ANTITRUST: WHAT IS IT AND WHY DOES IT MATTER?

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ALSTON & BIRD

Antitrust Defined

"Antitrust laws are the *Magna Carta* of free enterprise, and are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

Justice Thurgood Marshall, *United States v. Topco Associates* (U.S. 1972).

Agenda

- ✓ Antitrust 101 – Understanding Core Principles
- ✓ 3 Myths About Antitrust
- ✓ 3 Major Antitrust Traps in Law Firm Recruiting: Hypotheticals
- ✓ Summary and Best Practices

Antitrust 101

The View from 30,000 feet

- What categories of conduct are prohibited by the antitrust laws?
- Who enforces the antitrust laws?
- What are the potential penalties for violating antitrust laws?

What types of conduct are prohibited by the antitrust laws?

Monopolization

Section 2 of the Sherman Act makes it unlawful for a company to "monopolize, or attempt to monopolize," trade or commerce.

- Focuses on the conduct of a single firm
- Only applies to companies with "monopoly power"
- Prohibits acquiring or maintaining monopoly power through "exclusionary conduct" vs. better product or business savvy
- Examples: *U.S. v. Standard Oil, Texas v. Google, LePage's v. 3M*

Anticompetitive Mergers & Acquisitions

Section 7 of the Clayton Act prohibits mergers and acquisitions when the effect "may be substantially to lessen competition, or to tend to create a monopoly."

- Most large mergers reviewed by the federal government
- Focus on concentration
- Example: *U.S. v. ATT/T-Mobile*

Agreements that unreasonably restrain trade

Section 1 of the Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade."

- Prohibits only agreements that are "unreasonable"
- Certain agreements are <u>always</u> unreasonable
- Other agreements require balancing of harm vs. pro-competitive benefits
- <u>This is our focus today!</u>

What types of agreements "unreasonably restrain trade"?

- Certain categories of agreements between competitors ("horizontal") are **ALWAYS** prohibited:
  - Agreements to fix prices, rig bids, to divide up customers, territories or suppliers, or to boycott third-parties
  - Can result in criminal antitrust prosecutions – average prison sentences of 20 months & more than $10B in fines over past decade

- Other agreements that impact competition **MAY BE** prohibited:
  - Other types of horizontal agreements, including agreements to share competitively sensitive information
  - Vertical agreements between seller and buyer
  - Courts balance expected harm to competition against pro-competitive benefits. The risks increase for companies with high market share

- Independent action by a single business without a large market share generally is PERMISSIBLE

Who enforces that antitrust laws?

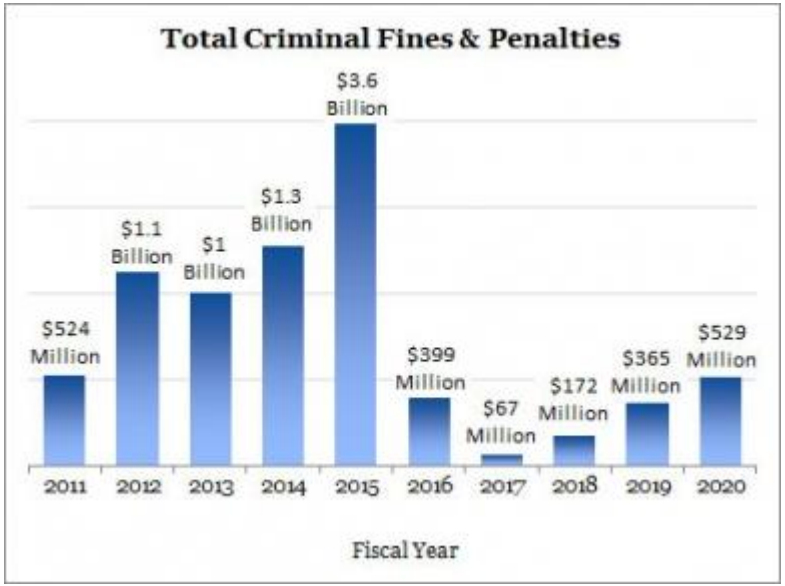
- U.S. Department of Justice
- Federal Trade Commission
- 51 state attorneys general

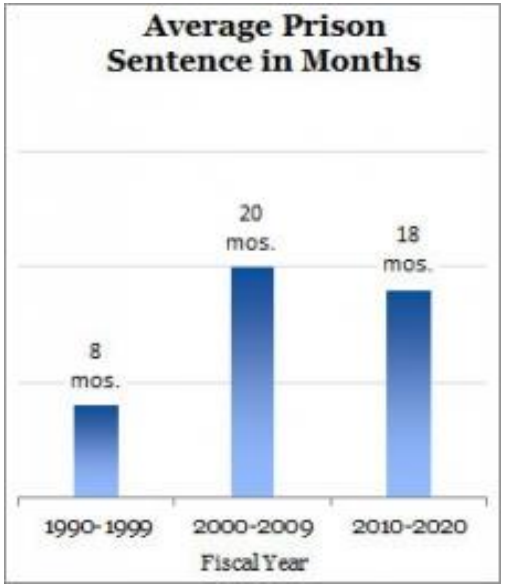
- Private plaintiffs, including class-action plaintiffs' counsel representing:
  - Competitors
  - Clients
  - Employees

What are the risks of violating the antitrust laws?

- Failure to comply carries siginificant risks:
  - Civil liability: Treble damages (x3), plus attorneys' fees and costs
  - Criminal liability: Corporations can be fined $100M or more; Individuals face up to 10 years in prison and $1M in fines
  - Disruption to business and harm to reputation

Fines & Jail Terms for Federal Antitrust Violations





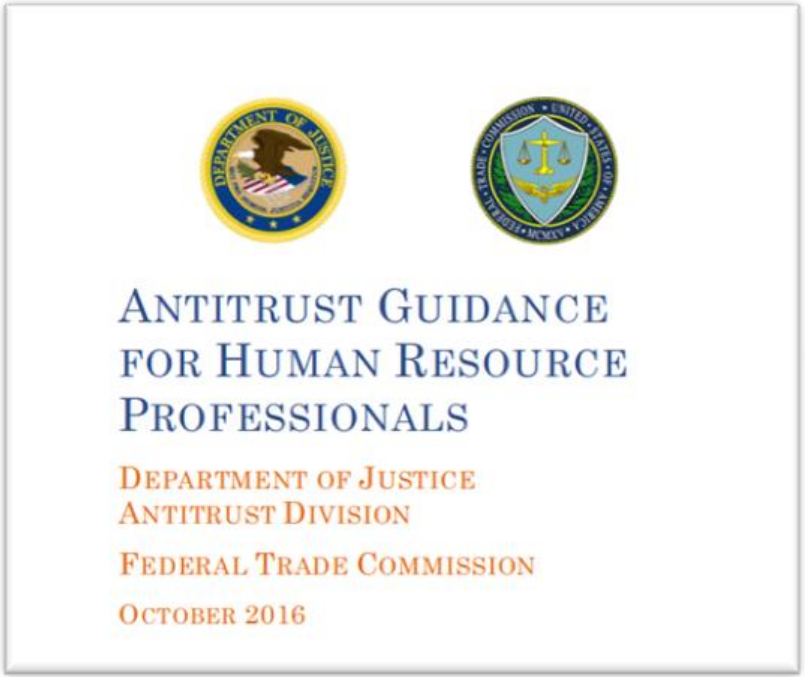
3 Myths You May Have Heard About the Antitrust Laws

The antitrust laws just don't apply to law firm HR activities…

My firm is relatively small. The antitrust laws are only concerned about really big, national companies like Google and AT&T…

I'm just trying to do the right thing. Our goal is to reduce confusion and simplify the recruitment and hiring process.

Myth #1: “Antitrust laws don’t apply to HR Professionals”



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

“From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace…

It is unlawful for competitors to expressly or implicitly agree not to compete with one another, even if they are motivated by a desire to reduce costs.

Therefore, HR professionals should take steps to ensure that interactions with other employers competing with them for employees do not result in an unlawful agreement not to compete on terms of employment.”

Myth 2: “Antitrust laws only apply to the biggest companies”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VOL. XXXIX. FITCHBURG

STANDARD OIL TRUST MUST BE DISSOLVED

Supreme Court Rules That It Is a Monopoly in Restraint of Trade—History of the Famous Case.

BIBLES P IN

U.S. Court of Appeals for the Seventh Circuit Revives Viamedia's $500 Million Antitrust Claim Against Comcast; Remands Case for Jury Trial

February 26, 2020

Nearly 40 states sue Google alleging search manipulation, marking the third antitrust salvo against the tech giant

The lawsuit by state attorneys general is the latest competition case that U.S. regulators have filed against the search-and-advertising giant since October

FTC, states sue to break up Facebook over anti-competitive behavior

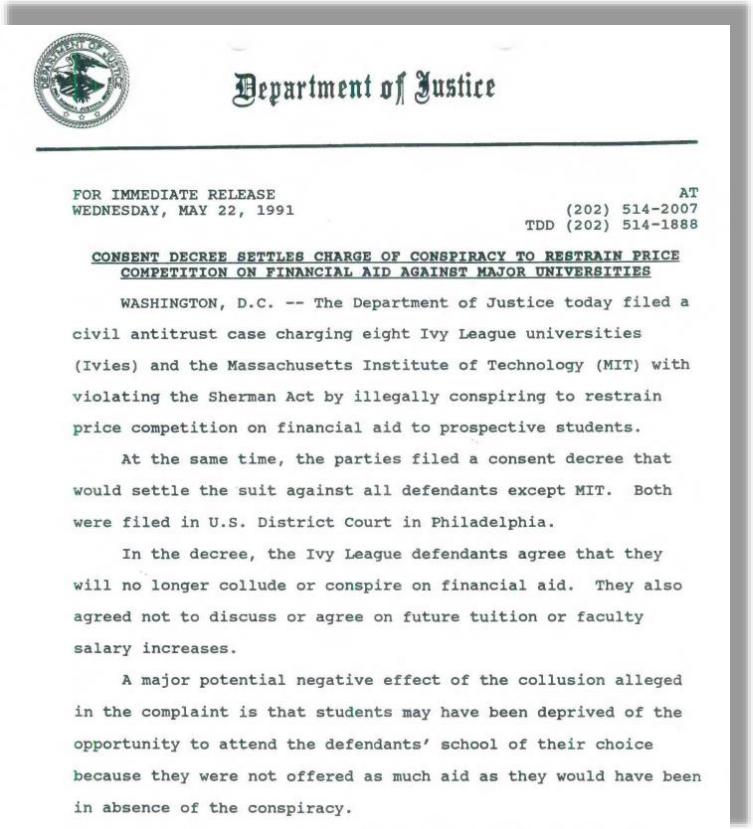
U.S. VS. MICROSOFT: THE OVERVIEW; U.S. JUDGE SAYS MICROSOFT VIOLATED ANTITRUST LAWS WITH PREDATORY BEHAVIOR

- The word “antitrust” dates from the late 1800s, when powerful companies dominated industries, working together as “trusts” to stifle competition. Thus, laws aimed at protecting competition have long been labeled “antitrust.”
- Certain antitrust violations, like monopolization, do apply only to companies that have significant market power.
- But other activities --such as price-fixing (or wage-fixing) by competitors -- are always illegal. The antitrust laws apply with equal force to small and medium size businesses and their employees that engage in this conduct.

Myth #3: “It’s ok, I’m just trying to do the right thing…”

“The loftiest of purported motivations do not excuse anti-competitive collusion among rivals. That’s long-standing antitrust law…. Even laudable ends do not justify collusive means in our chosen system of laws.”

Makan Delrahim, DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion, USA Today (Sept. 12, 2019)



Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, MAY 22, 1991

AT
(202) 514-2007
TDD (202) 514-1888

CONSENT DECREE SETTLES CHARGE OF CONSPIRACY TO RESTRAIN PRICE COMPETITION ON FINANCIAL AID AGAINST MAJOR UNIVERSITIES

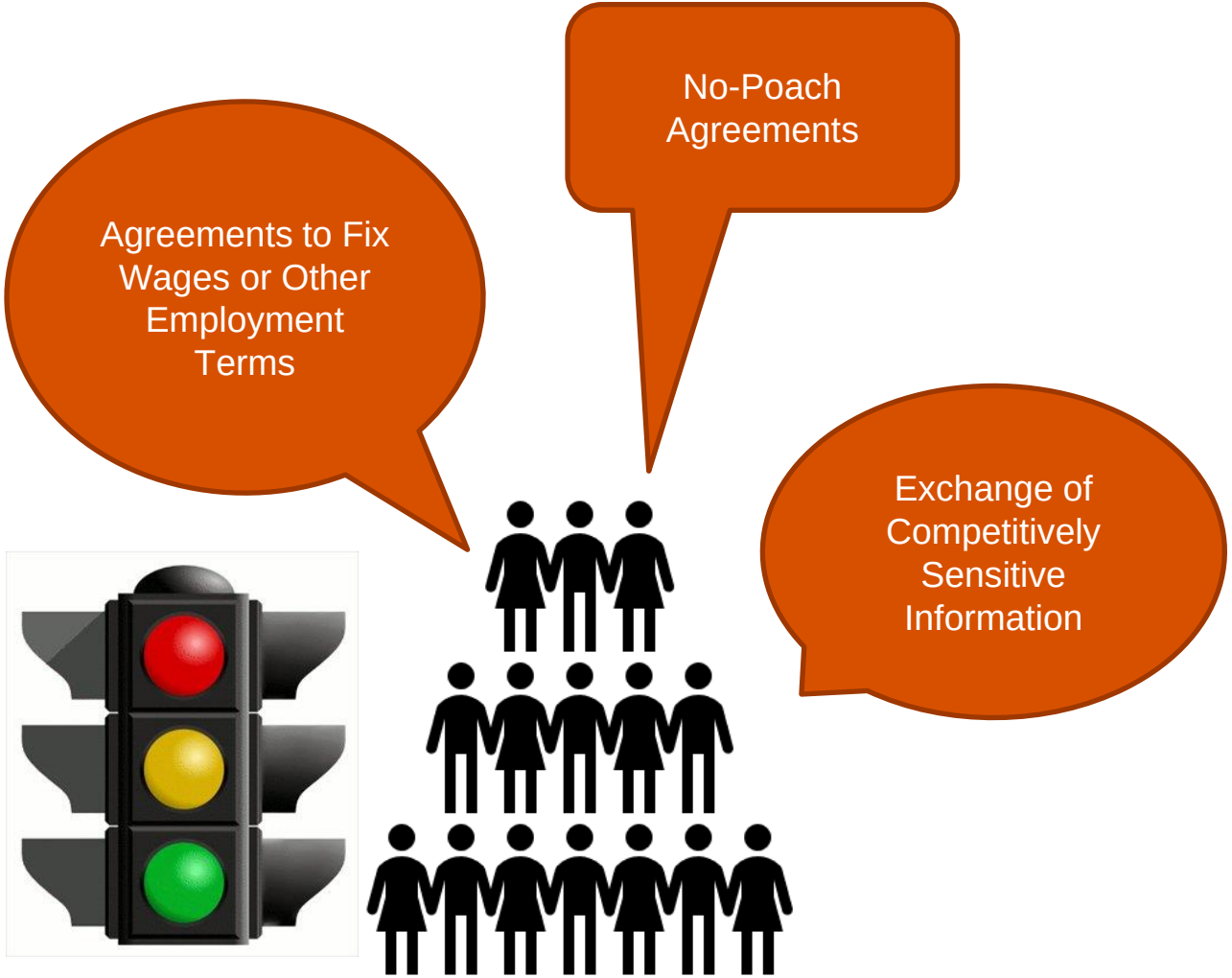
WASHINGTON, D.C. -- The Department of Justice today filed a civil antitrust case charging eight Ivy League universities (Ivies) and the Massachusetts Institute of Technology (MIT) with violating the Sherman Act by illegally conspiring to restrain price competition on financial aid to prospective students.

At the same time, the parties filed a consent decree that would settle the suit against all defendants except MIT. Both were filed in U.S. District Court in Philadelphia.

In the decree, the Ivy League defendants agree that they will no longer collude or conspire on financial aid. They also agreed not to discuss or agree on future tuition or faculty salary increases.

A major potential negative effect of the collusion alleged in the complaint is that students may have been deprived of the opportunity to attend the defendants' school of their choice because they were not offered as much aid as they would have been in absence of the conspiracy.

Antitrust Traps in Law Firm Recruiting



Understanding and Avoiding Wage-fixing Agreements

Wage-fixing agreements are express or implied agreement between individuals at two different employers about employee salaries or other terms of compensation, either at a specific level or within a range.

Wage Fixing: 6 Things You Need to Know

- Law firms in different geographic regions may be deemed competitors in connection with employment decisions.
- Firms may also be deemed competitors in hiring regardless of whether the firms also compete to provide the same legal services to clients.
- An agreement may be informal or formal, written or unwritten, spoken or unspoken.
- Even if an individual does not explicitly agree orally or in writing to fix employee compensation, other circumstances – such as evidence of discussions and parallel behavior – may lead to an inference that an illegal agreement was reached.
- Antitrust law prohibits agreements to fix or reduce salaries and other types of compensation, employee benefits, and terms of employment.
- In most cases, wage fixing is *per se* illegal. It does not matter if the firms involved are big or small or have the "market power" to impact prevailing wages/benefits.

Wage Fixing is a Current Focus of Federal Law Enforcement

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Thursday, December 10, 2020

Former Owner of Health Care Staffing Company Indicted for Wage Fixing

Antitrust Division Remains Committed to Prosecuting Collusion in Labor Markets

A federal grand jury returned an indictment charging Neeraj Jindal, the former owner of a therapist staffing company, for participating in a conspiracy to fix prices by lowering the rates paid to physical therapists and physical therapist assistants in north Texas, including the Dallas-Fort Worth metropolitan area, the Department of Justice announced today. The indictment also charges Jindal with obstruction of the Federal Trade Commission's separate investigation into this conduct.

According to the two-count indictment filed in the U.S. District Court in Sherman, Texas, Jindal and his co-conspirators agreed to pay lower rates to certain physical therapists and physical therapist assistants, and Jindal's company paid lower rates, from in or about March 2017 and continuing through in or about August 2017. Jindal is charged with participating in the conspiracy when he was the owner of a Texas-based therapist staffing company that provided in-home physical therapy services. Jindal is also charged with obstruction of proceedings before the Federal Trade Commission. According to the indictment, Jindal made false and misleading statements and withheld and concealed information during the Federal Trade Commission's investigation to determine whether Jindal's company or other therapist staffing companies violated Section 5 of the Federal Trade Commission Act.

"The charges announced today are an important step in rooting out and deterring employer collusion that cheats American workers — especially health care workers — of free market opportunities and compensation," said Assistant Attorney General Makan Delrahim of the Department of Justice's Antitrust Division. "Employers who conspire to fix the wages of workers or restrict their mobility by allocating labor markets will be prosecuted to the fullest extent of the law. The division will also continue to prosecute those who undermine the integrity of federal investigations, including proceedings before other federal agencies."

"The integrity of the market is the foundation of our free-enterprise system," said U.S. Attorney Stephen J. Cox for the Eastern District of Texas. "Wage-fixing agreements exploit workers by pushing down wages and eliminating competition. The Eastern District of Texas is proud to partner with the Antitrust Division in protecting the marketplace and the opportunities for American workers."

"The FBI is committed to rooting out anti-competitive activity and corruption in our markets," said Assistant Director Calvin Shivers of the Criminal Investigative Division. "In this case, Neeraj Jindal attempted to cheat the system and, in doing so, hurt hard-working Americans providing medical care and relief. Our International Corruption team worked creatively and diligently to investigate this crime. We are prepared to take our findings and work with our partners at the Department of Justice to ensure justice is served."

(a) The **Defendant** directed [redacted] to reach out to Individual 2, the owner of a competing therapist staffing company, regarding the rates that Company A and Company B paid their PTs and PTAs. On March 10, 2017, at approximately 1:36 p.m. CST, Individual 1, acting at the direction of and on behalf of the **Defendant**, texted with [redacted] Individual 1 texted: [redacted] Individual 1 texted: [redacted] Individual 2 responded by texting: [redacted] Individual 1 responded: [redacted] Individual 1 reported back to the **Defendant** regarding this text message conversation with Individual 2.

Wage-Fixing Hypo #1: Associate Bonuses

Scenario:

Over the last few years associate bonuses have been out of control. Once our peer firms announce a huge bonus, everyone matches.

Associates don't seem to grasp that as bonuses increase, so do billable hour expectations! It's a vicious cycle that's not good for the associates, our clients, or the firm.

This morning I got an email from a peer who works at another firm in town. She proposed that we could solve this problem by suggesting to our friends at other firms that we all freeze bonuses at last year's levels.

I think this would gain a lot of traction because everyone is facing the same challenges. And I think it would be good for our lawyers, many of which are working too hard.

I haven't responded to the email yet. What should I do?

Analysis:

- An agreement among competitors to freeze bonuses is an illegal wage-fixing agreement.
- Even if high bonuses were bad for lawyers, that would not be a defense to wage fixing.
- If you form such an agreement on behalf of your firm with your friend or others acting on behalf of their firms, you would likely be exposing yourself and your employer to substantial criminal and civil liability.
- Before responding, you should consult with an appropriate legal advisor at your firm – such as a General Counsel, managing partner or antitrust expert. That person will likely recommend that you respond to your friend's email indicating that you cannot agree to her proposal and that it may be illegal to reach an agreement to do so. In doing so, be explicit.

Wage-Fixing Hypo #2: Salary Matching

Scenario:

Our company monitors public sources like *BelowTheLaw*, for information on competitor associate salaries. In many cases, our competitors also publicly announce their associate salary scale.

Recently, our managing partner told me we were going to match the competition to ensure that we can attract the best talent. He asked me to investigate these public sources and set up a process to match the announced raises.

I'm worried that this could be an antitrust violation. Am I correct?

Analysis:

No. Matching competitors' public pricing may be good business and occurs often in competitive markets.

Using publicly available information to ensure that you remain competitive is not a violation of the antitrust laws.

Its also ok to receive and analyze information voluntarily shared by job applicants.

Each firm is free to set its own terms of employment, and it may choose to pay the same wages as its competitors so long as the decision is not based on any agreement or coordination with a competitor.

Wage-Fixing Hypo #3: Gym Memberships

Scenario:

I am the head of human resources of a boutique labor law firm. Like many of the top firms in my city, my firm has been offering gym memberships to all lawyers for several years.

Gym membership fees are increasing, so I would like to stop offering memberships, but I am worried that current employees will become disgruntled and move to other firms.

I would like to ask other firms in the industry to stop offering gym memberships, as well. Can I do that?

Analysis:

- No, you would likely violate antitrust law if your firm and the other firms agreed to cease offering gym memberships to employees.
- Job benefits such as gym memberships, parking, transit subsidies, meals, or meal subsidies and similar benefits of employment are all elements of employee compensation.
- An agreement with a competitor to fix elements of employee compensation is an illegal wage-fixing agreement.

Wage-Fixing Hypo #4: Canceling Summer Programs

Scenario:

I recently returned from a training program for law firm administrators that addressed financial challenges stemming from the pandemic.

During a Q&A period, one of my peers in the audience stood up and suggested that firms in my city should all just agree to cancel summer programs this year. He said that his firm couldn't appropriately social distance due to space constraints. And, he said it was a boondoggle to pay summers to work from home.

I could hear murmurs of agreement, and two other audience members even jumped up to agree. I didn't say anything. But in fact, my firm has already made the decision to cancel the summer associate program.

Is it ok for our firm to continue with its plan?

Analysis:

- Yes. Because your firm previously made the independent decision to cancel its summer program, doing so would not be a violation of the antitrust laws.
- However, the fact that your firm took the very action that was proposed could create an inference that your firm joined an agreement to cancel summer programs.
- Fortunately, it's likely that your firm has emails or other records of its unilateral decision that predate the training event --which could be used to show independent action.
- The best course of action is a "noisy exit." Immediately and publicly leave the event. If possible, publicly state that it would be improper to reach such an agreement and that you will not be a party to it.
- If a noisy exit is impossible, be sure to consult immediately with your firm's General Counsel or other appropriate advisor.

Understanding and Avoiding "No-poach" Agreements

"A no-poach agreement is an **agreement** between two or more employers—or their third-party agents or intermediaries (e.g., recruiters)—**not to cold-call, solicit, recruit, hire, or otherwise compete for each other's employees**.

These are market allocation agreements, but instead of allocating a corporation's output (its customers or territory), labor allocation agreements allocate a corporation's input (its employees). In other words, customer or territorial allocation agreements hurt customers. No-poach agreements hurt workers."

– AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL, U.S. Department of Justice (2018).

Alleged No-Poach Agreements Can be Costly for Employers

PUBLISHING SEPTEMBER 3, 2015 / 1:35 AM / UPDATED 6 YEARS AGO

U.S. judge approves $415 mln settlement in tech worker lawsuit

By Dan Levine 2 MIN READ

SAN FRANCISCO, Sept 2 (Reuters) - A U.S. judge on Wednesday granted final approval to a $415 million settlement that ends a high profile lawsuit in which workers accused Apple, Google and two other Silicon Valley companies of conspiring to hold down salaries.

The plaintiffs alleged that Apple Inc, Google Inc , Intel Corp and Adobe Systems Inc agreed to avoid poaching each other's employees, thus limiting job mobility and, as a result, keeping a lid on salaries.

Duke agrees to pay $54.5 million to settle class action lawsuit

Photo by Henry Haggart | The Chronicle

By Jake Satisky | @jsat15
May 25, 2019 | 5:51pm EDT

Duke and the Duke Health System have agreed to pay $54.5 million to settle a case in which they and the University of North Carolina at Chapel Hill were accused of antitrust collusion.

The court granted the settlement preliminary approval May 20 for the case, which was filed four years ago. In the class action lawsuit Seaman v. Duke University, Danielle Seaman—an assistant professor of radiology at Duke when she filed the case—alleged that Duke and UNC agreed not to hire each other's employees, which would violate federal antitrust laws protecting competition and wages.

Recent Indictment Reflects Aggressive Criminal Enforcement

"[T]he **DOJ will criminally investigate** allegations that employers have agreed among themselves. . . not to solicit or hire each others' employees. And if that investigation uncovers a naked … 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**."

- ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, USDOJ/FTC, Oct. 2016

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Thursday, January 7, 2021

Health Care Company Indicted for Labor Market Collusion

A federal grand jury returned a two-count indictment charging Surgical Care Affiliates LLC and its related entity (collectively SCA), which own and operate outpatient medical care centers across the country, for agreeing with competitors not to solicit senior-level employees, the Department of Justice announced today. These are the Antitrust Division's first charges in this ongoing investigation into employee allocation agreements.

"The charges demonstrate the Antitrust Division's continued commitment to criminally prosecute collusion in America's labor markets," said Assistant Attorney General Makan Delrahim of the Department of Justice's Antitrust Division. "A freely competitive employment market is essential to the health of our economy and the mobility of American workers. Along with our law enforcement partners, the division will ensure that companies who illegally deprive employees of competitive opportunities are not immune from our antitrust laws."

"The charges demonstrate the FBI's commitment to ensuring a free market and protecting opportunities for American workers," said Steven M. D'Antuono, Assistant Director in Charge of the FBI Washington Field Office. "The FBI will continue to work with our partners to root out this type of illegal activity and deter employer collusion that harms the American people and workers."

"Companies competing for top-level talent is the bedrock of the American labor market," said U.S. Attorney Erin Nealy Cox for the Northern District of Texas. "The Northern District of Texas is proud to partner with the Antitrust Division to prosecute Sherman Act violations."

The indictment, filed in the U.S. District Court for the Northern District of Texas, Dallas Division, charges SCA with entering into and engaging in two separate bilateral conspiracies with other health care companies to suppress competition between them for the services of senior-level employees, in violation of the Sherman Act. Beginning at least as early as May 2010 and continuing until at least as late as October 2017, SCA conspired with a company based in Texas to allocate senior-level employees by agreeing not to solicit each other's senior-level employees. Beginning at least as early as February 2012 and continuing until at least as late as July 2017, SCA separately conspired with a company based in Colorado to allocate senior-level employees through a similar non-solicitation agreement.

No-Poach Hypo #1: A Proposal Over Coffee

Scenario:

We spend a lot of money to recruit and train junior associates. Our partners committee is always complaining about our recruiting budget.

Last week I had coffee with a friend at another firm in the city. I mentioned how frustrated I get when a recent hire jumps ship to work at a competitor. My friend suggested that we deal with this problem by agreeing not to recruit or hire each other's employees.

He mentioned that he had discussed a similar arrangement with a friend at another firm and that it seemed to be working well. Retention was up and costs were down. I didn't know what to say so I said nothing.

What should I have done in that situation?

Analysis:

- What that friend is suggesting is a no-poaching agreement.
- That suggestion amounts to a solicitation to engage in serious criminal conduct.
- If you agree not to recruit or hire each other's employees, you would likely be exposing yourself and your firm to substantial criminal and civil liability.
- In this scenario you should unambiguously tell your friend that you cannot agree to his proposal and that it is improper to even discuss such an agreement.
- You should also immediately notify your firm's General Counsel or other designated legal advisor of the discussion.

No-Poach Hypo #2: An “Informal Understanding”

Scenario:

I work in the HR department of a firm that sometimes gets into bidding wars to attract lateral partners from rival firms. Those efforts rarely succeed, but they take up a lot of time, energy, and resources.

Recently a litigation partner at my firm told me that we now had an “informal understanding” with one of our top rivals not to try to recruit each other’s partners.

There isn’t a written agreement, and efforts to hire each other’s top performers were rarely successful anyway.

Is this okay?

Analysis:

- No. An illegal agreement can be oral; it need not be written down on paper. This conduct is similar to the conduct challenged by the government in no-poaching cases against tech companies.
- If you stopped recruiting and bidding for lawyers from another firm due to this informal understanding, you have become a member of that no-poaching conspiracy and could be subject to criminal liability.
- You should take no further action to comply with that agreement and notify your firm’s General Counsel of the firm’s participation in this illegal agreement.

No-Poach Hypo #3: A Special Candidate

Scenario:

I received a panicked call from a peer at another firm asking if we had interviewed a particular candidate.

He explained that a senior partner at his firm returned from a recruiting trip and really wants this person to accept their offer.

He asked if we would be willing to let the student go in order to increase his firm's chances. He promised that he would gladly do me the same favor if the shoe is on the other foot in the future.

This seems like a unique situation. It's not as if our firms are not generally competing for other candidates. Can I help him out?

Analysis:

- No. You should not agree not to compete to hire the candidate.
- This is a text-book no-poach agreement. While you may feel you are being generous by helping out a peer in a tough situation, your agreement would eliminate the benefits of competition between your firms for this candidate.
- It is akin to an agreement between two salespersons to divide markets or customers between them.

Understanding and Avoiding Improper Exchange of Competitively Sensitive Information

Sharing competitively sensitive information with competitors about salaries or other terms and conditions of employment can violate the antitrust laws.

Competitively Sensitive Information (CSI): Key Principles

- Competitively sensitive information, or CSI, includes **non-public** information about wages, salaries, benefits or other confidential terms of employment, particularly terms that employers use to compete to hire and retain employees.
- There are two main ways that the exchange of CSI can create antitrust liability:
  - First, it may be viewed **as circumstantial evidence** of an anticompetitive agreement to fix wages or divide markets.
  - Second, an agreement to share CSI may constitute **a stand-alone antitrust violation.** Even without an underlying agreement on terms of compensation among firms, excessive information exchange can enable firms to behave less competitively.

- While agreements to share information are not always illegal and therefore not prosecuted criminally, they may create civil antitrust liability when they have, or are likely to have, an anticompetitive effect.

CSI Hypo #1: Parental Leave Policies

Scenario:

I know that it would likely be improper for me to share confidential information about my firm's salary structure with a competing employer.

However, I recently received an email from a friend asking, "Would you be willing to privately share your firm's parental leave policy? We're thinking of changing ours and I was asked to dig around."

It seems harmless to me, and I'd like to help out my friend.

Analysis:

- You're right that sharing non-public salary information about your firm's salaries could be improper.
- Parental leave policies can also be competitively sensitive information if they are 1) important factors in attracting and retaining lawyers to your firm, 2) are non-public.
- Under those circumstances, the government or a plaintiff's counsel may allege that sharing your firm's parental leave policies with a competitor as an antitrust violation. And, if the other firm adopted your firm's policy, it could serve as circumstantial evidence of an illegal agreement to fix those benefits.
- This analysis would also apply to other types of employment terms and benefits.

CSI Hypo #2: Surveys and Benchmarking

Scenario:

I am an HR professional who serves on the board of our professional society. We are interested in understanding current and future trends in industry wages.

Can we distribute a survey asking firms and other legal employers about current and future wages?

Analysis:

- It may be unlawful for you, a member of the industry, to solicit a competitor's company-specific response to a wage survey that asks about current or future wages, or to respond to a competitor's request to provide such information.
- In addition, it may be unlawful for the professional society to distribute non-public and company-specific information about past, current, and future wages.
- However, the government recognizes a "safe harbor" for the exchange of otherwise competitively sensitive information if the exchange is managed by a third-party and the information:
  - is outdated,
  - is aggregated to protect the identity of the underlying sources, and
  - is collected from enough sources to prevent competitors from linking particular data to an individual source.

Summary and Best Practices

- Antitrust Red Flags for Recruiting and Human Resources Activities
- Avoiding Antitrust Risk: Best Practices

Summary: Break Glass in the event of…

Antitrust Red Flags for Employment Practices

Agreements and information exchanges among employers that compete to hire or retain employees may be illegal. If you are a **manager or human resource (HR) professional**, antitrust concerns may arise if you or your colleagues:

- 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.

Source: US DOJ Antitrust Division Website

Best Practices – Avoid Even the Appearance of Impropriety

- If you are concerned that you have witnessed or been involved in a potential antitrust violation, SEEK ADVICE from your organization's General Counsel or other designated legal advisor.
- Even if you haven't engaged in any wrongdoing, you need to BE CAREFUL ABOUT HOW YOU COMMUNICATE with others inside or outside your organization, including candidates, other employers and recruiters.
- ASSUME everything you write down (including social media) can be discovered in the course of litigation or an investigation, so:
    - Ask yourself: Could my language be interpreted or twisted to suggest an improper agreement?
    - Practice careful drafting: Avoid jokes, exaggerations, or vague references to agreements or understandings.
    - If you discuss apparently sensitive information, make sure you document that it came from a public source.
- REMEMBER that an improper agreement can be inferred from silence to an offer or from exchange of competitively sensitive information.
- As a general rule, DON'T DISCUSS wages, employment terms and conditions, or hiring practices with other employers. If you think another employer suggested an illegal agreement, you must clearly communicate that you are not on board.

Today’s speaker

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John Snyder is an antitrust partner in Alston & Bird’s Washington, D.C. office.

He provides comprehensive antitrust services, including merger clearance, litigation, and counseling. He regularly represents industry-leading clients before the U.S. Justice Department Antitrust Division, the Federal Trade Commission, and state attorneys general.

Before joining the firm in 2015, John served as counsel to the assistant attorney general in charge of the Antitrust Division of the U.S. Department of Justice. John also served for more than a decade as a senior trial attorney in the Antitrust Division, leading many of the government’s most significant investigations and litigations during that period.

John is ranked in Chambers USA: America’s Leading Lawyers for Business in antitrust for District of Columbia.