PAUL HASTINGS

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Employment Considerations and Risks: Antitrust

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OVERVIEW

I. Introduction to Antitrust in the Employment Context

II. Current trends in Antitrust Enforcement

III. Wage Fixing and Benchmarking

IV. Non-Competes and Non-Solicits

A MORE COMMON CONVERSATION THAN ONE WOULD THINK

Manager at company A texted with owner of rival company B

A: Have you considered lowering [physical therapy assistant] reimbursement

B: … the therapists are overpaid…

A: I think we're going to lower PTA rates to $45.

B: Yes, I agree. I'll do it with u. I think the [physical therapists] need to go back to $60… our margins are disappearing.

A: [thumbs up] I feel like if we're all on the same page, there won't be a bunch of flip-flopping and industry may stay stable.

THE GRAND JURY CHARGES CO-CONSPIRATORS…

Participated in meetings, conversations, and communications with co-conspirators to discuss the solicitation of senior-level employees… [defendant] emailed that "Someone called me to suggest they reach out to your senior biz dev guy for our corresponding spot. I explained I do not do proactive recruiting into your ranks"…

Agreed during those meetings, conversations, and communications not to solicit each other's senior-level employees…

Instructed certain executives, employees, and recruiters not to solicit senior-level employees of each other's companies

Alerted co-conspirators about instances of recruitment… "I thought there was a Gentlemen's Agreement between us and [defendant] re: poaching talent"… [reply:] "There is"

INPUT-SIDE ANTITRUST ENFORCEMENT IS HERE, AND WILL INCREASE

What is it?

Enforcement of competition theories applied to input markets—e.g., competition that occurs among employers for employees, including related to wages, hiring, and benefits.

Where is it showing up?

In criminal enforcement, private class actions, and in merger investigations/enforcement.

How can my company manage risk?

We offer concrete steps your company can take to help manage the risk of labor antitrust enforcement.

KNOW THE LAW

Sherman Act § 1

> *"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade [in interstate commerce], is declared to be illegal…"*

PENALTIES

Criminal penalties

- Imprisonment of up to 10 years
- Individual fines of up to $1 million per violation
- Company fines of up to $100 million per violation

Civil penalties

- Often in addition to criminal fines
- Treble damages automatic
- Attorney fees/costs
- Injunction

WHAT IS A "COMPETITOR" IN LABOR ANTITRUST

Our former colleague Maria moved to a productivity software company that doesn't do the same thing as us—not even close. If she asks, can we agree that we won't poach one another's employees? She's concerned employees have been jumping back and forth.

NO. *Actual or potential competitors in antitrust is measured in sales/output, but also in buyer/input markets.*

Maria's new company may very well be an actual or potential competitor for labor, and it sounds like it is! An agreement not to poach one another's employees would allocate labor and could very well be illegal.

WE AREN'T IN SIMILAR ROLES

I grabbed coffee with a friend from college. He's in HR and mentioned they're thinking of cutting back on on-campus interviewing. They don't want to be the only ones, so he asked me to check at my company and see if we would do the same. I'm not in HR, so I can pass it along and check, right?

WRONG. *Part of the challenge in this changing area of antitrust enforcement is that more of our colleagues need to be aware and vigilant.*

IS IT AN AGREEMENT?

I ran into a former colleague from my old company at the gym. She said she's dealing with budget pressure and it's really causing them headaches. She mentioned that salaries and benefits are an area where she thinks they can find savings, if only more companies will freeze things where they're at, even for just the next 6 months. We didn't shake hands on it or anything, but I'm thinking we do the same…

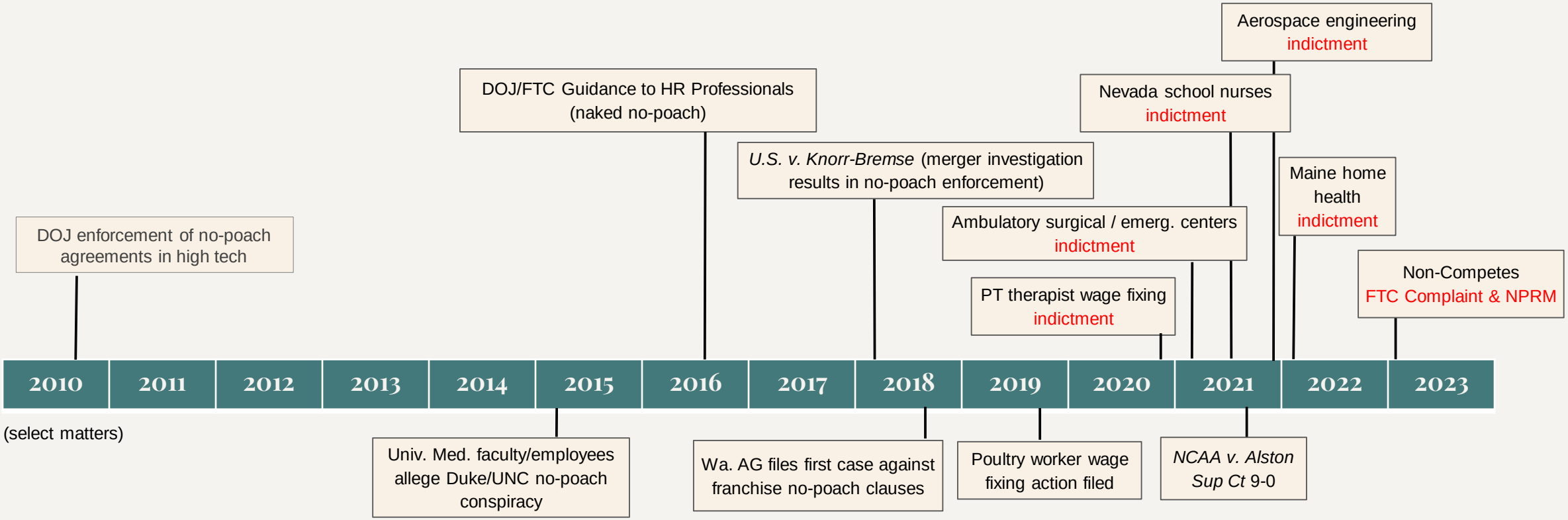
THAT IS HIGH RISK. *Competitors for labor need to make independent decisions about wages, benefits, hiring, and recruiting.*

UNLAWFUL AGREEMENTS ARE OFTEN INFERRED, NOT EXPRESS

- Unlawful agreements may be ***inferred from circumstantial evidence***
  - *For example, if two competitors meet the day before they both announce salary freezes, an unlawful agreement may be inferred*
- Unlawful agreements can be ***inferred from parallel conduct (conscious parallelism)*** and other "plus" factors like actions against economic interest and motivation to collude

- ➢ Express unlawful language, a/k/a "magic words," or "smoking gun" documents are **not required** to form a conspiracy under the law
- ➢ Parties to a conspiracy need **not** meet or communicate directly in order to be implicated in an unlawful agreement –public signaling can suffice

LABOR ANTITRUST ENFORCEMENT HAS BEEN BUILDING



ANTITRUST IS CLEARLY A GOVERNMENT ENFORCEMENT PRIORITY

Executive Order Promoting Competition

- Whole-of-government approach includes focus on “wage collusion”
- FTC rulemaking on non-competes/worker mobility

Criminal Prosecution

- Indictments for no-poach/wage fixing in 5 investigations in the last year
- Guilty plea from health-care staffing provider in D. Nevada case
- Leniency program incentives create a race to report potential collusion

Mergers Enforcement

- DOJ sued to halt book publisher deal alleging decreased author advances
- DOJ investigation of railway brake merger spawns no-poach investigation, pulling in alleged co-conspirator not party to the deal; results in consent decree/class action

State Attorneys General

- WA State AG investigations ended 100s of franchise non-competes
- NY ended no-poach agreements among title insurance companies

PLAINTIFFS' FIRMS ARE PURSUING LABOR ANTITRUST THEORIES

Private labor actions may lead or follow government enforcement

- Led: poultry, UFC fighters, medical faculty
- Followed: high tech, aerospace, others

Franchise theories move ahead, but sputter before trial

- Jimmy Johns no-poach suit settled after class cert denial
- 11th Cir allowed Burger King franchise claims to go forward
- McDonald's workers appealing no-poach summary judgment

Other, non-antitrust litigation creates risk

- Personnel recruiting, hiring, or setting salaries/wages/benefits can create or possess documents increasing antitrust risk
- Scenario: discovery in employment discrimination case unearths evidence of discussions about hiring/salaries among managers across companies

FOOD PROCESSOR CASES (2022)

2019 Private class action alleged wage-fixing conspiracy; indicated whistleblower; alleged “off the books” meetings at a particular hotel that included detailed information exchanges.

2022 DOJ allegations – starting before 2000, poultry processors that employ +90% of plant workers in the U.S. exchanged detailed salary and wage information, both granular (local plant-level information) and nationwide (budgets), current and sometimes future plans.

2000-2020, the processors engaged a survey consultant to gather benchmark wage information and present it to the group at in-person meetings.

$85m in restitution to DOJ, 10-year monitor. $120m to settle private claims.

BENCHMARKING OF HIRING, WAGES, BENEFITS?

1. **By itself, benchmarking is lawful, but guardrails are important**
   - Share info only with independent third party (not a competitor or under competitor's control).
   - Benchmarking reports should be aggregated so that competitors and employees cannot be identified.
   - Information should be "stale" by several months, not current or future.
2. **Context Matters**
   - If information is irregular in its form or how shared (e.g. in-person only).
3. **Manage Risk**
   - Accompanying benchmarking by increasing/improving training.

GUARDRAILS?

An executive at [Co-conspirator] emailed [other defendants], seeking details of each competitor's dental plan benefits, which her company was "currently reviewing." The [Co-conspirator] made clear that her company would use the information provided by its competitors to shape its own compensation decisions, explaining that "your responses to the questions below would greatly help us ensure we stay competitive within the industry." The questions she included related to eligibility for coverage, services included in the plan, annual deductible, and annual max per person.

WHISTLEBLOWERS

- A December 2020 law protects internal whistleblowers, or those who participate in a federal investigation or proceeding relating to a criminal antitrust violation.
- **Covered persons** may seek relief before OSHA or district court to correct adverse action (discharge, demotion, suspension, threats, harassment, or other discrimination).
- **Burden shifting**: covered person makes prima facie case that protected activity was a contributing factor in the alleged adverse action. Employer can rebut by clear and convincing evidence that the same personnel would have occurred absent the protected activity.
- **Remedies**: prevailing employee entitled to "all relief necessary to..[be made] whole" (reinstatement, back pay with interest, special damages, litigation costs, atty's fees).
- *Does not cover an employee who planned/initiated an antitrust violation, a related criminal violation, or obstruction.*

NON-SOLICITS / NON-COMPETES

- While historically acceptable so long as “reasonable,” the FTC is now seeking to ban all non-compete provisions under Section 5 of the FTC Act.
- In January 2023, three businesses also entered consent decrees with the FTC over their non-compete requirements.
- While employee non-competes are increasingly risky, other forms of non-compete provisions may pose less concern
  - When part of a larger, pro-competitive collaboration, AND reasonably necessary to achieve its purpose
  - In connection with the sale of a business
- In some cases, NDAs, confidentiality requirements, and other tools may be preferable to non-compete clauses.

INCLUDING A NON-SOLICIT

We're going to engage a consultant to work onsite for 6 months. We're hesitant to proceed, though, unless we can agree that he won't solicit our customers or employees during the work or at least 12 months afterward. Is that risky?

THIS LOOKS LIKE A REASONABLE RESTRICTION.

If the underlying consulting agreement is pro-competitive, yes. (Sure seems that way—helps the company to do something more effectively.) Antitrust law does not require that parties to a collaboration—even competitors—choose between the efficiency-enhancing venture and weakening themselves by giving over access/sensitive information without protection for the company. The key is to align on the justification for the collaboration and a reasonable restriction.

A DIFFERENT SCENARIO

We've been recruiting great team members away from a larger rival located in the Bay Area. Fed up, they sent us a cease and desist letter threatening legal action if we don't stop poaching their employees. They wrote that we're interfering with employee contracts and helping steal trade secrets. Should we cancel upcoming interviews with some of their personnel?

THIS WARRANTS A CAREFUL RESPONSE.

Non-compete agreements are unenforceable in California. Trade secret misappropriation and interference with contracts are real, but accepting a request to honor an unenforceable non-compete risks "agreeing" not to poach employees.

FTC NON-COMPETE CLAUSE RULEMAKING

Proposed ban on non-compete agreements between workers and employers, with limited exceptions.

- Applies to non-competes, including those styled as something else but functionally prohibit competition.
- No "grandfathering" -- would invalidate all existing non-competes and require notification.
- Covers independent contractors and anyone who works for an employer, whether paid or unpaid.
- There is a limited exception for sale of business context.

The Proposed Rule empowers the FTC to: (1) seek injunctions; (2) require compliance reporting; (3) access employer's premises for inspection and interviews; and (4) impose monetary penalties.

Rulemaking Process likely to take some time.

- 60-day period to solicit public comments on the Proposed Rule (beginning January 5, 2023).
- After the comment period closes, FTC will consider the input and possible whether revisions.
- Final Rule goes into effect 180 days after it is published.

Legal challenges may cause further delays.

- This could be a case where FTC's authority is called into question; rulemaking "presumes an expansive view of the agency's mandate" under Section 5 of FTC Act.
- The Supreme Court has recently endorsed the "Major Questions" doctrine, which requires Congress to speak clearly when authorizing agency action on "Major Questions."

HELP MANAGE ANTITRUST RISK

1. **Make it a priority to sensitize employees across the company to antitrust issues.**
2. **Participate in periodic training and be mindful of the cautionary tales.**
3. **Make sure executives and employees know that if they have questions, they can ask legal.**
4. **Make sure those who do the hiring, recruiting or set wages and benefits are particularly attuned to this area of changing antitrust enforcement.**
5. **Consider risks related to participation in benchmarking of salaries, wages, hiring levels.**
6. **Evaluate non-competes/non-solicits with heightened scrutiny in mind.**

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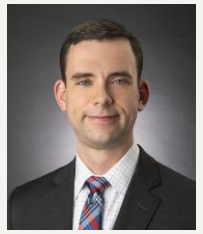

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