Employers Beware: The DOJ and FTC Confirm that Naked Wage-Fixing and "No-Poaching" Agreements Are Per Se Antitrust Violations

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Everyone knows that price fixing among competing sellers is illegal, but price fixing by buyers can also violate the antitrust laws. Every company with employees is a "buyer" of employees' services, and human resources (HR) managers should understand that the antitrust laws apply to agreements relating to the buying of those services, whether or not the purchasing employers are competitors in their downstream markets. In other words, employers can be liable for antitrust violations that reduce competition in an employment market even if the employees do not make (and the employers do not sell) competing products.

In October, the nation's two leading antitrust enforcers—the Federal Trade Commission and the U.S. Department of Justice's Antitrust Division—published Antitrust Guidance for Human Resources Professionals reminding (or, in some cases, informing) employers and HR personnel that the antitrust laws apply.[1] The HR Guidance also puts employers and HR personnel on notice that the antitrust laws will be strictly enforced to prevent agreements that restrain competition in the employment market. Consistent with past enforcement actions and cases, the HR Guidance confirms that certain types of wage-fixing and no-poaching agreements[2] will be treated as per se violations. Moreover, the HR Guidance explicitly states that the DOJ will treat at least some cases of naked wage-fixing and no-poaching agreements as criminal antitrust violations.

To antitrust practitioners, the HR Guidance should come as no surprise. Price fixing and market allocation by buyers has never been immune from antitrust scrutiny. The HR Guidance provides antitrust practitioners with a useful tool for educating HR personnel about antitrust risks and for demonstrating that HR practices are now squarely in the crosshairs of antitrust enforcement. In this article, we review some of the substantive principles set forth in the HR Guidance, the key legal developments that led up to the issuance of the HR Guidance, the kinds of ancillary agreements that escape per se condemnation, and some practical tips for employers and HR professionals looking to steer clear of potential antitrust scrutiny.

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Background: Protecting Against Flight of Employees in Demand

Competition for skilled employees (and conversely, fear of attrition of skilled employees) is at an all-time high in many industries. A company's investment in human capital may make its employees one of the company's most important assets, yet employees are mobile. An employer will be

[1] U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidance for Human Resources Professionals (2016), https://www.justice.gov/atr/file/903511/download [hereinafter HR Guidance].

[2] No-poaching agreements are also called no-hire, no-interference, non-solicitation, or no-switching agreements, depending on the circumstances. For convenience, we collectively refer to these as "no-poaching agreements" for the remainder of this article.

particularly concerned if its employee leaves to go work for a competitor. When that happens, the employer loses its investment in the employee and, worse, sees that investment used against it.[3]

Employers traditionally have used a mix of incentives and disincentives to keep valuable employees from leaving. "Incentives" include compensation (salary, bonuses, benefits packages, and employee-specific perks) and working conditions that encourage employees to stay. "Disincentives" include post-employment restrictions in an employment agreement that make it more difficult for the employee to leave. For example, an employment agreement might include a non-compete covenant (restricting the former employee's ability to work for a competitor for a specified time in a specified territory), a non-solicitation covenant (restricting the former employee's ability to solicit some or all of the former employer's customers), a worker non-solicitation covenant (restricting the former employee's ability to solicit former co-employees), or a confidentiality clause (prohibiting the former employee from taking, using, or disclosing the former employer's confidential information).

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Employment agreements, however, cannot fully protect a company's investment in human capital. State law regulates the enforceability of post-employment restrictive covenants, and some states (notably California) place severe limitations on their use. So an employer may be tempted to consider other means to protect its interests, such as an agreement with its competitors in the employment market not to hire each other's employees, or an agreement to set a cap on wages and other benefits. These agreements, however, are exactly what the law considers presumptively illegal—as the HR Guidance now confirms.

The HR Guidance: Stating the Obvious

The HR Guidance provides a good, reasonably plain-English guide for HR professionals regarding basic antitrust principles applied in the employment context, and it is a helpful tool for antitrust counsel to use in working with an HR team. The HR Guidance's Q&As are particularly helpful in identifying some common fact patterns where HR professionals may need some training. The agencies have also prepared a listing of "red flags" for employment practices.[4] This listing can provide useful material for a compliance presentation.[5]

"Incentives" include compensation (salary, bonuses, benefits packages, and employee-specific perks) and working conditions that encourage employees to stay.

From a substantive perspective, the HR Guidance focuses on three main antitrust violations:

- An agreement between two or more independent companies that does nothing more than fix wages, salaries, or other compensation (a naked wage-fixing agreement) is illegal per se.
- An agreement in which two or more independent companies agree not to solicit each other's employees or otherwise agree to limit methods of competition (a naked no-poaching agreement) is also illegal per se, although there may be an exception if the agreement is closely and narrowly tied to a joint venture or other legitimate collaboration between the employers.
- An agreement between or among two or more independent companies to exchange current or prospective compensation information is problematic. The agreement may not be illegal

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[3] This is not to suggest that all value-enhancing investments are made by the employer (rather than the employee) or that the employer's investment is independent of the employee's efforts or natural talents.

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

[5] Circulating the "red flags" document in unedited form and without guidance from company counsel carries certain risks. The list of problematic activities is overly long and yet is "by no means exhaustive." Moreover, the document acknowledges that it could generate false positives ("the presence of a red flag does not necessarily mean that there has been an antitrust violation"). It also encourages reporting directly to the DOJ or FTC, without mention of the employer's in-house counsel or ethics/compliance hotline.

per se, but it can be evidence of a per se violation (i.e., a naked agreement not to compete). HR professionals should take appropriate precautions in exchanging this information.

These substantive principles are not themselves "new" news. Antitrust rules have been applied in purchasing markets for decades[6] and, as suggested by the cases that the HR Guidance cites, in employment-related purchasing markets as well. Buyer-side agreements that fix wages and otherwise restrict competition for employees' services are no different than supplier agreements that fix prices of products. Similarly, antitrust concerns about information exchanges—and the need for appropriate safeguards—date back to the *Hardwood* Cases,[7] and information exchanges (including buyer-side information exchanges) continue to be an antitrust enforcement focus.[8]

What is new—or at least noteworthy—is the very clear statement that the DOJ intends to treat naked wage- or compensation-fixing agreements, no-poaching agreements, and other naked restraints in employment markets as *criminal* violations and may, where appropriate, bring felony charges against both the individuals responsible for the violation and their companies as well.[9] The DOJ has previously made clear its view that these restraints are illegal per se, and naked agreements between competing sellers to fix prices have been the bread and butter of criminal antitrust enforcement for a century. Now the DOJ has forewarned employers and managers that they should expect this same basic approach in employment markets.

Enforcement Actions and Follow-on Litigation in Employment Markets

Buyer-side enforcement actions aimed at protecting employment markets are not new to the federal antitrust enforcement agencies, but the DOJ's enforcement actions in the *High-Tech Employee Antitrust* cases[10] focused more attention on the issue, particularly on per se condemnation of no-poaching agreements. The HR Guidance mentions some of the DOJ's and FTC's enforcement actions either in or at least tangential to employment markets, and these cases (along with a few others) warrant more discussion than the brevity of the HR Guidance permitted.

Debes. In the early 1990s, the FTC brought an enforcement action against several nursing homes in Illinois, alleging a buyers' conspiracy to boycott a nurse registry that attempted to raise its prices for temporary nursing care services.[11] According to the FTC, nurse registries "compete among themselves to provide temporary nursing services at the price and quality nursing homes desire," and "[c]ompetition among nursing homes for temporary nursing services ensures an ade-

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[6] Mandeville Island Farms v. Am. Crystal Sugar, 334 U.S. 219 (1948).

[7] Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925).

[8] For example, the DOJ recently sued DirectTV for orchestrating an information-sharing arrangement with its competitors during the companies' negotiations to carry the Dodgers Channel. The complaint alleged that the information exchange led to decisions by DirecTV and its competitors not to carry the channel, depriving consumers of almost all live telecasts of Dodgers games in the LA area. *See* Complaint, United States v. DirectTV Group Holdings, LLC and AT&T Inc., No. 16-cv-8150 (C.D. Cal. Nov. 2, 2016), ECF No. 1.

[9] Assistant Attorney General Renata Hesse reiterated this position at the ABA Section of Antitrust Law's Fall Forum. Renata Hesse, Remarks Before the ABA Section of Antitrust Law Fall Forum (Nov. 17, 2016) ("going forward employers who conspire to hold down wages or restrict hiring of each other's workers will be investigated criminally and, if appropriate, prosecuted criminally. Naked 'no-poaching' agreements or agreements to fix wages stamp out competition just like agreements to allocate customers or to fix product prices . . . ."), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-remarks-0.

[10] *See e.g.*, Complaint, United States v. Adobe Sys., Inc., No. 10-cv-01629, 2010 WL 11417874 (D.D.C. Sept. 24, 2010); Complaint, United States v. Lucasfilm Ltd., No. 10-cv-02220, 2010 WL 5344347 (D.D.C. Dec. 21, 2010); Complaint, United States v. eBay, Inc., No. 12-cv-5869, 2012 WL 5727488 (N.D. Cal. Nov. 16, 2012).

[11] Debes Corp., 115 F.T.C. 701 (1991).

quate supply of quality nurses."[12] In this case, however, the nursing homes subverted the competitive process by agreeing among themselves to collectively reject a price increase from one of the registries. Thus, the agreement at issue did not deal with the conspirators' own respective employees or indeed with approaches to individual employees at all. Instead, it dealt with rates charged by temporary employment agencies for nursing services.[13] The basic principle, however, remains—naked agreements among competing buyers to restrict their purchasing decisions are illegal. The nursing homes settled, agreeing to an injunction that prohibited repetition of the challenged behavior.[14]

Council of Fashion Designers of America. Another FTC enforcement action in the 1990s involved the purchase of modeling services in the fashion industry.[15] Members of the Council of Fashion Designers of America (CFDA), a trade association of fashion designers, had formed a separate entity, "7th on Sixth, Inc.," that had what the FTC recognized as "[a] legitimate purpose" of producing centralized fashion shows twice a year. The FTC did not challenge 7th on Sixth's collective purchasing of services used in the production: tents, runway assembly, lighting design and installation, security, and architectural design. But 7th on Sixth did not purchase or resell modeling services for its shows. Instead, the Executive Director of 7th on Sixth met with fashion designers (who were also CFDA members) interested in participating in its shows to discuss modeling fees. During this meeting, 7th on Sixth and the fashion designers "agreed not to compete for modeling services and agreed to determine modeling fees collectively, rather than allow prices to be determined in a competitive market" in order to reduce the fees they paid for models.[16] If the modeling agencies refused to agree to the fixed pricing, 7th on Sixth and the fashion designers threatened to boycott the modeling agencies and use "open call" to secure modeling services.

The FTC's complaint alleged that the purchasers' agreement on prices for modeling services "was not ancillary to the legitimate purpose of creating centralized fashion shows, and respondents did not purchase modeling services jointly."[17] This suggests that the FTC viewed the agreement as per se illegal, but the phrasing of these allegations was itself interesting.[18] The FTC did not allege that 7th on Sixth and the fashion designers *could not* jointly purchase modeling services, just that they *did not* do so. In other words, the FTC took no position as to whether or not a joint venture or collaboration that collectively purchased the modeling services (at a lower price) might have passed muster. The CFDA and 7th on Sixth settled, consenting to an order requiring them to educate their members on the illegality of agreements to fix compensation for modeling or modeling agency services and prohibiting them from making such agreements in the future.

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[12] *Id.* at 704–05.

[13] Of course there may be some correlation between suppressed rates paid to nurse registries and lower wages paid to the temporary nurses working for the registries. Private litigants in the Arizona Hospital and Healthcare Association (AzHHA) follow-on case made that precise argument. *See infra* page 5.

[14] *Debes*, 115 F.T.C. at 705.

[15] Council of Fashion Designers of America, 120 F.T.C. 817 (1995). While the FTC and the DOJ are now touting this as an employment-related matter, the FTC's contemporaneous press release described the matter as making clear "that antitrust laws prohibiting price fixing apply to the fashion industry just as they do to other products or services." *See* Press Release, Fed. Trade Comm'n, Council of Fashion Designers of America (June 9, 1995), https://www.ftc.gov/news-events/press-releases/1995/06/council-fashion-designers-america.

[16] *Fashion Designers*, 120 F.T.C. at 819.

[17] *Id.* at 820.

[18] Another interesting aspect of this case is the FTC's repeated references to the presence and involvement of the fashion designers' legal counsel in planning and drafting agreements. *See, e.g., id.* at 819–20. The case thus also serves as a reminder that transactional lawyers should always have an ear attuned for antitrust concerns.

Utah Society for Healthcare Human Resources. Rounding out the cases from the 1990s, the DOJ brought suit against the Utah Society for Healthcare Human Resources Administration, the Utah Hospital Association, and a group of hospitals. The case involved an agreement to exchange nonpublic information about current and prospective wages for entry-level nurses. The complaint alleged that the hospitals (which employed 75 percent of the registered nurses in the county) used the information to suppress nurses' entry wages during a critical shortage of nurses.[19] The complaint did not allege that the hospitals actually agreed on entry-level wages, but it did allege that they "monitor . . . each other's registered-nurse entry wages."[20] The defendants consented to a final judgment prohibiting them from fixing nurses' compensation and from exchanging any current or prospective information about nurses' wages.[21]

AzHHA. In May 2007, the DOJ challenged the use of a group purchasing organization for the purchase of temporary nursing services.[22] The Arizona Hospital and Healthcare Association (AzHHA) had created a "registry" of temporary nurses and set quality standards that the DOJ did not challenge. Ten years after starting operations, the AzHHA Registry began setting prices for nursing services purchased through the registry.[23] The complaint did not allege a per se violation. Rather, the complaint alleged that the defendants had market power in the purchasing market, that their agreement had a negative effect on compensation for nurses, and that the anticompetitive effects were not outweighed by any efficiencies. AzHHA settled the claims by consenting to a final judgment that prohibited use of the registry to set rates or other terms related to the provision of nurses' services.[24]

Subsequent class action suits against AzHHA and a number of participating hospitals brought by temporary nurses seeking damages for suppressed wages not only alleged antitrust violations under the rule of reason (as the DOJ had done), they also alleged per se violations.[25] The class actions produced settlements totaling approximately $24 million.[26]

Detroit Nurses Antitrust Litigation. In December 2006, a group of registered nurses filed a class action suit alleging that Detroit-area hospitals conspired with one another to suppress nurses' wages and furthered that conspiracy by exchanging current compensation-related information in order to reduce competition.[27] Although this private litigation did not follow on the heels of any federal enforcement actions, the allegations are consistent with the principles set forth by the

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[19] United States v. Utah Society for Healthcare Human Res. Admin., No. 94-C-282G, 1994 WL 750657 (D. Utah Sept. 9, 1994).

[20] Complaint ¶ 26(d), *Utah Society*, 1994 WL 750657 (No. 94-C-282G).

[21] Final Judgment, *Utah Society*, 1994 WL 750657 (No. 94-C-282G).

[22] The complaint alleged two markets: one for "per diem" nurses (who lived in the region) and one for "travel" nurses (who came into the region for temporary but consistent employment). Complaint ¶ 17, United States v. Arizona Hosp. & Healthcare Ass'n, No. CV07-1030-PHX, (D. Ariz. Sept. 12, 2007), https://www.justice.gov/atr/case-document/complaint-28.

[23] *Id.* ¶ 3.

[24] Final Judgment, *Arizona Hospital*, No. CV07-1030-PHX, https://www.justice.gov/atr/case-document/final-judgment-17, ECF No. 17.

[25] *See e.g.*, Complaint, Johnson v. Arizona Hosp. & Healthcare Ass'n, No. CV-07-1292-PHX-SRB, 2009 WL 5031334 (D. Ariz. July 14, 2009), ECF No. 1.

[26] Final Judgment Approving Settlement with Certain Defendants, *Johnson*, 2009 WL 5031334 (No. CV-07-1292-PHX-SRB), ECF No. 660; Final Judgment Approving Settlement with Certain Defendants, *Johnson*, 2009 WL 5031334 (No. CV-07-1292-PHX-SRB), ECF No. 664; Final Judgment Approving Settlement with AzHHA Defendants, *Johnson*, 2009 WL 5031334 (No. CV-07-1292-PHX-SRB), ECF No. 665; Motion for Final Approval of Settlement with Abrazos Defendants, *Johnson*, 2009 WL 5031334 (No. CV-07-1292-PHX-SRB), ECF No. 721; Final Judgment Approving Settlement Against Abrazos Defendants, *Johnson*, 2009 WL 5031334 (No. CV-07-1292-PHX-SRB), ECF No. 724.

[27] Complaint, Cason-Merenda v. VHS of Mich., Inc., 862 F. Supp. 2d 603 (E.D. Mich. 2012) (No. 06-cv-15061), ECF No. 1; Third Amended Complaint, *Cason-Merenda*, 862 F. Supp. 2d 603 (No. 06-cv-15061), ECF No. 67.

agencies in the HR Guidance. Plaintiffs alleged that the hospitals' conspiracy to suppress wages was per se illegal, but they also alleged that the agreement to exchange information was a separate antitrust violation under rule of reason analysis (as well as evidence of a per se violation). This hard-fought litigation lasted close to ten years—but with all defendants eventually settling with plaintiffs for over $90 million in total.[28]

High-Tech Employee Antitrust Litigation. In a series of cases beginning in September 2010, the DOJ filed complaints against several high-tech companies alleging that their agreements relating to hiring practices violated Section 1 of the Sherman Act. In *Adobe*, the six defendants entered into substantially similar agreements that restricted use of a particular recruiting tool: cold-calling each other's employees (one of the variations of a no-poaching agreement).[29] Both *eBay* and *Lucasfilm* featured restrictions on recruiting, but the complaints had additional components as well. In *eBay*, the parties' agreement included a no-hire component, preventing eBay from hiring anyone at all from Intuit for at least a year.[30] In *Lucasfilm*, the employers also agreed to give notice if they intended to make an offer to an employee of their competitor, and when making such an offer, agreed not to counteroffer above the initial offer.[31]

"Antitrust analysis of downstream customer-related restraints applies equally to upstream monopsony restraints on employment opportunities."

In each case, the DOJ challenged the agreements as per se violations of Section 1 of the Sherman Act, and it is easy to see why. Each complaint focused on the direct restraint that the agreements imposed on the labor markets (rather than on any effects in downstream markets in which the firms may or may not have competed), because the real vice was the restraint's effect on competition for the services of highly trained technical employees, including access to better job opportunities. If the complaints had alleged the same kind of agreements among competing sellers—that is, agreements not to make sales calls on each other's customers, to give notice when offering to sell a product to each other's customers, and not to offer a lower price than what the new seller was offering—then no one would have any doubt that the allegations described a per se violation. Indeed, the DOJ advanced this argument in *Adobe*: "There is no basis for distinguishing allocation agreements based on whether they involve input or output markets. Anticompetitive agreements in both input and output markets create allocative inefficiencies."[32] It reiterated the same principle in *Lucasfilm* and specifically tied it to employment markets: "Antitrust analysis of downstream customer-related restraints applies equally to upstream monopsony restraints on employment opportunities."[33]

The DOJ acknowledged that in some instances the companies had "legitimate collaborative projects" and "extensive business relationships," such that some form or amount of recruiting restraints might have been justified. But as the DOJ observed, application of the rule of reason

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[28] Motion for Final Approval of Settlements with St. John Health, Oakwood Healthcare Inc. and Bon Secours Cottage Health Servs. *Cason-Merenda*, 862 F. Supp. 2d (No. 06-cv-15061), ECF No. 691; Final Orders as to Defendants, *Cason-Merenda*, 862 F. Supp. 2d (No. 06-cv-15061), ECF Nos. 717–719; Motion for Final Approval of Settlements with Henry Ford Health Sys., Mount Clemens Gen. Hosp., Williams Beaumont Hosp., and Trinity Health, *Cason-Merenda*, 862 F. Supp. 2d (No. 06-cv-15061), ECF No. 812; Final Order Approving Settlement as to Defendants, *Cason-Merenda*, 862 F. Supp. 2d (No. 06-cv-15061), ECF No. 824; Motion for Final Approval of Settlement with VHS of Michigan, Inc.; *Cason-Merenda*, 862 F. Supp. 2d (No. 06-cv-15061), ECF No. 964; Final Order Approving Settlement with VHS, *Cason-Merenda*, 862 F. Supp. 2d (No. 06-cv-15061), ECF No. 970.

[29] Complaint, *Adobe*, 2010 WL 11417874, at *1.

[30] Complaint, *eBay*, 2012 WL 5727488 at *1; *see also id.* at *3–5.

[31] Complaint, *Lucasfilm*, 2010 WL 5334347, at *3.

[32] Competitive Impact Statement at 8, *Adobe*, 2010 WL 11417874 (No. 10-cv-01629), ECF No. 2.

[33] Competitive Impact Statement at 5–6, *Lucasfilm*, 2011 WL 2636850 (No. 10-cv-02220), ECF No. 2.

requires that the restraint be designed to protect a legitimate business interest—and here the restraints were not limited in some way to such an interest.[34]

Adobe and *Lucasfilm* were settled early with consent judgments that prohibited the challenged conduct,[35] but eBay chose to seek dismissal of the complaint—and lost.[36] The district court first rejected eBay's argument that the existence of an overlapping director between the two companies immunized the agreement under either *Copperweld* or Section 8 of the Clayton Act.[37] Next, the court expressly found that the agreement was a market allocation agreement, because "[a]ntitrust law does not treat employment markets differently from other markets in this respect."[38] The court held, however, that it could not determine on the pleadings whether the no-poaching agreement was ancillary to an agreement with a legitimate business purpose (namely, the service, on eBay's board of directors, of an Intuit executive and director). As the court explained, it "simply cannot determine with certainty the nature of the restraint, and by extension, the level of analysis to apply" without discovery. In other words, the court deferred decision on whether to apply the per se rule (or, for that matter, the DOJ's only other theory—a "quick look" violation). After the denial of the motion to dismiss, eBay, like the *Adobe* and *Lucasfilm* defendants, agreed to the entry of a consent judgment that prohibited the challenged agreements.[39]

Private class action civil suits followed the DOJ enforcement actions, and the cases were consolidated in *In re High-Tech Employee Antitrust Litigation*.[40] The class plaintiffs, like the DOJ, alleged that the agreements were per se violations, but they added allegations that the bilateral actions challenged in the DOJ enforcement action were part of "an interconnected web of express bilateral agreements."[41] The cases survived both a motion to dismiss and a motion for summary judgment. On the motion to dismiss, the court found that plaintiffs alleged "much more than parallel conduct" for an overarching conspiracy, including sufficient details regarding the "who, what, to whom, where, and when" of the collusion.[42] The court expressly stated that in its view, the similarity of the six no cold-calling agreements, reached in secrecy over a two-year period, suggested collusion, rather than coincidence.[43] The court also held that determining whether to apply the per se rule or a rule of reason analysis was better left to summary judgment.[44] On summary judgment, the defendants again challenged proof of a conspiracy,[45] but the court found that plaintiffs presented sufficient disputed evidence that tended to exclude the possibility that the defendants

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[34] Competitive Impact Statement at 9, *Adobe,* 2010 WL 11417874 (No. 10-cv-10629), ECF No. 2.

[35] Final Judgment, *Adobe*, 2010 WL 11417874 (No. 10-cv-01629), ECF No. 17; Final Judgment, *Lucasfilm*, 2011 WL 2636850 (No. 10-cv-02220), ECF No. 7.

[36] United States v. eBay, Inc., 968 F. Supp. 2d 1030 (N.D. Cal. 2013).

[37] *Id.* at 1035–36; *see also* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984) (parent and wholly owned subsidiary are same "person" for Section 1 purposes); 15 U.S.C. § 19 (prohibiting certain interlocking directorates).

[38] *eBay*, 968 F. Supp. 2d at 1039.

[39] Final Judgment, *eBay*, 2012 WL572748 (No. 12-cv-05869), ECF No. 66.

[40] *In re* High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103 (N.D. Cal. 2012).

[41] *Id.* at 1110.

[42] *Id.* at 1117–18.

[43] *Id.* at 1120.

[44] *Id.* at 1122.

[45] Orders Denying Motions for Summary Judgment, *High-Tech*, 856 F. Supp. 2d 1103 (No. 11-cv-02509), ECF Nos. 771, 788.

had acted independently in determining not to cold call the other defendants' employees.[46] The cases ultimately settled for close to $435 million.[47]

Au Pair Litigation. In November 2014, five au pairs brought a class action suit against the 15 sponsor agencies responsible for the exclusive administration of the J-1 Visa program for the U.S. Department of State. The complaint alleged that the agencies were illegally fixing the wages of the au pairs placed through their agencies, claiming a per se violation of the federal antitrust laws.[48] An amended complaint was filed in March 2015, and a year later the court largely denied the several motions to dismiss the complaint.[49] The court found that the complaint adequately alleged the existence of a direct agreement between the firms to suppress au pair wages.[50]

After the Second Amended Complaint was filed in October 2016, one of the 15 defendant agencies moved to compel arbitration as to two newly added class representative plaintiffs under their agreement with the agency.[51] Briefing on this motion is not yet completed, but this motion serves as a reminder both that a company may be able to channel antitrust claims into arbitration if its agreement includes an applicable and enforceable arbitration and class action waiver clause—and that class counsel should be wary of this issue when identifying potential class representatives.[52]

Supplementing the HR Guidance

The HR Guidance reiterates the enforcement agencies' position that naked wage-fixing and no-poaching agreements between companies in an employment purchasing market are per se illegal. That does not mean that all restraints affecting employment markets are forbidden. The HR Guidance acknowledges that no-poaching agreements might be reasonably related to a legiti-

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[46] *See, e.g.*, Order Denying Motion for Summary Judgment at 3, *High-Tech*, 856 F. Supp. 2d 1103 (No. 11-cv-02509), ECF No. 771.

[47] Motion for Settlement Approval (claims against Intuit, Pixar/Lucasfilms), *High-Tech*, 856 F. Supp. 2d 1103 (No. 11-cv-02509), ECF No. 809; Order Granting Final Approval as to Settlement of Pixar/Lucasfilm Claims, *High-Tech*, 856 F. Supp. 2d 1103 (No. 11-cv-02509), ECF No. 936; Motion for Approval of Settlement of Claims of Remaining Defendants, *High-Tech*, 856 F. Supp. 2d 1103 (No. 11-cv-02509), ECF No. 1087; Order Granting Final Approval, *High-Tech*, 856 F. Supp. 2d 1103 (No. 11-cv-02509), ECF No. 1111. The plaintiffs had initially reached a $324.5 million settlement with the majority of the defendants, but the court declined to approve that settlement because the proposed payment fell below the range of reasonableness given that the plaintiffs' case had survived summary judgment. Order Denying 920 Plaintiffs' Motion for Preliminary Approval of Settlements at 6–7, *High-Tech*, 856 F. Supp. 2d 1103 (No. 11-cv-02509), ECF No. 974.

[48] Complaint, Beltran v. Noonan, No. 14-cv-3074, 2014 WL 5904663 (D. Colo. Nov. 13, 2014), ECF No. 1. The complaint has been subsequently amended twice. *See* Amended Complaint, *Beltran*, 2014 WL 5904663 (No. 14-cv-3074), ECF No. 101; Second Amended Complaint, *Beltran*, 2014 WL 5904663 (No. 14-cv-3074), ECF No. 395.

[49] Amended Complaint, *Beltran*, 2014 WL 5904663 (No. 14-cv-3074), ECF No. 10; Order Adopting and Affirming in Part February 22, 2016 Recommendation of United States Magistrate Judge at 9, *Beltran*, 2014 WL 5904663 (No. 14-cv-3074), ECF No. 258.

[50] Order Adopting and Affirming in Part February 22, 2016 Recommendation of United States Magistrate Judge at 9, *Beltran*, 2014 WL 5904663 (No. 14-cv-3074), ECF No. 258 (the allegations of a direct agreement in this case "amount to what Judge Richard Posner has termed the 'smoking gun in a price-fixing case'—namely, 'direct evidence . . . [in] the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to [set] prices").

[51] Second Amended Complaint, *Beltran*, 2014 WL 5904663 (No. 14-cv-3074), ECF No. 395; Defendant AuPairCare, Inc.'s Motion to Compel Arbitration and Dismiss or Alternatively, Stay Lawsuit, *Beltran*, 2014 WL 5904663 (No. 14-cv-3074), ECF No. 431.

[52] Although mandatory arbitration clauses are useful for avoiding class actions in some types of controversies, at least two circuits—the Seventh and Ninth—have refused to enforce them for certain class action statutory employment claims, such as FLSA class actions. *See* Ernst & Young, LLP v. Morris, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *petition for cert filed* (No. 16-300) (Sept. 8, 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *petition for cert. filed* (No. 16-285) (Sept. 2, 2016); s*ee also* Patterson v. Raymours Furniture Co., 2016 WL 4598542 (2d Cir. Sept. 2, 2016), *petition for cert. filed* (No. 16-388) (Sept. 22, 2016); Cellular Sales of Missouri, LLC v. NLRB, 824 F.3d 772 (8th Cir. 2016); Murphy Oil USA v. NLRB, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (No. 16-307) (Sept. 9, 2016).

mate procompetitive venture or collaboration between companies and reasonably necessary to protect that procompetitive venture (the ancillary restraints doctrine). Where parties can make a plausible case to that effect, then the agreement will be evaluated under the rule of reason, rather than be condemned as a per se violation.

Given the constraint imposed by brevity, the HR Guidance does not provide a complete playbook for the antitrust practitioner. Here are several areas that are not fully developed in the HR Guidance but that practitioners should understand.

Information Access in Mergers and Acquisitions. The HR Guidance generally refers to the risk of employment-related aspects of M&A agreements,[53] but it does not flesh out the principles that deal lawyers and HR professionals should understand. It is not enough to say that a diligence request for information on employee compensation and benefits "may be lawful."[54] Generally speaking, parties will sign a confidentiality agreement that limits the persons who will have access to information and the uses to which that information can be put. As long as there is a bona fide proposed transaction, then it is highly probable that the seller's disclosure of compensation and benefits information is lawful, because the buyer needs to evaluate the expected costs of employees. Furthermore, even with a strong confidentiality agreement, the seller is likely to be cautious about exposing its competitively sensitive information. This concern will usually act as a brake on when, how much, and to whom the seller's sensitive information will be disclosed. Nevertheless, the HR Guidance can assist counsel on both sides of an M&A transaction by providing a tool to resist premature or overly aggressive information demands from the buyer's HR department or undue squeamishness in the seller's HR department.

No Poaching Agreements in M&A Transactions. No-poaching agreements in the M&A/divestiture context have been found to be permissible and not subject to per se illegal treatment. In *Eichorn*, the Third Circuit analyzed a no-poaching agreement between a company and several former affiliates that the company divested.[55] As part of the transaction, the company and its former affiliates agreed that for an eight-month period, they would not hire each other's employees who made more than $50,000 a year. The plaintiffs alleged that the defendants were "direct competitors for their labor" and challenged the agreement as "an illegal group boycott and a horizontal price fixing conspiracy under § 1 of the Sherman Act."[56] The Third Circuit found that this restraint was ancillary to the company's sale of the business to the affiliates and justifiable under a rule of reason analysis because the restraint was reasonable in scope and duration. Similarly, in the *High-Tech Employee Antitrust* cases, no-poaching agreements in the M&A context were expressly excepted from the per se prohibitions outlined in the final judgments.[57]

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[53] HR GUIDANCE, *supra* note 1, at 5 ("Even if participants in an agreement are parties to a proposed merger or acquisition . . . there is antitrust risk if they share information about terms and conditions of employment.").

[54] *Id.* ("[I]n the course of determining whether to pursue a merger or acquisition, a buyer may need to obtain limited competitively sensitive information. Such information gathering may be lawful if it is in connection with a legitimate merger or acquisition proposal and appropriate precautions are taken.").

[55] *See, e.g.*, Eichorn v. AT&T Corp., 248 F.3d 131 (3d Cir. 2001).

[56] *Id.* at 139, 142.

[57] *See, e.g.*, Final Judgment ¶ V.A.2, *eBay*, 2012 WL 5727488 (No. 12-cv-05069), ECF No. 66 ("Nothing in Section IV shall prohibit the Defendant . . . from attempting to enter into, entering into, maintaining or enforcing a no direct solicitation provision, provided the no direct solicitation provision is . . . reasonably necessary for mergers or acquisitions, consummated or unconsummated, investments, or divestitures, including due diligence related thereto").

Of course, even legitimate ancillary no-poaching agreements must still be reasonably tailored to the larger, legitimate business transaction.[58] A broad and vague no-poaching agreement without an end-date is very likely to present antitrust risk. The no-poaching agreement or other restraint should be limited in duration (during due diligence and for a reasonable period after the closing) and usually in scope (applicable to specific key employees or identifiable categories of employees).

Employers in a Single Corporate Family. The HR Guidance refers to agreements "among competing employers," and clients have already asked whether this includes employers that are wholly owned by a common parent. The HR Guidance does not address this, but the answer is a clear "no." Longstanding jurisprudence teaches that a parent and its wholly owned subsidiary are considered a single "person" for antitrust purposes—and therefore incapable of making an "agreement."[59] The same principle has been extended to affiliates (with a common parent) and to subsidiaries that are less than wholly owned (but still majority-owned).[60] A no-poaching agreement within a corporate family would not be considered an agreement at all—it is an internal corporate policy.[61]

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An interesting example relying on this general principle in an employment context arose in *Williams v. I.B. Fischer Nevada*,[62] where the court considered an agreement under which management employees of a fast-food franchise could not move from one Jack-In-The-Box franchisee to a different franchisee without the first franchisee's consent. The court said that the purpose of this no-poaching agreement was "to prevent the franchises from 'raiding' one another's management employees after time and expense have been incurred in training them."[63] The analysis focused on the fact that the agreement was within a single enterprise, the Jack-in-the-Box franchise system. Both the district court and the Ninth Circuit used the *Copperweld* single-entity analysis to conclude that the franchisor and franchisees were incapable of conspiring with one another.[64] The district court explained that "the franchisor does everything in its power to minimize competition and promote uniformity between franchises," including uniformity of quality food and service, and does so to help both the franchisor itself and its franchisees achieve an "enhanced reputation" and increased business for both.[65] The Ninth Circuit affirmed, finding that despite the

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[58] *Eichorn*, 248 F.3d at 146 ("Because the no-hire agreement was a legitimate ancillary restraint on trade, we must determine whether the eight month restriction from employment at an AT&T affiliate was reasonable or whether it went further than necessary to ensure the successful transition of ownership."). The court held that the restraint was reasonable. *Id.* at 146–47.

[59] *See, e.g.*, *Copperweld*, 467 U.S. at 752.

[60] *See, e.g.*, Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316 (5th Cir. 1984) (sister corporations with common parent were a single entity under Copperweld); Novatel Commc'ns. v. Cellular Tel. Supply, Civ. A. No. C85-2674A, 1986 WL 15507, at *6 (N.D. Ga. Dec. 23, 1986) ("The 51% ownership retained by Novatel-Canada assured it of full control over Carcom and assured it could intervene at any time that Carcom ceased to act in its best interests.").

[61] *Eichorn*, 248 F.3d at 139.

[62] Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993).

[63] *Id.* at 1029.

[64] *Id.* at 1030–31; *Williams*, 999 F.2d at 447–48.

[65] *Williams*, 999 F.2d at 447.

fact that they did not share common "ownership," the franchisor and franchisees had a sufficient unity of purpose to qualify as a single entity under *Copperweld*.[66]

Vertical Restraints. Sometimes "competing employers" might also be in a supplier-customer relationship—for example, consulting firms and temporary employment agencies. The HR Guidance does not address vertical restraints in the employment market (such as a temp agency's agreement that the customer will not hire away an individual who was originally supplied by the agency). The per se rule, however, is not appropriate in this context. Vertical restraints are generally judged under the rule of reason,[67] and that makes particular sense here. If the employer wants to convert the relationship from employment-supply to employee-recruiting, then the no-hire provision serves either as a pricing mechanism (if the agreement includes a liquidated damages provision) or as a trigger for negotiation over the value of the temp agency's services for acting, in effect, as an employee-search firm. Even if the horizontal relationship (for example, between a consulting firm and its customer as competitors for the future services of the consulting firm's employee) is considered important, the restraint would very likely be acceptable under the ancillary restraints doctrine because it is reasonably necessary for the provision of specialized services—a legitimate procompetitive business purpose.

Looking Ahead: Practical Tips for Employers and HR Departments

The HR Guidance provides an opportunity for law and HR departments to take stock of HR practices that may raise antitrust red flags and to take steps to manage effectively the legal and business risks. Employers should consider the following action steps:

- *Conduct leadership compliance training.* Include the topic of antitrust rules for recruiting and employment practices on the agenda for the next meeting of legal and HR leadership. HR personnel responsible for compensation and hiring decisions should be reminded that the antitrust laws apply in their field and that violations carry serious consequences for both the employer and the individual.
- *Consider a training program for the whole HR department.* Legal risks can arise from lower- or mid-level HR managers, and companies should consider compliance programs for the entire HR department, or at least a significant portion. The Q&A section of the HR Guidance can provide a useful foundation for the program. Expanding the company's compliance program may also be appropriate if people outside the HR department participate in recruiting and hiring processes or if there is any reason to believe that there might be problematic recruiting-related agreements outside the HR department.
- *Rely on employment covenants (where possible).* An enforceable noncompete agreement—subject to reasonable geographic and time limitations—can keep employees from leaving for a competitor without raising the antitrust red flags that the HR Guidance is aimed at preventing. Just as it might do before entering into a joint venture or other collaboration with a

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[66] The court's analysis of *Copperweld*'s application to a franchise system predates the U.S. Supreme Court's *American Needle* decision, which has made it more difficult for franchise systems to argue that they are immune from antitrust scrutiny under the single entity rule. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010) (finding no single entity for the NFL and its member teams because they did not possess either the unitary decision-making quality or aggregation of economic power typically present in a single entity); *see also* Barry M. Block & Matthew D. Ridings, *Antitrust Conspiracies in Franchise Systems After* American Needle, 30 FRANCHISE L.J. 216 (2011) (concluding that while *American Needle* does not completely foreclose the argument that a franchise system should be treated as a single economic enterprise, the analysis will differ based on facts and circumstances for each franchise).

[67] S*ee* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

potential competitor, the employer should identify employees (by individual or by group) for whom noncompete agreements would be particularly important. Where a straight noncompete agreement is unenforceable or unobtainable, the employer might consider alternatives, such as requiring the employee to repay certain training and investment costs up to a set amount if the employee resigns or is fired for cause within a certain time period following his or her start date.[68] To help ensure enforceability, an employer should provide reasonable terms for the repayment amount and for the duration of employment that qualifies the employee for repayment forgiveness.[69] Similarly, an employer can link retention of a sign-on bonus with an agreed-upon length of employment. If the employee leaves before the end of the agreed-upon length of employment, a portion (or all) of the sign-on bonus must be repaid. With sufficient consideration, and as long as the sign-on bonus and time period are reasonable in amount, the contract would likely be enforceable.

- ***Keep M&A due diligence on point.*** When the company conducts employment-related due diligence in an M&A transaction, ensure that the due diligence is limited to what is reasonably necessary to evaluate the transaction and, where appropriate, ask M&A counsel whether other strategies (such as a clean room) can be used to facilitate due diligence of sensitive compensation-related information.
- ***Use narrowly tailored agreements (both in scope and duration).*** Before entering any kind of collaboration—with a competitor or anyone else—an employer should ask itself whether the collaborator might use the collaboration for recruiting and how the employer might protect itself. If that means contemplating no-poaching agreements in a legitimate business transaction, such as M&A deals, joint ventures, or customer agreements, make sure that the provision is appropriately tailored to enhance the overall purpose of the procompetitive business transaction and be prepared to explain why. Broad provisions are less likely to be considered ancillary to a legitimate transaction.
- ***Audit the company's participation in surveys and information exchanges.*** If the employer conducts or participates in compensation surveys, take the time to do an audit of how those surveys are drafted, compiled, and used, and seek outside counsel guidance when necessary to confirm that the company's practices do not raise red flags. Similarly, if the employer participates in information exchanges regarding employee compensation, make sure that the exchange has appropriate protections in place (such as the use of older data, management by an independent administrator, data masking and aggregation) to reduce risk of an antitrust violation. Pay attention as well to surveys conducted through trade associations.

Conclusion

The HR Guidance makes clear that restraints between competing buyers in the employment market are fully subject to the antitrust laws, including potential criminal liability. In an environment with increasing employee turnover and difficulties retaining top talent, companies must carefully navigate between business concerns about keeping employee talent and the laws that protect competition for those employees in employment markets. ●

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[68] Some states prevent the reimbursement of certain employer costs. See, *e.g.*, California Labor Code §§ 450, 2802, 2804 (West 2011).

[69] *See, e.g.*, USS-Posco Indus. v. Floyd Case, 197 Cal. Rptr. 3d 791 (Cal. Ct. App. 2016) (enforcing agreement for employer to recoup cost of training); Hassey v. City of Oakland, 78 Cal. Rptr. 3d 621 (Cal. Ct. App. 2008) (upholding agreement requiring police officer to repay training costs after leaving position before end of five-year period, but holding that the debt could not be repaid by withholding final paycheck); *see also* Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 Duke L.J. 1295 (2005).