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To hire or not to hire: U.S. cartel enforcement targeting employment practices

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ABSTRACT

In October 2016, the Antitrust Division of the Department of Justice announced its intention to thereafter—and for the first time—criminally prosecute "naked" no-poach and wage-fixing agreements. Fundamental fairness questions arise when the Justice Department expands the reach of its criminal enforcement program to penalize conduct with fines and jail terms that a few years ago was only subject to consent decrees, and where there has been no judicial review of its classification of such agreements as per se offenses under the Sherman Act. In light of the Justice Department's recent statements referencing a pipeline full of cases, companies should expect to see cases testing the reach of per se criminal liability for no-poach and wage-fixing agreements.

En octobre 2016, la Division de la concurrence du Département de la Justice américain a annoncé son intention d'engager – pour la première fois – des poursuites pénales contre les accords dits « nus » de non sollicitation et de fixation des salaires. Des questions fondamentales d'équité se posent lorsque le Département de la Justice étend la portée de son programme d'application de la loi pénale afin de sanctionner les comportements par des amendes et des peines d'emprisonnement, et ce alors qu'il y a quelques années, ceux-ci n'étaient soumis qu'à des engagements d'abstention ou exécutoires (Consent Decrees), et alors qu'il n'y a pas eu de contrôle judiciaire concernant leur statut d'infraction à proprement dit en vertu de la Loi Sherman. À la lumière des récentes déclarations du Département de la Justice faisant référence à l'existence de nombreux dossiers de ce genre, les entreprises devraient s'attendre à ce que des affaires de cette nature surviennent afin de tester la portée de la responsabilité pénale en soi en ce qui concerne les accords de non sollicitation et de fixation des salaires.

To hire or not to hire: U.S. cartel enforcement targeting employment practices

1. In October 2016, the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission issued joint guidance (the "Guidance") announcing the DOJ's intention to thereafter—and for the first time—criminally prosecute "naked" no-poach and wage-fixing agreements.[1] A no-poach agreement exists among companies that agree not to compete for each other's employees, such as by not soliciting or hiring them, whereas wage-fixing concerns an agreement on employees' salary or other terms of compensation, either at a specific level or within a range. Notably, such agreements can exist among companies that compete to hire and retain employees, even where they do not otherwise compete in the market to sell products or services. For this reason, the potential for antitrust liability that normally attaches with agreements between classic horizontal competitors was not obvious to many, as the publication of the Guidance itself impliedly concedes. This is because the definition of "competitors" found in most antitrust compliance materials—companies that operate on the same level of the supply chain and compete to sell their respective product or service offerings—differs from the definition announced in the Guidelines. Recent statements by the DOJ referencing a pipeline full of cases[2] as well as a filed action[3] indicate that the DOJ is following through on its proclamation by targeting such practices for prosecution as hardcore cartel offenses. However, fundamental fairness questions arise when the Justice Department expands the reach of its criminal enforcement program to penalize conduct with fines and jail terms that a few years ago was only subject to consent decrees, and where there has been no judicial review of its classification of such agreements as per se offenses under the Sherman Act.

1 *See* Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/ 903511/download. Without giving further explanation, the guidance states that, "[g]*oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poach agreements.*" Id. at 4.

2 M. Perlman, Delrahim Says Criminal No-Poach Cases Are In The Works, *Law360* (Jan. 19, 2018), https://www.law360.com/competition/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works; A. C. Finch, Principal Deputy Asst. Att'y Gen., Trump Antitrust Policy After One Year, Remarks at the Heritage Foundation (Jan. 23, 2018), https://www.justice.gov/opa/speech/file/1028906/download; B. Nigro, Deputy Asst. Att'y Gen., A Prescription for Competition, Keynote Remarks at the Am. Bar Ass'n Antitrust in Healthcare Conference (May 17, 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar.

3 Press Release, Dep't of Justice, Office of Pub. Affairs, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

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I. The DOJ brands "naked" no-poach and wage-fixing agreements as per se violations of the Sherman Act

2. Although Section 1 of the Sherman Act ostensibly prohibits "every" restraint of trade, the U.S. Supreme Court has layered on it a judicial gloss, interpreting the statute as prohibiting only "unreasonable" restraints of trade. Courts assess reasonableness in two ways: the rule of reason and the per se rule. Courts apply the rule of reason to cases where a business practice may potentially have the capacity to encourage competition in some circumstances. In those cases, a business practice is illegal only where under the totality of the circumstances the challenged practice suppresses, rather than promotes, market competition. By contrast, restraints subject to the per se rule are necessarily illegal, notwithstanding any purported pro-competitive benefits.

3. The DOJ has staked out its position that "naked" no-poach and wage-fixing agreements are per se illegal under Section 1 of the Sherman Act, meaning the DOJ may prosecute such agreements without any inquiry into their justifications or competitive effects.[4] While stressing that it will only apply its criminal enforcement powers to prosecute "naked" agreements that are "*separate from or not reasonably necessary to a larger legitimate collaboration between the employers*,"[5] such a per se classification presumes an inherent anticompetitive quality that the courts have found thus far only with price-fixing, bid rigging and market allocation agreements.

4. The U.S. Supreme Court has strictly confined the per se rule, which forecloses any inquiry into competitive efficiencies, to agreements or conduct that "*because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal*."[6] Accordingly, a robust body of case law has so far reserved per se classification for price-fixing, bid rigging, and customer or territory allocation. Within this context, the DOJ has now decided to pursue no-poach and wage-fixing agreements under the per se rule with its criminal enforcement powers in advance of supporting legal precedent from civil cases. The DOJ's decision to treat no-poach and wage-fixing agreements as "hardcore" criminal cartel conduct is remarkable in its deviation from an exhibited reticence to expand the per se category beyond practices condemned by legal precedent as inherently anticompetitive.

5. While the DOJ has not to date brought any criminal charges involving no-poach or wage-fixing agreements, the DOJ has stated that it has several active criminal investigations,[7] and it has filed a civil action noting specifically its intent to prosecute agreements existing after the 2016 Guidance criminally.[8]

II. The DOJ's prior civil enforcement against no-poach agreements

6. In recent years, agreements between companies that inhibit employees' rights to work have drawn increasing attention from the DOJ. In an era in which employment mobility is at peak levels, several companies have attempted to reach agreements with competitors in the employment marketplace that could restrain employee movement and advancement. The DOJ has investigated these agreements and, in several cases, has brought civil suits against the companies involved.

7. In 2010, the DOJ brought a series of civil lawsuits against Silicon Valley companies, including technology industry leaders Apple, Google, and eBay, for entering into no-poach agreements with their competitors. In each of these cases, the DOJ challenged the companies' agreements related to hiring practices as per se violations of Section 1 of the Sherman Act. The DOJ viewed these agreements as placing direct restraints on the labor markets, which hindered competition for the services of highly trained technical employees and limited their access to better job opportunities.[9] While these cases resulted in settlements enjoining the companies from entering into no-poach agreements and requiring them to institute appropriate training and compliance programs, the Guidance has left little doubt that the DOJ will investigate similar future agreements as potential criminal violations. Given the dearth of filed no-poach

4 Antitrust Guidance at 4.

5 Id. at 3. "Naked" no-poach and wage-fixing agreements are being treated like restrictions of competition "by object" under Article 101(1) of the Treaty on the Functioning of the European Union (the "Treaty"). Restrictions of competition by object are those which by their very nature have the potential to restrict competition. These restrictions are deemed to have such a high potential for negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) of the Treaty to demonstrate any actual or likely anticompetitive effects on the market.

6 *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

7 M. Perlman, Delrahim Says Criminal No-Poach Cases Are in the Works.

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

9 Press Release, Dep't of Justice, Office of Pub. Affairs, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

cases, the technology industry cases provide insight into the DOJ's view of such agreements as per se violations and its move toward criminal enforcement.

8. In the first case, *United States v. Adobe Systems*, the DOJ alleged that six technology companies—Adobe, Apple, Google, Intel, Intuit, and Pixar—agreed not to cold call each other's employees about job opportunities. Cold calling was a principal means of recruiting highly skilled employees.[10] The DOJ asserted that the agreements were per se illegal, relying on prior cases that mostly dealt with sales restraints outside of the employment context.[11] The DOJ argued that if competing sellers entered into similar agreements when selling products to customers, there would be no doubt that the allegations constituted per se violations, and "[t]*here is no basis for distinguishing allocation agreements based on whether they involve input or output markets*," because "[a]*nticompetitive agreements in both input and output markets create allocative inefficiencies*."[12] The DOJ asserted that no cold-call agreements, which were not limited by geography, job function, product group, or time period, "*eliminated a significant form of competition to attract high tech employees, and, overall, substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities*."[13]

9. In *United States v. Lucasfilm Ltd.*, the DOJ asserted similar allegations as in its *Adobe* complaint. There, the DOJ alleged that Lucasfilm and Pixar entered into an agreement "*not to cold call, not to make counteroffers under certain circumstances, and to provide notification when making employment offers to each other's employees*."[14] The DOJ asserted that the agreements at issue were even more problematic than those found in *Adobe* because they prohibited counteroffers by non-employing firms above the competitor's initial wage offer, and thus went beyond "*an agreement to refrain from cold-calling*."[15] The DOJ reiterated its argument in *Adobe* and specifically tied it to employment markets, noting that "[a]*ntitrust analysis of downstream customer-related restraints applies equally to upstream monopsony restraints on employment opportunities*."[16]

10. The parties in *Adobe* and *Lucasfilm* reached settlements with the DOJ that broadly prohibited the companies from entering, maintaining, or enforcing any agreement that in any way prevented any person from soliciting, cold calling, recruiting or otherwise competing for employees.[17] The companies further agreed to implement compliance measures to prevent future offending agreements.[18] The settlements did not impose monetary penalties.

11. In a third case, *United States v. eBay*, the DOJ alleged that eBay and Intuit entered into an agreement that contained both no-solicitation and no-hire provisions, even in situations where an employee independently approached the competitor about employment opportunities.[19] According to the complaint, the companies acknowledged that they declined to hire talented applicants, pursuant to their agreement.[20] The defendants filed a motion to dismiss, arguing that the DOJ failed to state an actionable conspiracy and to allege an unreasonable restraint of trade adequately.[21] The court denied the motion, rejecting eBay's argument that the presence of a single overlapping director renders two otherwise separate firms a single entity for antitrust purposes.[22] The court further noted that the agreement constituted a "*classic*" horizontal market allocation agreement, which is generally a per se violation, because "[a]*ntitrust law does not treat employment markets differently from other markets in this respect*."[23] However, the court deferred ruling on whether a per se rule or "quick look" analysis should apply, stating that it "*simply cannot determine with certainty the nature of the restraint, and by extension the level of analysis to apply*" at the pleading stage.[24] After the court denied the defendants' motion to dismiss, the parties reached a settlement that was substantially similar to that in *Adobe* and *Lucasfilm*, prohibiting the defendants from entering into, maintaining, or enforcing anticompetitive agreements related to employee hiring and retention, and required them to implement compliance measures to prevent future agreements.[25]

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10 Id.

11 Competitive Impact Statement at 7–8, *United States v. Adobe Sys., Inc.* (No. 10-CV-01629) (D.D.C. filed Sept. 24, 2010), https://www.justice.gov/atr/case-document/file/483431/download (citing *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367 (6th Cir. 1988) (finding the agreement between movie theater booking agents to refrain from soliciting each other's customers was per se illegal, even though booking agents remained free to accept unsolicited business); *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991) (affirming jury verdict on violation of Section 1 of the Sherman Act against two competitors who agreed to refrain from bidding on each other's former leases for a year after the space was lost or abandoned by the other conspirator)).

12 Id.

13 Id. at 10.

14 Complaint at 1, *United States v. Lucasfilm Ltd.* (No. 10-CV-02220) (D.D.C. filed Dec. 21, 2010), https://www.justice.gov/atr/case-document/file/501671/download.

15 Competitive Impact Statement at 4, *Lucasfilm Ltd.* (No. 10-CV-02220) (D.D.C. filed Dec. 21, 2010), https://www.justice.gov/atr/case-document/file/501651/download.

16 Id. at 5–6.

17 Final Judgment at 5–9, *Adobe Sys., Inc.* (No. 10-CV-01629) (D.D.C. filed Mar. 18, 2011), https://www.justice.gov/atr/case-document/file/483426/download; Proposed Final Judgment at 4–8, *Lucasfilm Ltd.* (No. 10-CV-02220) (D.D.C. filed Dec. 21, 2010), https://www.justice.gov/atr/case-document/file/501656/download.

18 Final Judgment at 9–11, *Adobe Sys., Inc.*; Proposed Final Judgment at 8–10, *Lucasfilm Ltd.*.

19 Complaint at 1–2, *United States v. eBay, Inc.* (No. 12-CV-5869) (N.D. Cal. filed Nov. 16, 2012), https://www.justice.gov/atr/case-document/file/494701/download.

20 Id. at 9.

21 *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1034 (N.D. Cal. 2012).

22 Id. at 1035–1036.

23 Id. at 1039.

24 Id. at 1040.

25 Final Judgment at 4, 9, *eBay, Inc.* (No. 12-CV-5869) (N.D. Cal. filed Sept. 2, 2014), https://www.justice.gov/atr/case-document/file/494626/download.

12. Notably, each of these matters ended with settlements and without a judicial determination that the conduct amounted to a per se violation. According to its Guidance, however, the DOJ will not only investigate such agreements as per se offenses going forward, but as criminal violations carrying the potential for significant monetary penalties and jail time. It is highly unusual for the DOJ to switch from civil to criminal enforcement against any particular type of conduct, and yet it has done so over a short time span and without judicial precedent that is directly on point. Moreover, the sudden policy change has garnered some criticism that these agreements, like joint purchasing agreements, could offer some pro-competitive effects such that outright condemnation as per se anticompetitive is precipitous and inappropriate.[26] However, this shift did not occur in a vacuum, but rather emerged as part of a much broader scrutiny of agreements that limit employee mobility.

III. The DOJ's stepped up enforcement and shift toward criminal enforcement

13. The DOJ's decision to shift from civil to criminal enforcement reflects an evolution of its view of the harm caused by no-poach and wage-fixing agreements. Whereas the 2010 actions aimed to eliminate and discourage such agreements through only remedial measures, the 2016 Guidance embraces a new view that the same agreements instead merit criminal punishment. This change occurred over a period of less than six years, but straddled two presidential administrations, one Democratic and one Republican, and appears to have been part of a much larger popular focus on the potential harms caused by agreements that limit employee access to job opportunities.

14. Leading up to the publication of the Guidance, there was also significant government action on the federal and state levels concerning non-compete agreements that employers enter into with their employees rather than with each other (as is the case with no-poaching and wage-fixing agreements). In March 2016, the U.S. Department of the Treasury released a report on the economic effects and policy implications of non-compete agreements and proposed directions for reform.[27] The report noted that these non-compete agreements often cover low-wage workers unlikely to possess trade secrets that employers have a legitimate interest in protecting, and that workers are often poorly informed about the existence, details, and implications of their non-compete agreements. In May 2016, the White House also released a report about non-compete agreements, suggesting that they limit job mobility, worker bargaining power, entrepreneurship, and wages.[28] The White House had previously instructed executive departments and agencies to propose new ways of promoting competition and providing consumers and workers with information they need to make informed decisions.[29]

15. Several states also have recently enacted or proposed legislation intended to address the issues raised by non-compete agreements.[30] In late April, House Democrats unveiled proposed legislation that included both the Workforce Mobility Act and the End Employer Collusion Act.[31] The Workforce Mobility Act would presume non-compete provisions in employment agreements to be illegal unless the employer can show that the provision is not anticompetitive.[32] The End Employer Collusion Act would broadly ban all agreements between employers not to poach each other's employees, regardless of their pro-competitive benefits or previous treatment under the rule of reason.[33] These developments provide context to view the Guidance as part of a broader trend toward discouraging or eliminating various types of employment-related non-compete agreements by government enforcers and legislators.

16. While the DOJ has not yet announced a criminal prosecution, there are several indications that bringing a no-poach or wage-fixing case is a top priority. Since its announced policy shift, there have been reports of a DOJ criminal probe into whether Barclays entered into an agreement with JPMorgan not to hire JPMorgan's staff following several defections by senior employees

26 *See*, e.g., J. M. Taladay and V. Mehta, Criminalization of Wage-Fixing and No-poach Agreements, *CPI*, June 2017, https://www.competitionpolicyinternational.com/wp-content/uploads/2017/05/North-America-Column-June-Full-1.pdf.

27 U.S. Dep't of the Treasury, Office of Econ. Policy, Non-compete Contracts: Economic Effects and Policy Implications (Mar. 2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf.

28 The White House, Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses (May 2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf.

29 White House, Office of the Press Sec'y, Executive Order: Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy (Apr. 15, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

30 *See*, e.g., D. J. Clark, Non-Competes Continue to Face Political Headwinds, *The Nat'l Law Rev.*, May 14, 2018, https://www.natlawreview.com/article/non-competes-continue-to-face-political-headwinds.

31 S. Goldfein and K. Hoffman Lent, No-Poach and Non-Competes: Democrats' Proposed Legislation Places Employment Practices in Antitrust Crosshairs, *New York Law J.* (June 11, 2018), https://www.law.com/newyorklawjournal/2018/06/11/no-poaches-and-non-competes-democrats-proposed-legislation-places-employment-practices-in-antitrust-crosshairs.

32 Id.

33 Id.

in 2016.[34] In January 2018, Assistant Attorney General Makan Delrahim announced that the Antitrust Division had a handful of criminal cases in the works related to agreements by companies not to hire each other's workers.[35] Then, in April 2018, the DOJ announced the settlement of its first case relating to no-poach agreements since issuing the Guidance.[36] In that case, two of the leading rail equipment manufacturers, Knorr-Bremse AG ("Knorr") and Westinghouse Air Brake Technologies Corporation ("Wabtec"), settled charges by the DOJ that they had entered into a series of unlawful no-poach agreements between 2009 and 2016.[37]

17. In the *United States v. Knorr-Bremse AG* complaint, the DOJ alleged that the companies competed with one another to attract, hire and retain skilled employees, including engineers, project managers, business unit heads, sales executives and corporate officers, but then agreed not to solicit one another's employees and, in some instances, not to hire one another's employees without approval. Observing that there is "*high demand for and limited supply of skilled employees who have rail industry experience*," the DOJ asserted that the challenged agreements restrained competition to attract skilled rail industry workers and "*denied employees access to better job opportunities, restricted their mobility, and deprived them of competitively significant information that they could have used to negotiate for better terms of employment*."[38] Reiterating its position that "[m]*arket allocation agreements cannot be distinguished from one another based solely on whether they involve input or output markets*," the DOJ claimed the agreements constituted per se violations of Section 1 of the Sherman Act.[39]

18. Despite alleging a per se violation of antitrust law, the DOJ did not bring criminal charges, instead citing prosecutorial discretion in light of the fact that the no-poach agreements were both discovered by the DOJ and terminated by the parties prior to the issuance of the October 2016 Guidance.[40] The DOJ reiterated, however, that "*the department has made clear that it intends to bring criminal, felony charges against culpable companies and individuals who enter into naked No-Poach Agreements* (…) *where the underlying No-Poach Agreements began or continued after October 2016*."[41]

34 C. Binham and M. Arnold, Barclays' Email Raises Questions on Banks' 'No-Poach Agreement', *Fin. Times* (Sept. 10, 2017), https://www.ft.com/content/ede2ef76-94af-11e7-bdfa-eda243196c2c.

35 M. Perlman, Delrahim Says Criminal No-Poach Cases Are in the Works.

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

37 Id.

38 Complaint at 5, 10, 11, *United States v. Knorr-Bremse AG* (No. 18-CV-00747) (D.D.C. filed Apr. 3, 2018), https://www.justice.gov/opa/press-release/file/1048491/download.

39 Competitive Impact Statement at 9, *Knorr-Bremse AG* (No. 18-CV-00747) (D.D.C. filed Apr. 3, 2018), https://www.justice.gov/opa/press-release/file/1048481/download.

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

41 Competitive Impact Statement at 10–11, *Knorr-Bremse AG*.

19. Although there have been no criminal prosecutions for no-poach agreements to date, recent remarks by government officials on several occasions reveal that the DOJ has been active in investigating these agreements, and charges may be brought in the coming months.[42] The potential consequences of criminal prosecution are severe. Both companies and individuals can be prosecuted and punished by fines of up to $100 million for corporations and $1 million for individuals, and the maximum jail sentence is ten years.[43]

IV. Uncertain times for franchises and joint ventures in the wake of no-poach Guidance

20. In the wake of the Guidance, and the DOJ's public promises of zealous no-poach enforcement, class action plaintiffs have filed a series of complaints against fast-food franchisors—Carl Karcher Enterprises (i.e., Carl Jr.'s) (February 2017), McDonald's (June 2017), Pizza Hut (November 2017) and Jimmy John's (January 2018)—alleging that the defendants violated Section 1 of the Sherman Act by imposing no-poach agreements on their franchisees.[44] Relying in part on the Guidance, each of these lawsuits allege per se unlawful, horizontal restraints of trade,[45] exposing the companies to treble

42 *See*, e.g., A. C. Finch, Acting Asst. Att'y Gen., Antitrust Enforcement and the Rule of Law, Remarks at Global Antitrust Enforcement Symposium (Sept. 12, 2017), https://www.justice.gov/opa/speech/file/996151/download ("*The Guidelines cautioned that naked agreements among employers not to recruit certain employees, or not to compete on employee compensation, are per se illegal and may thereafter be prosecuted criminally*"); R. B. Hesse, Acting Asst. Att'y Gen., The Measure of Success: Criminal Antitrust Enforcement during the Obama Administration, Remarks at 26th Annual Golden State Antitrust, UCL and Privacy Law Institute (Nov. 3, 2016), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrustdivision-delivers-remarks-26th ("*Naked wage-fixing or no-poach agreements eliminate competition in the same irredeemable way as per se unlawful price-fixing and customer-allocation agreements do. So we will approach them the same way, using our professional judgment, and considering all the factors that ordinarily weigh on our discretion as criminal prosecutors*"); A. C. Finch, Trump Antitrust Policy After One Year ("*In October 2016, the Division issued guidance reminding the business community that no-poach agreements can be prosecuted as criminal violations. For agreements that began after the date of that announcement, or that began before but continued after that announcement, the Division expects to pursue criminal charges*").

43 15 U.S.C. § 1.

44 Class Action Complaint, *Bautista v. Carl Karcher Enterprises, LLC* (No. BC649777) (Sup. Ct. Cal. filed Feb. 8, 2017); Class Action Complaint, *Deslandes v. McDonald's USA, LLC* (No. 17-CV-04857) (N.D. Ill. filed June 28, 2017); Class Action Complaint, *Ion v. Pizza Hut, LLC* (No. 17-CV-00788) (E.D. Tex. filed Nov. 3, 2017); Class Action Complaint, *Butler v. Jimmy John's Franchise, LLC* (No. 18-CV-00133) (S.D. Ill. filed Jan. 24, 2018).

45 Plaintiffs allege that the franchisor is the organizer, or "hub," of a hub-and-spoke conspiracy that targets horizontal competition between franchisors. They further allege that the conspiracies are horizontal given the franchisors' operation of company-owned stores.

damages and attorneys' fees without regard to any pro-competitive benefits of the arrangements.

21. Until recently, the string of class action lawsuits arising in the franchise space appeared to be a harbinger of more to come. In a November 21, 2017, letter to Attorney General Jeff Sessions, Senators Elizabeth Warren and Cory Booker inquired as to whether the DOJ was "*currently investigating the use of no-poach agreements in the franchise industry*." They cited a Princeton University study that found that "*fully 58% of the 156 largest franchisors operating around 340,000 franchise units used some form of anti-competitive 'no-poach' agreements*."[46]

22. In May 2018, however, the U.S. Supreme Court dealt what could be a fatal blow to the no-poach class actions by ruling in *Epic Systems Corp. v. Lewis* that companies may enforce arbitration clauses in employment contracts to prevent employees from bringing collective or class action suits regarding workplace issues.[47] While this could have the effect of severely limiting class action suits, criminal enforcement could still be in play, although it is unclear how no-poach agreements involving franchise systems would fare under the DOJ's new policy direction.

23. The Guidance indicates that ancillary restraints in the labor market—that is, restraints which are "[related to and] *reasonably necessary to a larger legitimate business collaboration between the employers*"—are entitled to rule of reason analysis.[48] No-hire arrangements among franchisees arguably fit within this category, given their joint interest in promoting the brand and providing a uniform customer experience. For similar reasons, courts have treated no-hire agreements in mergers and acquisitions as ancillary restraints entitled to rule of reason analysis. For example, in *Eichorn v. AT&T*, the U.S. Court of Appeals for the Third Circuit approved a 245-day no-hire arrangement executed in connection with an agreement governing the sale of a subsidiary business enterprise. The court concluded that the no-hire clause was "*not anticompetitive*" because the "*primary purpose of the no-hire agreement was to ensure that* (…) *the purchaser of* [the subsidiary] *could retain the skilled services of* [the subsidiary's] *employees*."[49]

24. The DOJ maintains that "*legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws*."[50] The Guidance does not elaborate further, however, and what qualifies as a "legitimate" joint venture remains undefined. The DOJ will likely scrutinize the no-poach agreements in terms of factors bearing on the reasonableness of the agreements' duration and scope—including geography, job function, and product group—but the acceptable parameters of the venture itself are unclear.

V. Avoiding antitrust liability for employment practices relating to hiring and retention

25. Although the DOJ has not provided comprehensive guidance about the types of conduct that qualify as "naked" restraints on trade, they would not include ancillary restraints made in pursuit of legitimate commercial interests and tailored in terms of geography, job function, product group, and duration. For example, the DOJ will not criminally prosecute no-poach agreements necessary to legitimate business collaborations or the settlements of theft of trade secrets disputes. By contrast, a shared desire among competitors to hold down costs or safeguard the benefits of their own employee training would not qualify as legitimate reasons for no-poach agreements.

26. Even in the context of a joint venture or potential acquisition or merger, care must be taken to limit what information is shared and how. As the Guidance notes, although not subject to per se criminal liability, an exchange of sensitive information between employers falling short of an agreement could place a company at risk of civil antitrust liability.[51] In particular, "*evidence of periodic exchange of current wage information in an industry with few employers could establish an antitrust violation*" when, for instance, the exchange of information results in a decrease, or is likely to decrease, compensation.[52] For example, the DOJ filed a civil suit against the Utah Society for Healthcare Human Resources Administration for conspiring to exchange nonpublic prospective and current wage information about registered nurses.[53] The complaint charged that defendant hospitals matched each other's wages, which kept the nurses' pay artificially low.[54] The case ended in a settlement that allowed the nurses to "*benefit*

46 *See* B. T. Sicalides and B. J. Eichel, Antitrust Division Threatens Criminal Prosecution for Employment Practices: Antitrust Agencies Issue Joint Guidance on Employment Restrictions, *Competition News* (2016), http://www.pepperlaw.com/publications/antitrust-division-threatens-criminal-prosecution-for-employment-practices-antitrust-agencies-issue-joint-guidance-on-employment-restrictions-2016-11-08.

47 *Epic Sys. Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018).

48 Antitrust Guidance at 3.

49 *Eichorn v. AT&T Corp.*, 248 F.3d 131, 146 (3d Cir. 2001), as amended (June 12, 2001).

50 Antitrust Guidance at 3.

51 Id.

52 Id. at 4–5.

53 Id. at 5.

54 Complaint, *United States v. Utah Soc'y for Healthcare Human Res. Admin.* (No.94-CV-00282)(D.UtahMar.filed14,1994),https://www.justice.gov/atr/case-document/file/514706/download.

from competition for their services."[55] Specifically, the settlement broadly prohibited the defendant from conducting or facilitating any exchange of information by or between healthcare facility employees concerning current or prospective compensation paid to nurses and further required the defendant to implement compliance measures.[56]

27. Information exchanges about conditions of employment made within the framework of a merger or acquisition, joint venture, or other collaborative agreement may also pose antitrust risks.[57] In order to avoid those risks, the exchange of sensitive information should be limited to the purpose of the proposed transaction. The Guidance explains that an information exchange may be lawful if: (i) the exchange is managed by a neutral third party; (ii) the exchange involves relatively old information; (iii) the information is aggregated to protect the identity of the underlying sources; and (iv) enough sources are aggregated to prevent competitors from linking particular data to an individual source.[58]

28. Companies should also be wary of sharing information about the terms and conditions of employment with a common third party, such as a recruiter or trade association, which poses antitrust risk insofar as it may facilitate or create the appearance of collusion or coordinated behavior.

29. Individual employees may still consensually enter into "non-compete agreements" not to work for a competitor, as long as the agreements are reasonable in terms of scope and duration and narrowly tailored to address legitimate employer concerns, such as loss of trade secrets. The employees must also receive consideration for their agreement not to compete. Note that this is also an area of increased enforcement, and legal counsel should be consulted when drafting these agreements.

30. Further, in light of the decision in *Epic Systems Corp. v. Lewis*, companies may want to consider including arbitration clauses in employment contracts to mitigate the dangers of class-action suits related to workplace issues.

31. Companies should review and, if necessary, strengthen their existing antitrust compliance programs. They should also educate the appropriate human resources personnel (those who hire, recruit, and set wages) on potential issues related to these agreements and compliance.

VI. Potential challenges faced by the DOJ and the case for prosecutorial discretion

32. The DOJ's decision to pursue no-poach and wage-fixing agreements as hardcore criminal conduct is a remarkable departure from the DOJ's long-practiced self-restraint in not expanding its criminal program to capture new types of harm to competition, and it does so without the clear support of legal precedent. The Guidance sounded a warning shot that many employers may not have heard, even those who have undertaken significant antitrust compliance efforts already. It therefore stands to reason that, once the DOJ follows through on its promise to pursue agreements in existence after its 2016 Guidance as criminal matters, a number of companies and individuals are at risk of being caught in the government's cross hairs. Accordingly, companies should expect to see cases testing the reach of per se criminal liability for no-poach and wage-fixing agreements.

33. It cannot be assumed that judges will uniformly adopt the DOJ's view that the per se rule should be applied in all cases involving naked no-poach agreements. There have been recent examples of judges expressing discomfort with the DOJ's attempts to extend the per se rule to new circumstances without directly analogous judicial precedent.[59] Similarly, the Antitrust Division's own manual explains that criminal prosecution of even per se matters may not be appropriate where there are novel issues of fact or law, or where there is unsettled or uncertain case law.[60] The Antitrust Division's manual also states that criminal charges may be inappropriate where the parties involved were not aware of, or did not appreciate, the consequences of their actions, or where confusion reasonably may have been caused by past prosecutorial decisions.[61] Only a few lines above, the same manual explains that "*current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations*."[62] There is no reference to no-poach, no-hire, or wage-fixing agreements here or anywhere else in the manual.

55 Antitrust Guidance at 5.

56 Consent Judgment, *United States v. Utah Soc'y for Healthcare Human Res. Admin.* (No. 94-CV-00282) (D. Utah Sept. 9, 1994), https://www.justice.gov/atr/case-document/file/628496/download.

57 Antitrust Guidance at 5.

58 Id.

59 *See*, e.g., Order on Defense Motion Regarding Application of Rule of Reason, *U.S. v. Kemp* (No. 16-CR-00403) (D. Utah Aug. 28, 2017).

60 Department of Justice, *Antitrust Division Manual* (5th ed. 2012) at Sec. III-12, https://www.justice.gov/atr/file/761141/download.

61 Id.

62 Id.

34. It is against the backdrop of a relatively abrupt enforcement policy change, inconsistent Antitrust Division guidance, a lack of directly analogous judicial precedent, and a host of recent no-poach cases pursued civilly, that questions can arise about the fundamental fairness of prosecuting all naked no-poach agreements criminally. Judges may also be reluctant to extend a per se analysis to conduct that is unlikely to be intuitively viewed as criminal and where there is no contemporaneous consciousness of guilt expressed by the defendants.[63] Notably, these types of agreements often lack the hallmarks of typical hardcore cartel activity and may be memorialized in writing and somewhat widely distributed, rather than negotiated in the proverbial smoke-filled room, consciously hidden from view.[64] To the extent that the DOJ criminally prosecutes naked no-poach or wage-fixing agreements lacking any indicia of consciousness of guilt or fraudulent intent (although neither are required to prove a Sherman Act offense), it may face resistance and defeat in litigation.

35. The level of prosecutorial discretion that the DOJ will apply when deciding which cases to bring pursuant to this policy is unclear. Thus far, however, it appears that the government is inclined to take an aggressive approach. Assistant Attorney General Delrahim recently stated that, "[i]*f the* [no-poaching] *activity has not been stopped and continued from the time when the DOJ's* [October 2016 Guidance] *was made, a year and a couple of months ago, we'll treat that as criminal.*"[65] It is of critical importance to the Antitrust Division's enforcement program that nuance and discretion are applied in deciding which cases merit criminal treatment, as the business community continues to learn and digest the stark consequences it potentially faces for these agreements. ■

63 *See*, e.g., M. Strimel, Rare Heir: Will DOJ's Kemp Charges Blur Per Se Rule? *Law360* (Jan. 11, 2018), https://www.law360.com/articles/1001104.

64 *See*, e.g., Competitive Impact Statement at 3, *Lucasfilm Ltd.* ("*In furtherance of this agreement, Pixar drafted the terms of the agreement with Lucasfilm and communicated those written terms to Lucasfilm*"); Competitive Impact Statement at 7–8, *Adobe Sys., Inc.* ("*In furtherance of this agreement, Apple placed Pixar on its internal 'Do Not Call List' and senior executives at Pixar instructed human resources personnel to adhere to the agreement and maintain a paper trail* (…) *Similarly, Intel instructed its human resources staff about the existence of the agreement*").

65 M. Perlman, Delrahim Says Criminal No-Poach Cases Are in the Works.

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