

## Antitrust & HR Compliance

Justin P. Hedge

September 2019



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### Key Antitrust Issues

- Antitrust law construes “markets” broadly
  - Antitrust enforcement tends to focus on markets for goods and services
  - But antitrust laws also apply with equal force upstream
  - Input and labor competition currently under scrutiny from enforcers and private plaintiffs
- “Naked” restraints on competition are per se unlawful, e.g.:
  - Coordination of wage or benefit information
  - Certain uses of no-poaching/non-solicitation agreements
- Information sharing and benchmarking also at risk
  - Precautions should be taken with respect to inputs and labor just as they would for the company’s product and service offering



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# The Legal Basics

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## Purpose of Antitrust Laws

- Concerns are:
  - Consumer welfare
  - Competition – but not competitors
- Nothing improper about winning by, e.g.:
  - Having superior products,
  - Running a better business, or
  - Innovating



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## Sherman Act § 1 Basics

- Prohibits any agreement that unreasonably lessens competition
  - All agreements “restrain”
  - Unlawful only when trade is unreasonably restrained
- Proof of Agreement
  - Doesn’t have to be a formal or written agreement
  - Can be explicit or implicit – inferences can be drawn from parallel conduct

“Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”  
15 U.S.C. § 1

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## Per Se Unlawful Activities

- Fixing Prices – agreeing to maintain prices at a certain level, raise prices, or reduce/eliminate discounting
- Limiting Production – agreement to shut down or otherwise limit capacity
- Dividing Markets – agreement not to compete in each other’s markets or for customer groups
- Rigging Bids – collusion among competing bidders (deciding the winner)
- Group Boycotts – collectively punishing a third party (customer or supplier), shutting a competitor out of a market, or preventing entry of a new firm into a market

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## Competition for Inputs Such as Talent

- Antitrust laws always favor aggressive HR competition:
  - More competition results in higher wages or better benefits.
  - Less competition results in lower wages and reduced benefits
- Where specialized skills are needed, talent can be in short supply—potentially more “at risk” area for misconduct
- Agreeing not to compete for employees or agreeing to lower the price of labor (wages) would violate the antitrust laws absent a legitimate justification
  - E.g., can be legitimate reasons in the context of a particular project or M&A transaction
- Companies compete for the same employees even if they do not make the same products.
  - For example, most companies need to hire software developers



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## Possible Penalties For Violation in U.S.

- Criminal Penalties
  - Non-compliance is a felony
  - Jail time can be up to 10 years per violation
  - Substantial corporate and individual fines
- Civil Penalties
  - Damages are 3x actual injuries
- Other
  - Disgorgement of profits
  - Limitations on business conduct



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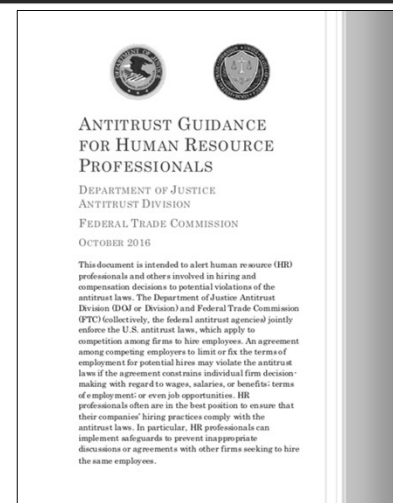
# Recent Wave of Enforcement

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## DOJ/FTC Joint HR Guidelines (Oct. 2016)

- Made clear there would be criminal investigations for labor issues
- “Naked” no poaching or wage-fixing agreements – those that are unrelated to a legitimate collaboration or transaction
- Agreements not pursued as criminal still may be subject to civil penalties



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## DOJ/FTC “Red Flags” for Hiring Practices

- Agreeing with another company to refuse to solicit or hire that other company’s employees
- Agreeing with another company about employee salary or other terms of compensation, either at a specific level or within a range
- Agreeing with another company about employee benefits or other terms of employment
- Expressing to competitors that you and they should not compete too aggressively for employees
- Exchanging company-specific information about compensation or terms of employment with another company
- Participating in a meeting, such as a trade association meeting, where the above topics are discussed
- Discussing the above topics with colleagues at other companies, including during social events or non-professional settings

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## DOJ/FTC “Red Flags” for Hiring Practices *(cont’d)*

- Receiving documents that contain another company’s internal data about employee compensation
- This list is by no means exhaustive and the presence of a red flag does not necessarily mean that there has been an antitrust violation



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## Antitrust Enforcers

- U.S. Department of Justice Antitrust Division
  - Criminal, mergers, conduct
- Federal Trade Commission
  - Mergers, conduct, unfair trade practices, consumer protection
- State AG Enforcement
- Private Litigation



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## Wage-Fixing Enforcement

- Steady enforcement activity by both federal agencies
  - *Arizona Hospital & Healthcare Association (DOJ)*
    - Civil enforcement action against AzHHA for acting on behalf of most hospitals in Arizona to set a uniform bill rate schedule that the hospitals would pay for temporary and per diem nurses
  - *Debes Corporation (FTC)*
    - Boycott temporary nurses' registries in order to eliminate competition among the nursing homes for the purchase of nursing services
  - *Council of Fashion Designers of America (FTC)*
    - Alleged that organizers of fashion shows attempting to reduce the fees and other terms of compensation for models
  - *Your Therapy Source (FTC, TX AG)*
    - Alleged collusion to pay for therapists staffed to home health agencies
    - Owner of Your Therapy Source and the former owner of a competing staffing company were also charged.
- Private Litigations can follow or arise independently
  - E.g., AzHHA had private follow-on litigation
  - Duke and UNC sued by physicians for agreement not to hire medical faculty and staff employed by the other institution

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## "No Poach" Enforcement

- Prior to the Guidelines, DOJ brought a number of civil cases
  - Lucasfilm and Pixar
  - Adobe, Apple, Google, Intel, Intuit, and Pixar
  - eBay and Intuit
- Allegations were similar:
  - Competitors agreed not to cold call each other's employees
  - Agreed to limit hiring of current employees
  - Reduced competition for highly-skilled technical employees
- Evidence of industry meetings also used against animation studios
  - Defendants met at least once a year at "survey" meetings organized by a third party to exchange industry-specific salary information and agree upon compensation ranges
- Remedies were significant
  - DOJ entered into consent decrees requiring companies to refrain from "entering, maintaining or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees" for a period of five years.
  - Adobe, Apple, Google, and Intel settled for \$415 million
  - Intuit, Lucasfilm, and Pixar settled for \$20 million
  - Apple, Pixar/Disney, Lucasfilm, Dreamworks settled for \$150 million

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## Evidence from High-Tech Litigation

Subject: RE: Recruiting  
Date: Mon, 13 Feb 2006 15:17:11 -0800  
From: "Eric Schmidt" <eschmidt@google.com>  
To: "Steve Jobs" <sjobs@apple.com>  
Message-ID: <200602132317.k1DNHCf1029022@stewie.corp.google.com>

I'm sorry to hear this; we have a policy of no recruiting of Apple employees. I will investigate immediately ! Eric

-----Original Message-----  
From: Steve Jobs [mailto:sjobs@apple.com]  
Sent: Monday, February 13, 2006 3:15 PM  
To: Eric Schmidt  
Subject: Recruiting

Eric,

I am told that Googles new cell phone software group is relentlessly recruiting in our iPod group. If this is indeed true, can you put a stop to it?

Thanks,  
Steve

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## Evidence from High-Tech Litigation (cont'd)

From: Shona Brown  
To: [ ] Amnon Geshuri  
Cc: [ ] Eric Schmidt; Laszlo Bock; Judy Glibert  
Re: [ ]  
Subject: Re: FW: Google Recruiting from Apple

Sent: 3/11/2007 12:57 PM

Amnon-  
Appropriate response. Please make a public example of this termination with the group. Please also make it a very strong part of new hire training for the group. I want it clear that we have a zero-tolerance policy for violating our policies. This should (hopefully) prevent future occurrences.

On 3/8/07, Amnon Geshuri <arnnon@google.com> wrote:

Eric,

On this specific case, the sourcer who contacted this Apple employee should not have and will be terminated within the hour. We are scrubbing the sourcer's records to ensure she did not contact anyone else.

In general, we have a very clear 'do not call' policy (attached) that is given to every staffing professional and I reiterate this message in ongoing communications and staffing meetings. Unfortunately, every six months or so someone makes an error in judgment, and for this type of violation we terminate their relationship with Google.

Please extend my apologies as appropriate to Steve Jobs. This was an isolated incident and we will be very careful to make sure this does not happen again.

Thanks,  
Amnon

On 3/8/07, Eric Schmidt <eschmidt@google.com> wrote:

I believe we have a policy of no recruiting from Apple and this is a direct inbound request. Can you get this stopped and let me know why this is happening? I will need to send a response back to Apple quickly so please let me know as soon as you can.

Thanks Eric

From: Steve Jobs [mailto:sjobs@apple.com]  
Sent: Wednesday, March 07, 2007 10:44 PM  
To: Eric Schmidt  
Subject: Google Recruiting from Apple

Eric,

I would be very pleased if your recruiting department would stop doing this.

Thanks,  
Steve

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## Evidence from High-Tech Litigation (cont'd)

To: Thompson, Gabrielle/O=INTEL/OU=AMERICAS01/CN=Workers/cn=Thompson, Gabrielle]; Murray, Patty/O=INTEL/OU=AMERICAS01/CN=Workers/cn=Murray, Patty]  
From: Otellini, Paul  
Sent on behalf of: Otellini, Paul  
Sent: Thur 9/6/2007 7:41:23 PM  
Importance: Low  
Sensitivity: None  
Subject: RE: global gentleman agreement with Google -- Privileged & Confidential  
Categories: 0x00000000

Let me clarify. We have nothing signed. We have a handshake "no recruit" between eric and myself. I would not like this broadly known. 'paul

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## Private Litigations Have Had Broader Reach

- Sept. 2016 class action Samsung and LG
- Alleged unlawful no-poaching agreement spanning more than a decade
- Recruiter had said “I made a mistake! I’m not supposed to poach LG for Samsung!!! Sorry!”
- Case dismissed as insufficient evidence of a top level “conspiracy”

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## State AGs Taking Center Stage as Well

- Since the 2016 Guidance, aggressive enforcement by states regarding no-poach agreements
- E.g., Washington State
  - Targeting franchises since January 2018
  - Initially focused fast-food franchises, now expanded, e.g., tax prep services, UPS Store, hotels
  - Settled with more than 60 companies to eliminate use of no-poach agreements
  - Sued one that refused (Jersey Mike's)
- In July 2018, 10 states and DC formed coalition to investigate franchise no-poach agreements
  - Over two dozen franchise groups targeted to date
- AG activity has spurred private class actions in federal courts across the country
  - Also car repair services (e.g., Jiffy Lube) and other franchise-based businesses that include broad no-poach clauses in their franchise agreements



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## Is Per se Criminal Enforcement the New Norm?

- April 2018, the DOJ announced a no-poach enforcement action in Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation.
  - At the same time, Assistant Attorney General Makan Delrahim of the DOJ Antitrust Division stated, "Today's complaint is part of a broader investigation by the Antitrust Division into naked agreements not to compete for employees."
- FTC made similar stern warnings suggesting increased use of disgorgement when it announced its July 2018 enforcement action against Your Therapy Source
  - Bruce Hoffman, Director of the Bureau of Competition, stated, "We will aggressively investigate any other instances in which companies engage in this type of behavior, and we will seek relief commensurate with the conduct, the harm to workers, and – where appropriate – any ill-gotten benefits received by the firms engaged in the illegal activities."

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## Not always...

- DOJ recently tried to promote the rule of reason balancing approach in some circumstances
  - In cases against McDonalds and Cinnabon, courts applied the "quick look" rule of reason standard
  - Limits evidence of legitimate reasons for the restraint or impact on competition
- DOJ filed Statements of Interest in three private no-poach cases filed by former employees against Auntie Anne's, Arby's, and Carl's Jr.
  - DOJ argued "quick-look" form of rule of reason analysis is inapplicable
  - Urged court to weigh the anticompetitive effects against the procompetitive benefits of franchise no-poach agreements that qualify as either vertical or ancillary restraints
- DOJ argued that a franchise/franchisee agreement is subject to the full rule of reason standard because it is a vertical restraint
- If there is alleged agreement among the franchisees, the restraint should also be subject to the rule of reason so long as it is ancillary; that is, separate from, and reasonably necessary to, the legitimate franchise collaboration

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## But Per Se Treatment Still A Risk

- On the same day as the franchise case filings, DOJ filed in *In re Railway Industry Employee No-Poach Antitrust Litigation* (W.D. Pa.)
- DOJ disagreed with defendants that the rule of reason should apply
- Echoing the 2016 guidance, DOJ argued in support of per se standard--unless the restraints are necessary to further a related, legitimate collaboration between the employers

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## Enforcement Activity Likely to Continue

- In Aug. 2019, DOJ announced a workshop on labor markets for Sept. 23, 2019
- The workshop will cover a variety of labor competition issues, including:
  - no-poach and wage-fixing agreements
  - approaches to labor market definition
- Also suggests that DOJ will be exploring cases about labor monopsonies
  - Unlawful to maintain monopolies
  - Same types of unlawful monopolization conduct (exclusivity, predatory behavior, etc.) seen in cases about good and services markets could apply to input or labor markets under certain circumstances

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# Benchmarking / Info Sharing

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## Competitively Sensitive Information for HR

- Sharing information with competitors about terms and conditions of employment can also run afoul of the antitrust laws
  - Such conduct is not per se illegal, but subject to a rule of reason analysis
  - Such agreements may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect
- Current or future information is the most sensitive
  - The more historical, the less likely it is to impact competition
- Examples of sensitive information include:
  - Wages and salaries
  - Bonus structure
  - Benefits
  - Other compensation terms and policies
  - Employee specific compensation information
  - Recruitment strategies

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## Litigation Threat for Info Sharing As Well

- **Cason-Merenda v. Detroit Medical Center**
  - Registered nurses sued eight Detroit, Michigan hospital
  - Alleged conspiracy to lower wages via scheme of sharing compensation-related information
- Plaintiffs identified three ways in which the information was exchanged:
  - Direct contact between hospital employees involved in determining the nurses' wages
  - Communications at various health care industry meetings
  - Third party surveys sponsored by the hospitals
- In 2012, court plaintiffs failed to prove their per se claim of a wage fixing conspiracy
- But, court denied summary judgment allowing a rule of reason case to proceed
  - Would need to balance the procompetitive benefits of the info exchange against allegedly depressed wages
- Parties reached multiple settlements amounting to over \$90 million from the various defendants

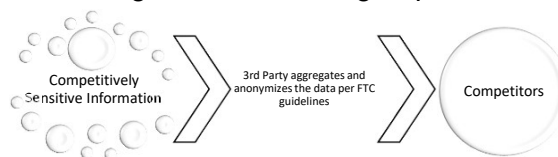
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## Use Caution in Benchmarking Activities

- Risks with sharing sensitive information can be mitigated
- Agency Guidelines for Safe Harbor where enforcement is unlikely:
  - The exchange is managed by a third-party, like a vendor or trade association; and
  - The information provided by participants is more than three months old; and
  - At least five participants provide the data underlying each statistic shared, no single provider's data contributes more than 25% of the "weight" of any statistic shared, and the shared statistics are sufficiently aggregated that no participant can discern the data of any other participant.
- Creating firewalls so that information shared with one workgroup does not affect competitive decision making in another workgroup.



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## Sources of Competitive Information

- Legitimate sources
  - Public materials: open websites, government filings, analyst reports, investor presentations, etc.
  - Industry reports from established sources
  - Third-party consultants subject to the guidelines related to information exchange discussed
- Problematic sources
  - Info obtained from directly from competitors
  - Info that would breach confidentiality obligations owed to competitors – by an ex-employee, distributor, customer
  - Info obtained via deception/misrepresentation (e.g., posing as customer on protected website, at trade show)

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## Crafting Effective Compliance

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## Where can issues arise?

- Day-to-day business activities
- Resolving potential breaches of confidentiality or non-competes by former employees
- Trade association participation or other industry interactions
- Joint ventures
- M&A transactions
- Social events or non-professional settings

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## When are labor restraints permissible?

- DOJ/FTC guidance explains that agreements to restrict recruiting, which are “reasonably necessary” for legitimate collaborations, may be acceptable
- These could include agreements:
  - Between two joint venture partners not to hire or recruit employees involved in the joint venture;
  - In the context of the sale of a business, not to rehire or recruit key employees for certain time;
  - Not to hire or recruit employees whom a consultant has staffed on a company project; or
  - Not to hire or recruit employees involved with due diligence or negotiating a transaction.
- Also, employees are often subject to “non-compete” or “non-solicitation” agreements pursuant to which they agree not to work for a competitor or not to solicit employees to join them at a new employer until a certain period lapses after leaving their employer
  - These employer-employee agreements (“restrictive covenants”) are typically permissible, at least when limited in scope, duration, and geography
  - Usually found in employment contracts or standalone agreements

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## Attention to Substance...

- Agreements to restrict recruiting that are reasonably necessary for a legitimate collaboration or transaction should meet the following criteria:
  - Narrowly drafted to affect only employees who are anticipated to be directly involved in the collaboration or transaction;
  - Identify with reasonable specificity the employees who are subject to the agreement;
  - Contain a specific termination date or event
- Info Sharing
  - Review agendas in advance for meetings involving competitors
  - Need to pay attention to this in transaction due diligence as well as ongoing business activities
  - Follow Guidelines and in particular use third parties or “clean teams” that lack decision making on the competitive issue

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## ...And Perception

- Avoiding even the appearance of impropriety can go miles to avoid controversy
- Warnings or informal communications to other companies about not hiring company employees may be construed by the government or private plaintiffs as evidence of an unlawful agreement not to hire
- Backing down from hiring an employee working at another company following complaints by that company may also be perceived as evidence of an illegal agreement not to hire even where one does not exist
- Use caution whenever communicating about such issues to avoid documents that could be misconstrued

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## Quick Reference Antitrust Checklist: HR Issues

### Non-Competes/Non-Solicits

- ☐ Could it be considered a “naked” agreement?
- ☐ Ancillary to what legitimate purpose?
- ☐ Are the terms reasonable in scope?

### Information Sharing

- ☐ What information do the parties plan to share?
- ☐ Can firewalls/clean teams or consultants be used to mitigate risks?
- ☐ Does the exchange fit within Safe Harbor Guidelines?

### Sensitizing Non-Customer Facing Employees

- ☐ Has antitrust training been done outside of just sales and marketing, e.g., with supply chain and HR departments?
- ☐ Are internal compliance checks in place in procurement and HR areas for competitor interactions?



**Justin P. Hedge**

Arnold & Porter  
601 Massachusetts Ave, NW  
Washington, DC 20001

[Justin.Hedge@arnoldporter.com](mailto:Justin.Hedge@arnoldporter.com)

202-942-6583

[vCard](#)

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