed a bill amending the Freedom to Work Act that will, if signed into law as expected, impose significant new restrictions and regulations on non-compete and non-solicitation agreements in that state. Among other changes, the new law clarifies that both non-compete agreements and non-solicitation agreements are outlawed for "low-wage employees" and sets separate compensation thresholds for non-compete agreements and non-solicitation agreements. The new law goes into effect Jan. 1, 2022.²²
- **New Jersey:** Assembly Bill 1650, currently pending before the New Jersey General Assembly, would significantly strengthen New Jersey's laws governing the scope and enforceability of post-employment non-compete agreements.²³
- **New York:** Several bills are currently pending before the New York State Legislature that would prohibit anticompetitive clauses and expand antitrust enforcement.
- Senate Bill S766 would prohibit employers from including no-rehire clauses in settlement agreements.²⁴
- Senate Bill S562 would prohibit no-poach clauses in franchise agreements between employers.²⁵
- Senate Bill S933A, dubbed the "Twenty-First Century Anti-Trust Act," would substantially expand the state's ability to pursue antitrust actions. Notably, the bill singles out the use

of non-compete and no-poach clauses as constituting direct evidence of a dominant position in a labor market meriting antitrust scrutiny.²⁶

Compliance takeaways

As antitrust enforcement in the labor market continues to gain momentum, it is critical for companies to evaluate their compliance programs. Recent DOJ enforcement activity shows that companies that enter into no-poach or wage-fixing agreements may be subject to criminal prosecution.

On April 29, 2021, the Supreme Court of Pennsylvania ruled that a no-poach agreement between trucking companies was unenforceable and went against public policy.

Moreover, the myriad state laws prohibiting, limiting, or banning non-compete, no-rehire and no-poach clauses require companies to revisit existing agreements and clauses.

Businesses should create, examine or enhance compliance programs to address HR and hiring practices and ensure compliance with federal and state antitrust and employment laws.

Businesses should avoid:

- Discussions or agreements with individuals at another company about employee salary or other terms of compensation, either at a specific level or within a range (i.e. wage-fixing agreements). Terms of compensation to avoid discussing include benefits, hours limitations, labor costs, and other terms and conditions of compensation.
- Discussions or agreements with individuals at another company about refusals to solicit, recruit or hire that other company's employees (i.e. no-poach agreements).
- The use of identical non-compete agreements across jurisdictions without first evaluating the changing non-compete laws applicable in each jurisdiction where the company has employees.

Businesses should:

- Make sure compliance programs address hiring practices and prohibit no-poach and wage-fixing discussions and agreements with competitors.
- Train legal, compliance and HR staff on existing antitrust HR and no-poach guidance and state non-compete laws.
- Train corporate, HR and hiring managers to know the proper limits for communicating with competitors, implement preapproved agendas prior to such interactions, and involve counsel in such discussions where possible.

- Promote a culture of competition for employees and wages and reinforce it with a strong tone from the top promoting competition for employees and business.
- Proactively prepare for further state and federal restrictions on non-compete and non-solicitation agreements by strengthening internal policies on access to sensitive corporate data and reevaluating business models for a new era of employee mobility.

Notes

¹ U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), available at <https://bit.ly/3yE5Vzw>.

² Joe Biden (@JoeBiden), Twitter (Dec. 23, 2019), <https://bit.ly/2UuFnlv>.

³ U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), available at <https://bit.ly/3yE5Vzw>.

⁴ *Id.* at 3.

⁵ *Id.* at 3-4.

⁶ U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, Bureau of Competition, *Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets* (Apr. 2020), available at <https://bit.ly/2Vv3voN>.

⁷ U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016) at 4, available at <https://bit.ly/3yE5Vzw>.

⁸ U.S. Dep't of Justice, Antitrust Div., *Antitrust Division Update Spring 2019, No-Poach Approach*, available at <https://bit.ly/36rcYzC>.

⁹ See Tyson Y. Herrold, Carl W. Hittinger & Jeffrey D. Martino, *Healthcare Indictment Marks Justice Department's First Criminal No-Poach Case*, BakerHostetler (Jan. 12, 2021), <https://bit.ly/3woRX2Y>; see also Press Release, U.S. Dep't of Justice, Antitrust Div., *Former Health Care Staffing Company Executives Charged in Superseding Indictment with Wage Fixing and Obstruction* (Apr. 19, 2021), available at <https://bit.ly/3wtSX5S>; Press Release, U.S. Dep't of Justice, Antitrust Div., *Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses* (Mar. 30, 2021), available at <https://bit.ly/3qZnHuu>; Press Release, U.S. Dep't of Justice, Antitrust Div., *Health Care Company Indicted for Labor Market Collusion* (Jan. 7, 2021), available at <https://bit.ly/3dWEOYD>.

¹⁰ Press Release, U.S. Dep't of Justice, Antitrust Div., *Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses* (Mar. 30, 2021), available at <https://bit.ly/3qZnHuu>.

¹¹ U.S. Dep't of Justice, Antitrust Div., *Antitrust Division Update Spring 2019, No-Poach Approach*, available at <https://bit.ly/36rcYzC>.

¹² *Id.*; see also Statement of Interest of the United States, *In re: Railway Industry Employee No-Poach Antitrust Litig.*, 2:18-mc-00798-JFC, Dkt. 158 (W.D. Pa. Feb. 8, 2019), available at <https://bit.ly/3qWZqFg>.

¹³ See *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 485 (W.D. Pa. 2019) ("The court's decision . . . is supported by the government's explanation . . . that the federal agencies charged with enforcing the antitrust laws consider naked no-poach agreements *per se* violations of the Sherman Act and the DOJ will proceed criminally against those who enter into those kinds of agreements.").

¹⁴ U.S. Dep't of Justice, Antitrust Div., *Antitrust Division Update Spring 2019, No-Poach Approach*, available at <https://bit.ly/36rcYzC>; see also Statement of Interest of the United States of America, *Seaman v. Duke University*, 1:15-cv-00462-CCE-JLW, Dkt. 325 (M.D.N.C. Mar. 7, 2019), available at <https://bit.ly/3rOZpAs>.

¹⁵ Memorandum Opinion and Order, *Seaman v. Duke University*, 1:15-cv-00462-CCE-JLW (M.D.N.C. Sept. 25, 2019).

¹⁶ Tyson Y. Herrold, Carl W. Hittinger & Jeffrey D. Martino, *Demystifying the Antitrust Implications of Franchise No-Poach Agreements*, BakerHostetler (Nov. 11, 2019), <https://bit.ly/3hR7rHU>; see also Corrected Statement of Interest of the United States of America, *Stigar v. Dough, Inc.*, 2:18-cv-00244-SAB, Dkt. 34 (E.D. Wash. Mar. 8, 2019), available at <https://bit.ly/3yE775Y>; Corrected Statement of Interest of the United States of America, *Richmond v. Bergey Pullman Inc.*, 2:18-cv-00246-SAB, Dkt. 45 (E.D. Wash. Mar. 8, 2019), available at <https://bit.ly/3dYrUte>; Corrected Statement of Interest of the United States of America, *Harris v. CJ Star, LLC*, 2:18-cv-00247, Dkt. 38 (E.D. Wash. Mar. 8, 2019), available at <https://bit.ly/3htkvnj>.

¹⁷ Brief of Amicus Curiae United States of America in Support of Neither Party, *Arrington v. Burger King Worldwide, Inc.*, Case No. 20-13561 (11th Cir. Dec. 7, 2020), available at <https://bit.ly/2Uw5Sae>; see also Jeffrey Martino & Tyson Herrold, *Franchise No-Poach Agreements: Is Reform on The Horizon?*, BakerHostetler Antitrust Advocate (Jan. 6, 2021), <https://bit.ly/3qZPhaV>.

¹⁸ U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016) at 4, available at <https://bit.ly/3yE5Vzw>.

¹⁹ *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, No. 31 WAP 2019, 2021 WL 1676399, at *15 (Pa. Apr. 29, 2021).

²⁰ <https://bit.ly/3xvqzlj>.

²¹ <https://bit.ly/36EG4M5>.

²² <https://bit.ly/3xpOfaF>.

²³ <https://bit.ly/3dYsrLK>.

²⁴ <https://bit.ly/2TKZBrL>.

²⁵ <https://bit.ly/3xtXfvm>.

²⁶ <https://bit.ly/3e2avQi>.

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