Restrictions on Employee Change of Jobs: Antitrust Challenges to "Non-Compete" and "No-Poach" Clauses

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Introduction

Agreements among competing employers related to terms of employment can raise meaningful antitrust risks if they are not tethered to an efficiency enhancing business transaction (like a sale of a business or a joint venture) and result in firms pulling "competitive punches" when it comes to the hiring and compensation of current and/or prospective employees. Similarly, exchanges of competitively sensitive information among employers can create risks of a potential anticompetitive agreement being inferred to exist among competing firms. In recent years, the landscape of private and public antitrust enforcement has become increasingly aggressive in scrutinizing employment practices across various industries. This paper explores the trends in civil and (now) potentially criminal antitrust enforcement in the employment area.

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I. Federal Antitrust Law—Section 1 of the Sherman Act

The governing federal law in this area is section 1 of the Sherman Act.[1] As interpreted long ago by the Supreme Court, section 1 prohibits *unreasonable* "restraints of trade."[2]

Courts that consider the legality or reasonableness of challenged restraints of trade analyze them under the so-called "rule of reason" analysis, or apply automatic illegality or *per se* treatment to them.[3] Under the rule of reason, a court looks at various factors, including the history of the challenged restraint, and weighs the anticompetitive effects in a properly defined market against the procompetitive justifications for business practice at issue.[4] By contrast, *per se* treatment condemns as a matter of law a business practice without consideration of any anticompetitive effects or procompetitive justifications.[5] *Per se* treatment is reserved for a limited category of business practices that always, or nearly always, are harmful to competition, meaning that, on their face, they lead to higher prices or reduced output or lessened innovation.[6] Price-fixing, bid-rigging, and customer or market allocation schemes are typical examples of business conduct that has been treated as *per se* illegal under section 1.[7]

In terms of enforcers, federal antitrust law relies on a system of dual enforcement. An antitrust plaintiff may be a private entity or citizen, or a class thereof consistent with Federal Rule of Civil Procedure 23. Under the Clayton Act, a private plaintiff can sue for damages—that are automatically trebled—and injunctive relief, as well as recover attorneys' fees and costs.[8] In a conspiracy case under section 1, which employment cases have been historically, liability is joint and several with no right of contribution.[9] Thus, the potential civil antitrust exposure in a private antitrust lawsuit can be significant.

In addition to private enforcement, the Antitrust Division of the United States Department of Justice or the Federal Trade Commission

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1. 15 U.S.C. § 1 (2012).

2. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 60–68 (1911). This paper does not purport to address treatment of employment-related agreements under state antitrust or other state laws. However, many state antitrust statutes have so-called "harmonization" provisions that result in state antitrust law following or incorporating federal antitrust jurisprudence.

3. For a more detailed discussion of the "rule of reason" and *per se* analysis under the Sherman Act, see generally Adam Weg, Note, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS L.J. 1535 (2009).

4. *See, e.g.*, Bd. of Trade v. United States, 246 U.S. 231 (1918).

5. *See, e.g.*, Broad. Music, Inc. v. CBS, 441 U.S. 1, 19–20 (1979).

6. *Id.* at 8.

7. U.S. DEP'T OF JUSTICE, ANTITRUST DIV., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2, https://www.justice.gov/sites/default/files/atr/legacy/2007/10/24/211578.pdf (last visited May1, 2020).

8. *See* 15 U.S.C. §§ 15(a), 26 (2012).

9. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642–46 (1981).

can enforce section 1. Both federal agencies may bring civil cases, but only the Department of Justice may bring criminal cases.

II. History and Evolution of "No-Poach" and "Wage Fixing" Jurisprudence

The idea that there is a market for employing individual—or groups of—employees and that that market is subject to the same rules protecting competition as any other market is not a new one. For years, in evaluating whether certain information exchanges among competitors violate the antitrust laws, antitrust enforcers and private antitrust litigants have considered whether communications among competitors concerning employment may constitute an anticompetitive information exchange.[10]

However, in recent years, the frequency and intensity with which employment-related agreements—either not to "poach" a rival's employees or to suppress wages, benefits, and other terms of employment within an industry—that have been challenged under the antitrust laws have increased dramatically.[11] Correspondingly, private and public enforcers have treated these agreements more severely, alleging that *per se*, rather than rule of reason, treatment is appropriate and (now according to the federal regulators) that they constitute criminal, rather than civil, violations of antitrust law.

In considering the history and evolution of cases challenging employment-related agreements and information exchanges, one can observe this as an area of growing risk for companies. Although few cases reach a final adjudication on the merits and many are resolved by settlement with no admission of wrongdoing, the growing frequency of these cases, the attention received by the federal regulators, and the magnitude of the penalties lend support for this observation. In this paper we have grouped the types of antitrust challenges into four categories of cases, involving: (1) information sharing; (2) "ancillary" agreements to efficiency enhancing business transactions where the parties to a deal enter into reasonable restrictions related to the hiring of certain employees; (3) "naked' agreements concerning employment or hiring; and (4) potentially criminal agreements not to compete for certain employees' services.

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10. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at ABA Section of Antitrust Law and ABA Center for Continuing Legal Education, Antitrust Issues Related to Benchmarking and Other Information Exchanges (May 3, 2011), https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-issues-related-benchmarking-and-other-information-exchanges/110503roschbenchmarking.pdf.

11. *See, e.g.*, Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, 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.

A. Information Exchanges or Sharing

In 2001, in *Todd v. Exxon Corp.*, the Second Circuit—in an opinion written by then-Judge Sotomayor—reversed a decision granting a motion to dismiss a private civil antitrust class action complaint alleging that fourteen oil and gas companies violated section 1 of the Sherman Act by sharing information concerning salaries paid to certain types of professional (nonunion) employees.[12] Specifically, the complaint in *Todd v. Exxon* alleged that the fourteen defendant employers regularly met to discuss the results of periodically conducted surveys of employees' past and current salaries, as well as the employers' current and projected salary budgets.[13] Salary and other compensation data were regularly collected, analyzed, and distributed among the defendants by themselves and by a third-party consultant.[14] Plaintiffs alleged that this exchange constituted a violation of section 1 under the rule of reason because it had the purpose and effect of keeping salaries for the affected employees lower than they would have been absent the information exchange.[15]

The district court dismissed the complaint, holding, among other things, that the plaintiffs did not allege facts that supported the existence of an actual *agreement* to set compensation levels for the affected employees.[16] On appeal, the Second Circuit clarified that information exchanges challenged under section 1 of the Sherman Act are subject to the rule of reason.[17] The Second Circuit also enumerated certain factors to be used in applying the rule of reason analysis, principally the "structure of the industry involved and the nature of the information exchanged."[18]

In addressing the "nature of the information exchanged," the Second Circuit clearly laid out the four factors that courts should consider in determining whether the information exchange is anticompetitive. The first is the *timeframe* to which the information pertains. The exchange of historical information poses less risk of harm to competition than the exchange of information that is current or prospective because competitors cannot react to historical information in real time.[19]

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12. 275 F.3d 191, 214–15 (2d Cir. 2001).
13. *Id.* at 196.
14. *Id.*
15. *Id.*
16. *Id.* at 197.
17. *Id.* at 199 ("As plaintiff does not allege an actual agreement among defendants to fix salaries, we analyze plaintiff's complaint solely as to whether it alleges unlawful information exchange pursuant to this rule of reason.").
18. *Id.* (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).
19. *Id.* at 211 ("The first factor to consider is the time frame of the data. . . . The exchange of past price data is greatly preferred because current data have greater potential to affect future prices and facilitate price conspiracies. By the same reasoning, exchanges of future price information are considered especially anticompetitive.").

The second is the *specificity* of the information being exchanged. The more specific the information being exchanged is, the more likely it could be used by competitors in an anticompetitive manner.[20]

The third factor the court identified is whether the information is *publicly available*. Public dissemination of the information being exchanged can reduce the likelihood of competitors acting with an unfair advantage based on unequal access to information that could inform the decision-making process.[21]

The fourth factor is the *context* in which the information is exchanged, including the existence or absence of precompetitive reasons for the information exchange.[22] Because the complaint in *Todd v. Exxon* alleged the exchange of current and forward-looking salary data, which was detailed and specific as to which defendants it described (in that case, not aggregated beyond three competitors), not made publicly available, and exchanged in frequent meetings among competitors with no other precompetitive purpose, the Second Circuit held that it adequately alleged an unlawful information exchange under the rule of reason. "In sum, the 'nature of the information exchanged' weighs against the motion to dismiss. The characteristics of the data exchange in this case are precisely those that arouse suspicion of anticompetitive activity under the rule of reason."[23]

In 2011, then-Federal Trade Commissioner J. Thomas Rosch delivered a speech entitled *Antitrust Issues Related to Benchmarking and Other Information Exchanges*.[24] As for benchmarking where "a firm compar[es] its practices, methods, or performance against those of other companies," Commissioner Rosch concluded that "[b]enchmarking has

20. *Id.* at 212 ("[A]nother factor courts look to is the specificity of the information. Price exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy to stabilize prices. Courts prefer that information be aggregated in the form of industry averages, thus avoiding transactional specificity.") (citations omitted).

21. *Id.* at 213 ("Another important factor to consider in evaluating an information exchange is whether the data are made publicly available. Public dissemination is a primary way for data exchange to realize its procompetitive potential. . . . A court is therefore more likely to approve a data exchange where the information is made public.").

22. *Id.*

23. *Id.* After the Second Circuit's ruling, the case was remanded and transferred by the Judicial Panel on Multidistrict Litigation. *See In re* Compensation of Managerial, Professional, & Technical Employees Antitrust Litig., 206 F. Supp. 2d 1374 (J.P.M.L. 2002). Class certification was denied. *See In re* Compensation of Managerial, Professional, & Technical Employees Antitrust Litig., No. 02 Civ. 2924, 2006 U.S. Dist. LEXIS 249, at *29 (D.N.J. Jan. 4, 2006) (denying class certification under Fed. R. Civ. P. 23(b)(1), (2)); *In re* Compensation of Managerial, Professional, & Technical Employees Antitrust Litig., No. 02 Civ. 2924, 2003 U.S. Dist. LEXIS 22836, at *11–12 (D.N.J. May 22, 2003) (denying class certification under Fed. R. Civ. P. 23(a), (b)(3)). And the district court granted defendants' motion for summary judgment on the issue of the relevant market. *In re* Compensation of Managerial, Professional, & Technical Employees Antitrust Litig., No. 02 Civ. 2924, 2008 U.S. Dist. LEXIS 63633 (D.N.J. Aug. 19, 2008). A settlement was eventually reached.

24. Rosch, *supra* note 10.

obvious procompetitive potential. It allows companies to learn about more efficient means of production and distribution, which can in turn lead to better and lower cost products for consumers."[25] But because benchmarking can potentially lead to tacit collusion without an express agreement, companies have been subjected to antitrust scrutiny for benchmarking exercises.

In his remarks, Commissioner Rosch analyzed the *Todd v. Exxon* case in the context of section 1 antitrust jurisprudence and identified the following "factors that raise the antitrust scrutiny of [information] exchanges":[26]

1. "a concentrated industry";
2. "a fungible product or service";
3. "inelastic demand";
4. "use of current or future data";
5. "non-aggregated results";
6. "not making the survey results public";
7. "frequent meetings among participants"; and
8. "agreements regarding the use of the [information exchanged]."[27]

For practitioners and in-house counsel examining information exchanges, this is a useful guide for compliance with section 1 when it comes to employment-related information exchanges. Ultimately, Commissioner Rosch concluded that "information exchanges are likely to be reviewed under the full rule of reason rather than under a *per se*, truncated, or 'quick look' analysis."[28] Nevertheless, while the plaintiffs in *Todd v. Exxon* ultimately lost, a rule of reason antitrust class action can consume lots of time and resources for a company.[29]

B. Ancillary v. Naked Restraints of Trade Concerning Employment

Next, we turn to communications among competitors concerning employment that include agreements as to how to treat employees, as contrasted with pure exchanges of information that the employers may use as they see fit. In *Addyston Pipe & Steel Co. v. United States*, the Supreme Court held that certain restraints of trade may be lawful when they are "ancillary" to an agreement that is otherwise lawful and procompetitive and so should be analyzed under the rule of reason.[30] The same restraint, if "naked"—meaning if it were the sole or primary purpose of the agreement being challenged—would be *per se* unlawful.

25. *Id.* at 15–16.
26. *Id.* at 20.
27. *Id.*
28. *Id.*
29. *See* 15 U.S.C. § 1 (2012).
30. 175 U.S. 211, 239 (1899).

Since antitrust doctrine has long given ancillary restraints of trade rule of reason treatment, it is not surprising that agreements concerning employment, when they are part of a broader agreement among competing employers, are also analyzed under the rule of reason. It is worth noting here that we are not addressing traditional "non-compete" agreements, where a separating employee agrees not to work for a competitor of his or her former employer within certain reasonable geographical and temporal restraints.[31] Rather, we are discussing agreements of the sort typically described as a "no-poach" agreement, where competing employers reach an agreement concerning whether or how to hire one another's current, former, or even potential future employees.

A notable challenge to what plaintiffs characterized as a naked "no-poach" agreement concerns skilled high-tech workers in Silicon Valley.[32] In that case, the Antitrust Division of the United States Department of Justice filed a civil suit against seven named Silicon Valley companies alleging a *per se* agreement among the defendants to abstain from hiring one another's employees, or to do so only pursuant to conditions agreed upon by the defendants.[33] The defendants settled with the Department of Justice agreeing to abandon the challenged business practice.[34] Because that settlement provided no monetary compensation to the injured employees, private plaintiffs subsequently sued the same seven defendants and an additional two hundred unnamed companies and individuals on behalf of a putative class of injured employees.

Specifically, a putative class of employees alleged that:

> 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.[35]

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31. S*ee, e.g.*, J.J. Prescott et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 Mich. St. L. Rev. 369.

32. Consolidated Amended Complaint, *In re* High-Tech Employee Antitrust Litig., No. 11-CV-2509-LHK, 2015 WL 5159441 (N.D. Cal. Sept. 2, 2015), 2011 WL 11683784.

33. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, 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.

34. United States v. Adobe Systems, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement, 75 Fed. Reg. 60,820 (Oct. 1, 2010), https://www.govinfo.gov/content/pkg/FR-2010-10-01/pdf/2010-24624.pdf.

35. Consolidated Amended Complaint at 1, *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-2509-LHK, 2011 WL 11683784.

As further alleged, "Defendants entered into the express agreements and entered into the overarching conspiracy with knowledge of the other Defendants' participation, and with the intent of accomplishing the conspiracy's objective: to reduce employee compensation and mobility through eliminating competition for skilled labor."[36]

The class complaint claimed that "Defendants' conspiracy and agreements restrained trade and are *per se* unlawful under federal and California law."[37] The class complaint also explicitly noted that the Department of Justice alleged a *per se* violation of the antitrust laws because the agreements not to compete for the high-tech employees' services were naked agreements, and not ancillary to any legitimate or precompetitive restraints:

> [T]he DOJ concluded that Defendants had agreed to naked restraints of trade that were *per se* unlawful under the antitrust laws. The DOJ found that Defendants' agreements "are facially anticompetitive because they 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." The DOJ further found that the agreements "disrupted the normal price-setting mechanisms that apply in the labor setting."
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> The DOJ also concluded that Defendants' agreements "were not ancillary to any legitimate collaboration" and were "much broader than reasonably necessary for the formation or implementation of any collaborative effort."[38]

By contrast, the defendants argued that the conduct alleged did not constitute an antitrust violation meriting *per se* treatment. The issue was litigated in the district court, which ultimately held that the plaintiffs adequately pled, at the motion-to-dismiss stage, that the *per se* standard applied to the challenged "no poach" conduct in that case.[39] Ultimately, because the class plaintiffs settled with the defendants,[40] the issue of whether the alleged agreement at issue actually

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36. *Id.* at 10.

37. *Id.* at 1.

38. *Id.* at 19–20.

39. *See In re* High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) ("Moreover, the Court need not engage in a market analysis until the Court decides whether to apply a *per se* or rule of reason analysis. Defendants' argument relies on the false assumption that the Court should apply a rule of reason analysis, but as the parties agree, the Court need not decide now whether *per se* or rule of reason analysis applies. Indeed, that decision is more appropriate on a motion for summary judgment. Plaintiffs have successfully pled a *per se* violation of the Sherman Act for purposes of surviving a 12(b)(6) motion, and therefore no market analysis is required at this time.") (citations omitted).

40. *See* Lance Whitney, *Apple, Google, Others Settle Antipoaching Lawsuit for $415 Million*, CNET (Sept. 3, 2015, 8:32 AM PT), https://www.cnet.com/news/apple-google-others-settle-anti-poaching-lawsuit-for-415-million.

constitutes a *per se* violation was never reached and there was no final adjudication based on the full evidentiary record.

It is worth noting, however, that the size of the settlement reached in the Silicon Valley no-poach case is an indication of how seriously these cases are to be taken. In August 2014, the district court rejected the plaintiffs' settlement with the four then-remaining defendants of $324.5 million on the ground that it was insufficient to compensate the class based on an earlier, smaller settlement in the litigation.[41] The district court put on the public record detailed factual evidence as to why the strength of the case against the remaining defendants warranted an even larger settlement.[42] According to the district court:

> The Court recognizes that Plaintiffs face substantial risks if they proceed to trial. Nonetheless, the Court cannot, in light of the evidence above, conclude that the instant settlement amount is within the range of reasonableness, particularly compared to the settlements with the Settled Defendants and the subsequent development of the litigation. The Court further notes that there is evidence in the record that mitigate at least some of the weaknesses in Plaintiffs' case.[43]

Finally, the district court concluded that there was no evidence offered that the agreements at issue were either ancillary restraints or procompetitive. Specifically:

> As to the contention that Plaintiffs would have to rebut Defendants' contentions that the anti-solicitation agreements aided collaborations and were therefore pro-competitive, there is no documentary evidence that links the anti-solicitation agreements to any collaboration. None of the documents that memorialize collaboration agreements mentions the broad anti-solicitation agreements, and none of the documents that memorialize broad anti-solicitation agreements mentions collaborations. . . . Thus, despite the fact that Defendants have claimed since the beginning of this litigation that there were procompetitive purposes related to collaborations for the anti-solicitation agreements and despite the fact that the purported collaborations were central to Defendants' motions for summary judgment, Defendants have failed to produce persuasive evidence that these anti-solicitation agreements related to collaborations or were pro-competitive.[44]

The district court noted further that

> the U.S. Department of Justice ("DOJ") also determined that the anti-solicitation agreements "were not ancillary to any legitimate collaboration," "were broader than reasonably necessary for the formation or implementation of any collaborative effort," and "disrupted

41. *See In re* High-Tech Employee Antitrust Litig., No.: 11-CV-02509-LHK, 2014 WL 3917126, at *3–4 (N.D. Cal. Aug 8, 2014) ("The Court finds the total settlement amount falls below the range of reasonableness.").

42. *See generally id.*

43. *Id.* at *15.

44. *Id.* at *16.

> the normal price-setting mechanisms that apply in the labor setting." The DOJ concluded that Defendants entered into agreements that were restraints of trade that were per se unlawful under the antitrust laws.[45]

The significance of a prior government enforcement action (even if settled with no admission of wrongdoing) cannot be understated on follow-on civil litigation.

In the end, the district court subsequently approved a modified class action settlement with the remaining defendants for $415 million.[46]

C. Potential Future Criminal Enforcement by the Department of Justice

Following the Silicon Valley "no-poach" cases, in 2016, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission jointly issued guidance for human resource professionals in connection with hiring practices (the HR Guidance).[47] The stated purpose of the guidance is "to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws . . . which apply to competition among firms to hire employees."[48] The HR Guidance makes clear that the federal antitrust laws apply to all aspects of hiring, stating: "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."[49]

The HR Guidance warns that "[v]iolations of the antitrust laws can have severe consequences. Depending on the facts of the case, the DOJ could bring a criminal prosecution against individuals, the company, or both."[50] The HR Guidance addresses both agreements among potential employers—noting that the agreement need not be express or written—as well as information exchanges.[51] The HR Guidance reiterates the Department of Justice's position in its civil suit against the

45. *Id.* (internal citations omitted).

46. *In re* High-Tech Employee Antitrust Litig., No.: 11-CV-02509-LHK, 2015 WL 5159441 (N.D. Cal. Sept. 2, 2015); Whitney, *supra* note 40.

47. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), https://www.justice.gov/atr/file/903511/download [perma.cc/79MY-VDYD].

48. *Id.* at 1.

49. *Id.*

50. *Id.* at 2.

51. *Id.* at 3–6.

Silicon Valley firms that a naked agreement not to compete for employees' services is a *per se* antitrust violation.[52]

The HR guidance highlights recent civil enforcement actions directed at naked employment-related agreements by both the Antitrust Division of the United States Department of Justice and the Federal Trade Commission in four different industries—hospitals, technology, nursing, and fashion—before warning that the Department of Justice will, in the future, prosecute similar agreements as *criminal* antitrust violations.[53] The HR Guidance puts companies and industry stakeholders on notice as to the future "rule of the road":

> *Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.* These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.[54]

Finally, the HR Guidance concludes with a warning to self-report suspected criminal violations.[55]

The HR Guidance goes on to state that employment-related information exchanges, while not *per se* illegal and not subject to criminal prosecution, might also be found to violate the antitrust laws:

> *Sharing information with competitors about terms and conditions of employment can also run afoul of the antitrust laws.* Even if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement. While agreements to share information are not *per se* illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect. Even without

52. *Id.* at 3 ("Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws. That means that if the agreement is not separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects.").

53. *Id.* at 3–4.

54. *Id.* at 4 (emphasis added).

55. *Id.* at 11 ("With respect to potential criminal violations, in particular, it can be beneficial to report personal involvement in an antitrust violation quickly. Through the Division's leniency program, corporations can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the Division, and meeting other specified conditions.").

> an express or implicit agreement on terms of compensation among firms, evidence of periodic exchange of current wage information in an industry with few employers could establish an antitrust violation because, for example, the data exchange has decreased or is likely to decrease compensation.[56]

The HR Guidance also notes the conditions under which information exchanges may be lawful, largely echoing the four factors described above that the Second Circuit examined in *Todd v. Exxon*.[57]

Since the issuance of the HR Guidance, the Antitrust Division of the United States Department of Justice has announced on many occasions that employment-related agreements among *competing* employers will become an enforcement priority, with the Department of Justice bringing more cases in this area and seeking to criminally prosecute offending companies and individuals where justified.[58] Prior to the HR Guidance, antitrust enforcement of employment-related agreements—even naked "no-poach" agreements—was only civil, with the only question being whether the Department of Justice would seek rule of reason or *per se* treatment. From recent statements, it is clear that the Department of Justice will seek *per se* treatment of such agreements among true competitors, and the question has become whether it will bring a civil or criminal suit.

Tellingly, in April 2018, the Department of Justice settled a civil antitrust challenge to a no-poach agreement between rail equipment suppliers Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec) that allegedly began in 2009 and was discovered by the Department of Justice prior to the issuance of the HR Guidance in October 2016. For that reason only, the Department of Justice stated it chose to bring a civil, rather than criminal, suit.[59] The Department of

56. *Id.* at 4–5 (emphasis added).

57. *Id.* at 5.

58. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, 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[perma.cc/6VJW-4GCM].

59. *Id.* ("Beginning in October 2016, the department has made several announcements that it intends to bring criminal, felony charges against culpable companies and individuals who entered into these types of no-poach agreements. In an exercise of prosecutorial discretion, the department will pursue as civil violations no-poach agreements that were formed and terminated before those announcements were made. Knorr's and Wabtec's respective no-poach agreements were discovered by the Division and terminated by the parties before October 2016, prompting the Division to resolve its competition concerns through a civil action."). The case was ultimately resolved via public consent decree enjoining the challenged conduct. United States v. Knorr-Bremse AG, No. 1:18-cv-00747-CKK, 2018 U.S. Dist. LEXIS 142125 (D.D.C. July 11, 2018).

Justice has told the bar that grand jury investigations in new criminal matters are now underway.[60]

Given the new, potential aggressive criminal enforcement in this area, the federal regulators came forward with some possible "Red Flags" for HR professionals.[61] These include:

- "Agree with another company about employee salary or other terms of compensation, either at a specific level or within a range."
- "Agree with another company to refuse to solicit or hire that other company's employees."
- "Agree with another company about employee benefits."
- "Agree with another company on other terms of employment."
- "Express to competitors that you should not compete too aggressively for employees."
- "Exchange company-specific information about employee compensation or terms of employment with another company."
- "Participate in a meeting, such as a trade association meeting, where the above topics are discussed."
- "Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings."
- "Receive documents that contain another company's internal data about employee compensation."[62]

To be clear, the federal regulators explicitly state that, on the one hand, this is not an exhaustive list of "red flags," and, on the other hand, "the presence of a red flag does not necessarily mean that there has been an antitrust violation."[63] For now, following the agencies' guidance combined with monitoring enforcement actions is the best way to keep abreast of the trends in potential criminal exposure in the employment area and navigate antitrust risk appropriately.

60. Press Release, Fed. Trade Comm., FTC and DOJ Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), https://www.ftc.gov/news-events/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how [perma.cc/K7CX-RW8U].

61. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Red Flags for Employment Practices (Oct. 2016), https://www.justice.gov/atr/file/903506/download.

62. *Id.* at 1.

63. *Id.* at 2.

D. DOJ Clarifies Approach on Distinguishing between Per Se and "Rule of Reason" Analysis

In 2019, the Department of Justice filed a number of "Statements of Interest" in civil class action litigation in this area to clarify and curb potential misuse of the HR Guidance. Specifically, in a follow-on class action to the Government's April 2018 enforcement action against the rail equipment suppliers (that would have been criminally prosecuted if the conduct occurred before the HR Guidance), the Department of Justice reaffirmed its view that a naked no-poach agreement among competing firms is a type of horizontal market allocation that should be assessed under the *per se* rule.[64]

Yet, in class actions challenging some form of contractual provision in the context of a fast-food franchise system, the Department of Justice has taken the position that franchises should be treated differently.[65] Among other things, the Government made clear that some form of hiring restriction that is ancillary to a broader economic transaction, such as within the context of a franchise system, should be subject to the traditional, full-blown "rule of reason" standard based on a definition of a proper relevant market and after balancing the procompetitive benefits against any anticompetitive effects.[66] The Government said that a *per se* or "quick look" "rule of reason" is inappropriate in the franchise context because, unlike the enforcement actions discussed above, a franchisor and its franchisees are not "horizontal" competitors.[67] According to the Department of Justice, "The franchise relationship is in many respects a vertical one because the franchisor and the franchisee normally conduct business at different levels of the market structure. Restraints imposed by agreement between the two are usually vertical and thus assessed under the rule of reason."[68]

Conclusion

There can be no question that employment-related information exchanges and especially agreements have been, and will continue to be, an area of increasing scrutiny for antitrust enforcers and private plaintiffs. It can be expected that these business practices will be challenged both more frequently and more vigorously. The law is developing, and companies and practitioners will continue to see this as a top area of focus.

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64. U.S. Dep't of Justice, No-Poach Approach (Sept. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach [perma.cc/9546-NJTN].

65. Corrected Statement of Interest of the United States, Stigar v. Dough Dough, Inc., Nos. 2:18-cv-00244, -00246, -00247 (E.D. Wash. Mar. 8, 2019) (including consolidated cases Richmond v. Bergey Pullman Inc. and Harris v. CJ Star, LLC).

66. *Id.* at 11–13.

67. *Id.* at 16.

68. *Id*. at 11.