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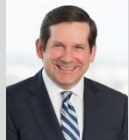
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The Tax Cuts and Jobs Act of 2017 and Antitrust Damages

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On December 22, 2017, President Trump signed into law the Tax Cuts and Jobs Act of 2017 (the "Act"). The Act includes significant changes to U.S. taxation for individuals and businesses effective January 1, 2018. While there has been much debate among economists about the effects the Act may have on macroeconomic measures such as gross domestic product, jobs, wages, and capital stock, another area on which the Act could also have an effect is damage calculations in antitrust litigation (as well as other types of litigation).

This is due to the following considerations:

1. As a general matter, an antitrust plaintiff is harmed by a violation when that plaintiff would be in a better financial position "but for" the violation.
2. Damages are intended to compensate for the effect of the defendant's violation.¹
3. Taxes may be important in determining a plaintiff's financial position, and consequently, important in determining damages.
4. In general, the plaintiff will owe taxes on any damages awarded.²

¹Proving Antitrust Damages: Legal and Economic Issues, Third Edition (Chicago, IL: ABA Book Publishing, 2017), p. 103.

²Proving Antitrust Damages: Legal and Economic Issues, Third Edition (Chicago, IL: ABA Book Publishing, 2017), p. 109.

5. There may be changes in taxation between the time a plaintiff is harmed and the time of an award of damages, which consequently could affect the determination of damages.

The last point is one in which the Act may play a role.

Consider, for example, the change in the federal corporate tax rate brackets that result from the Act. While it is often incorrectly reported in the media that the corporate rate prior to the Act taking effect was 35%, several brackets delineated by the amount of taxable income were in existence at the time the Act took effect.³ For example, the rate on taxable income up to \$50,000 was 15%, while the rate on taxable income over \$18,333,333 was 35%. As a result of the Act, the statutory rate on taxable income became a flat rate of 21%, and this rate is permanent.⁴ Of course, the actual impact of the Act on any particular taxpayer will depend on a number of factors, but for purposes of this article we will focus on just the change in the brackets.⁵

As noted above, damages are intended to compensate for the effect of the defendant's violation and make the plaintiff "whole." What, though, is meant by "compensate"? "Perfect compensation," as defined in law and economics literature, is "a sum of money to make the victim of an injury equally well off with the injury and the money as he or she would have been without the money or the injury."⁶ We will focus on the compensatory objective of the award (as opposed to other possible objectives, such as deterrence). The hypotheticals below, based on the following facts, help explain how the Act can affect the damages calculation:

In 2017, the ABC Corporation sues the XYZ Corporation for an antitrust violation it alleges occurred in 2016. Further, ABC alleges that but for the alleged violation by XYZ, it would have earned an additional \$100 million in pre-tax profit in 2016. This \$100 million would have been taxable income and the applicable rate on this taxable income would have been 35%. Therefore, but for the alleged violation by XYZ, ABC's financial position would have improved by \$65 million (\$100 million in additional pre-tax profit less \$35 million in federal taxes).⁷ ABC and XYZ go to trial. ABC prevails and is awarded damages of \$100 million.

³ "Corporate Rate Schedule," *Tax Policy Center* (May 4, 2017).

⁴ "Analysis of the Tax Cuts and Jobs Act," *Tax Policy Center* (December 22, 2017).

⁵ There is much on this topic that is beyond the scope of this article, such as whether an award is taxable and if so, at what rate. For example, the portion of the award that is attributed to lost profits is taxable as ordinary income, whereas the portion of the award that is attributed to lost "goodwill" is taxable at the capital gains rate. *Proving Antitrust Damages: Legal and Economic Issues, Third Edition* (Chicago, IL: ABA Book Publishing, 2017), p. 109, footnote 18. For readers seeking to deepen their knowledge of the subject, see 17-7. Merle Erickson and James K. Smith, "Tax Treatment of Damages Awards," in *Litigation Services Handbook: The Role of the Financial Expert, Fifth Edition*, ed. Roman L. Weil *et al.* (Hoboken, NJ: John Wiley & Sons, Inc., 2012).

⁶ Robert Cooter and Thomas Ulen, *Law and Economics, 6th Edition* (Boston, MA: Addison-Wesley, 2016), p. 192.

⁷ We ignore state and local taxes for the purposes of this example just to keep the arithmetic simple. The reader should note that the incorporation of state and local taxes may involve more than simply adding the applicable state and local rates because state and local taxes may be deductible for determining the amount of income subject to federal tax.

Hypothetical 1:

Now consider the first hypothetical, in which XYZ pays immediately in 2017 (ignore treble damages for the purposes of this example). If the award is taxable, and the applicable rate on this taxable income is 35%, then ABC's financial position improves by \$65 million (\$100 million in additional pre-tax profit less \$35 million in federal taxes). This "perfectly" compensates ABC because it is indifferent between the situation in which there is no violation (an increase in after-tax profit of \$65 million) and the situation in which there is a violation and an award (an increase in after-tax profit of \$65 million). Simply put, ABC would not prefer one over the other.⁸

Note that this may not be technically true given the passage of time when ABC would have received the profit if there had been no violation and when ABC receives the award if the time value of money is positive. For example, if this period of time is one year, and ABC could have invested its additional after-tax profit in 2016 at an after-tax risk-free interest rate of 1% over this period, then its financial position had there been no violation would have improved to \$65.65 million at the time of the award in 2017. Therefore, an award of only \$65 million in 2017 would not perfectly compensate ABC. In this case, ABC is not indifferent between the situation in which there is no violation (an increase in after-tax profit of \$65.65 million) and the situation in which there is a violation and an award (an increase in after-tax profit of \$65 million). ABC would prefer a situation in which there is no violation. The antitrust laws, however, do not provide for prejudgment interest.⁹

Hypothetical 2:

Now, consider a second hypothetical in which XYZ pays *in 2018* rather than in 2017. If the award is taxable, then, as a result of the Act, the applicable rate on this taxable income is the flat rate of 21% rather than the 35% that ABC would have paid had it received the income in 2016. In this hypothetical, ABC's financial position improves by \$79 million (\$100 million in additional pre-tax profit less \$21 million in federal taxes). This, however, overcompensates ABC because it is not indifferent between the situation in which there is no violation (an increase in after-tax profit of \$65 million) and the situation in which there is a violation and an award (an increase in after-tax profit of \$79 million). It would prefer the violation and an award.

If the goal is to perfectly compensate ABC, then an adjustment needs to be made to the pre-tax amount awarded and paid in 2018. Therefore, in the second hypothetical, the pre-tax award of \$100 million should be reduced by approximately 17.72% to about \$82.28 million. With a flat rate of 21% in federal taxes on this amount, or about \$17.28 million, that is paid in taxes by

⁸ Of course, with treble damages in antitrust cases, a plaintiff would be in a better financial position with a violation and an award. For purposes of assessing tax consequences, however, it makes sense to start by comparing the financial positions pre-trebling. Indeed, in my experience, settlement amounts in antitrust cases are based on single, not treble, damages.

⁹ *Proving Antitrust Damages: Legal and Economic Issues, Third Edition* (Chicago, IL: ABA Book Publishing, 2017), p. 116. However, the laws do provide for post-judgment interest for the time between judgment and the payment of the award. We assume awards are paid immediately so that we can ignore post-judgment interest for purposes of the example. We also ignored any litigation costs that ABC might not recover.

ABC, its financial position improves by \$65 million if the award is about \$82.28 million. ABC is perfectly compensated because it is indifferent between the situation in which there is no violation (an increase in after-tax profit of \$65 million) and the situation in which there is a violation and an award (an increase in after-tax profit of \$65 million). It would not prefer one over the other.

Hypothetical 3:

Even though the title of the Act contains the words “tax cuts,” it is possible the Act could result in an *increase* in the applicable rate such that the adjustment would go the other way. For example, consider a third hypothetical in which the amount in question is only \$50,000 and that ABC had no other taxable income, so it would have been taxed at a rate of 15% in 2016. But for the alleged violation by XYZ, ABC’s financial position would have improved by \$42,500 (\$50,000 in pre-tax profit less \$7,500 in federal taxes). In this case, a pre-tax award in 2018 would need to be increased by approximately 7.59% to about \$53,797. ABC would pay a flat rate of 21% in federal taxes on this amount, or about \$11,297, which would improve its financial position by \$42,500. This perfectly compensates ABC because it is indifferent between the situation in which there is no violation (an increase in after-tax profit of \$42,500) and the situation in which there is a violation and an award (an increase in after-tax profit of \$42,500). It would not prefer one over the other. The reader might consider the third hypothetical to be an unrealistic example because it might not seem to make sense to go to trial to try to win \$50,000 given that the costs of litigation would likely exceed this amount. But that is not necessarily the case, for a number of reasons. First, the federal antitrust laws provide for a plaintiff prevailing at trial to not only receive treble damages at trial (so that “stakes” are actually \$150,000 rather than \$50,000) but also to recover the cost of suit and a reasonable attorney’s fee. Second, the plaintiff might also be seeking injunctive relief along with damages. The value to the plaintiff of the injunctive relief, either alone or in combination with the \$50,000 sought in damages, may make the “stakes” of the whole case sufficiently large so that it makes sense for a plaintiff to go to trial. Third, the plaintiff might be seeking damages for more than just one year. The value to the plaintiff of the damages for the other years, either alone or in combination with the \$50,000 sought in damages for the one year, may make the “stakes” of the whole case sufficiently large so that it makes sense for a plaintiff to go to trial.

How does one determine the amount of the adjustment to be made? We will spare the reader much of the algebra, but let $T(\text{harm})$ be the applicable tax rate (in % terms) at the time of the harm and let $T(\text{award})$ be the applicable tax rate (in % terms) at the of the award. The adjustment factor, A , is given by

$$A = (100\% - T(\text{harm})) / (100\% - T(\text{award})).$$

The adjustment factor A is multiplied by the dollar amount in question.

Let's apply this equation to the first hypothetical we described above. T(harm) is 35% (the applicable tax rate in 2016) and T(award) is 21% (the applicable tax rate in 2018), so the adjustment factor is

$A = (100\% - 35\%) / (100\% - 21\%) = 65\% / 79\% = \text{approximately } 0.8228.$
In the first hypothetical, the dollar amount in question, \$100 million, is multiplied by 0.8228, which *reduces it* by approximately 17.72% to about \$82.28 million.

In the second hypothetical we described above, T(harm) is 15% (the applicable tax rate in 2016) and T(award) is 21% (the applicable tax rate in 2018), so the adjustment factor is

$A = (100\% - 15\%) / (100\% - 21\%) = 85\% / 79\% = \text{approximately } 1.0759.$

In the second hypothetical, the dollar amount in question, \$50,000, is multiplied by 1.0759, which *increases it* by approximately 7.59% to about \$53,797. Of course, if the tax rate at the time of the harm and the tax rate at the time of the award are the same (that is T(harm) = T(award)), then the adjustment factor is simply 1. That is, there is no adjustment.

By now the reader may realize such an adjustment is necessary whenever there is any difference in the applicable tax rate between the time of the harm and the time of the award, not just the result of changes in the law such as those resulting from enactment of the Act.¹⁰ To see why, suppose the amount in question is only \$50,000 and that ABC had no other taxable income so it would have been taxed at a rate of 15% in 2016. So, but for the alleged violation by XYZ, ABC's financial position would have improved by \$42,500 (\$50,000 in pre-tax profit less \$7,500 in federal taxes). Suppose ABC sues XYZ in 2017, and ABC prevails and is awarded damages of \$50,000 that XYZ pays immediately in 2017 (we ignore treble damages for the purposes of this example). Suppose, though, ABC has other taxable income in 2017, so that the applicable rate on this additional \$50,000 is 35%. In this case, a pre-tax award in 2017 would need to be increased by approximately 30.77% to about \$65,385. ABC would pay 35% in federal taxes on this amount, or about \$22,885, which would improve its financial position by \$42,500. This perfectly compensates ABC because it is indifferent between the situation in which there is no violation (an increase in after-tax profit of \$42,500) and the situation in which there is a violation and an award (an increase in after-tax profit of \$42,500). It would not prefer one over the other.

Although only a small fraction of federal antitrust cases actually go to trial, and the plaintiffs do not always prevail and receive an award of damages, an adjustment to an award at trial is an important consideration during settlement negotiations. This is because settlement bargaining is a game that takes place in the "shadow of the law" in which the parties consider what would happen at trial. The amount the defendant would pay the plaintiff to avoid trial may be a function of the amount of damages that would be awarded at trial. Thus, the amount of a settlement may need to be adjusted according to

¹⁰ This is not a novel approach. *Proving Antitrust Damages: Legal and Economic Issues, Third Edition* (Chicago, IL: ABA Book Publishing, 2017), p. 109, footnote 18.

the adjustment factor as discussed above. If we change the facts in the first hypothetical such that XYZ was 100% certain ABC would prevail at trial and receive an award of \$100 million in 2017 as compensation for the pre-tax profit ABC would have received in 2016, then it would make economic sense for XYZ to pay \$100 million to ABC (and the costs of litigation) to avoid trial and the associated costs of litigation.¹¹ Alternately, if XYZ was 100% certain that ABC would prevail at trial and receive an adjusted award of \$82.28 million *in 2018* (as a result of the Act) as compensation for the pre-tax profit ABC would have received in 2016, then XYZ would be prudent in settling with ABC for under \$82.28 million (and the costs of litigation) to avoid trial and the associated costs of litigation.

The astute reader will note we were careful to state the Act *could* have an effect on damage calculations in antitrust litigation (as well as other types of litigation). Even though it is recognized that “[t]axes are an explicit expense of a commercial firm and must be considered when calculating damages” in antitrust cases, the law does not appear to require an award be adjusted for any change in the applicable tax rate between the time of the harm and the time of the award.¹² Going forward, practitioners should pay attention to how changes to U.S. taxation for individuals and businesses in the Act find their way into antitrust (and other) cases and how damages experts (such as economists), lawyers, judges, and juries address them in making the plaintiff “whole.”

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¹¹ We again ignore trebling of damages.

¹² *Proving Antitrust Damages: Legal and Economic Issues, Third Edition* (Chicago, IL: ABA Book Publishing, 2017), p. 109.

Antitrust Enforcement in the Employment Marketplace

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I. INTRODUCTION

No-poaching agreements, also known as no-solicitation or no-hire agreements, are agreements between two or more employers not to compete in the labor or employment market.¹³ Employers that compete for the same talent are considered competitors in the employment market, even though they may not be competitors in the same product or service markets.¹⁴ Firms that form bilateral agreements to restrict recruitment strategies or that agree not to recruit competitors' employees, therefore, are suppressing competition in the employment marketplace and are potentially acting in violation of antitrust laws.¹⁵ These agreements are more common when employers are competing for highly skilled labor, especially within the technology industry.¹⁶

Traditionally, the Antitrust Division of the Department of Justice (the "DOJ") challenged no-poaching agreements through civil enforcement actions.¹⁷ However, the DOJ has recently departed from the prior stance on enforcement, announcing its intention to criminally prosecute naked no-poaching and wage-

¹³ See ANTITRUST DIV., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2 (2016), available at <https://www.justice.gov/atr/file/903511/download> [hereinafter 2016 ANTITRUST GUIDANCE].

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See, e.g., Press Release, Dep't of Justice, Justice Department Requires Lucasfilm to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 21, 2010), available at <https://www.justice.gov/opa/pr/justice-department-requires-lucasfilm-stop-entering-anticompetitive-employee-solicitation> [hereinafter Press Release: Lucasfilm]; Press Release, Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), available at <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee> [hereinafter Press Release: High Tech Companies]; Press Release, Dep't of Justice, Justice Department Requires eBay to End Anticompetitive "No Poach" Hiring Agreements (May 1, 2014), available at <https://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements> [hereinafter Press Release: eBay].

¹⁷ See 2016 ANTITRUST GUIDANCE, *supra* note 1, at 3.

fixing agreements as *per se* illegal violations of antitrust law.¹⁸ In October 2016, the DOJ and Federal Trade Commission (the “FTC” and, together with the DOJ, the “Agencies”) issued a joint report titled Antitrust Guidance for Human Resource Professionals¹⁹ (the “2016 Antitrust Guidance”) which counseled that “no-poaching” agreements, wherein two or more employers agree among themselves to fix wages or to refuse to solicit or hire the other the other companies’ employees, violate the antitrust laws.²⁰ The Agencies further warned that “the DOJ could bring a criminal prosecution against individuals, the company, or both” for engaging in such anticompetitive conduct.²¹

In January 2018, Makan Delrahim, the Assistant Attorney General for the Antitrust Division of the DOJ appointed by President Trump, reiterated the DOJ’s commitment to challenging such conduct and announced that the DOJ will soon bring its first criminal cases involving alleged no-poaching agreements in violation of the Sherman Act.²² This announcement confirms that the Agencies’ recent focus on enforcement of antitrust laws in the employment marketplace is not waning under the current administration and that employers should take steps to ensure compliance with the antitrust laws.

This article will explain how no-poaching agreements violate antitrust laws and outline the Agencies’ recent enforcement actions relating to those agreements. Finally, this article will conclude by offering some prophylactic measures that antitrust practitioners might consider in advising employers.

II. HOW DO NO-POACHING AGREEMENTS VIOLATE ANTITRUST LAWS?

Antitrust laws protect competition within markets, including the employment marketplace. The 2016 Antitrust Guidance issued by the Agencies declared that “an agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual decision-making.”²³ Agreements not to recruit potential hires from competing employers by limiting the parties’ recruitment and hiring practices would constitute such a violation.

The DOJ can challenge no-poaching agreements under Section 1 of the Sherman Act as *per se* illegal²⁴ because such agreements “eliminate competition in the same irredeemable way as agreements among competitors to fix the prices of goods or allocate customers.”²⁵ The DOJ has traditionally confined its criminal antitrust enforcement to *per se* violations of the Sherman Act, and the DOJ has stated its commitment to seeking criminal remedies for no-poaching

¹⁸ See Press Release, Dep’t of Justice, Protecting Our Nation’s Workforce Through Antitrust (Oct. 20, 2016), available at <https://www.justice.gov/archives/opa/blog/protecting-our-nations-workforce-through-antitrust> [hereinafter Press Release: Protecting Our Nation’s Workforce].

¹⁹ See 2016 ANTITRUST GUIDANCE, *supra* note 1.

²⁰ See *id.* at 3.

²¹ See *id.* at 2.

²² See Eleanor Tyler, *Justice Dept. Is Going After ‘No-Poach’ Agreements*, BIG LAW BUS. (Jan. 19, 2018), available at <https://biglawbusiness.com/justice-dept-is-going-after-no-poach-agreements/>.

²³ 2016 ANTITRUST GUIDANCE, *supra* note 1, at 1.

²⁴ See, e.g., Complaint ¶ 3, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010) [hereinafter *Adobe Complaint*]; see also generally Sherman Antitrust Act, 15 USC §1.

²⁵ Press Release: Protecting Our Nation’s Workforce, *supra* note 6.

agreements.²⁶ No-poaching agreements eliminate competition by impacting both individual and market-wide decision-making. Individual employers that have entered into no-poaching agreements are unable to make independent hiring decisions, and the agreements reduce overall market competition for employees.

Individual employers may be motivated to enter into no-poaching agreements by the desire to retain highly skilled employees²⁷ or the desire to reduce costs.²⁸ However, these perceived benefits are accompanied by constraints on recruitment and hiring decisions contained within the agreements themselves. In labor markets characterized by expertise and specialization, highly trained employees are in high demand.²⁹ When employers are unrestrained in competing for the best employees, they compete in three key ways: through targeted recruitment, by offering better pay, and/or by offering better benefits.³⁰ No-poaching agreements can substantially restrict individual employers' recruitment abilities by, for example, prohibiting certain methods of contacting potential hires or by prohibiting any contact with a particular firm's employees. No-poaching agreements may also prevent employers from offering competitive pay and benefits packages and consequently limit employers' capacity to attract the most talented and valuable employees. Moreover, employers may find themselves suffering the costs of stagnation inherent to an unchanging and potentially less-talented workforce.

Additionally, collusive no-poaching agreements deprive employees of opportunities associated with a competitive employment market.³¹ In a competitive employment market, for example, employers would be incentivized to offer better benefits or wages to employees with highly sought-after skills or expertise. However, employers that have entered into no-poaching agreements would not be motivated to offer incentives to employees, resulting in lower wages and fewer benefits for employees overall.³² According to former acting Assistant Attorney General Renata B. Hesse, "[a]ntitrust violations in the employment arena can greatly harm employees and impact earnings over the course of their entire careers."³³

No-poaching agreements can also reduce market-wide competition and negatively impact consumers. By interfering with the natural price-setting mechanisms of an unrestricted market,³⁴ consumers can be unwittingly subjected to unnaturally priced and lower-quality goods or services.³⁵

²⁶ *See id.*

²⁷ *See* Michael M. Briley, "Employee 'No Poaching' Agreements Meet the Antitrust Laws: Protection of Employees in the New Economy," LEXOLOGY.COM, (July 27, 2017), *available at* <https://www.lexology.com/library/detail.aspx?g=b6a5e33c-8eb1-4c1f-a8a4-ea2578f8a72e>.

²⁸ *See* 2016 ANTITRUST GUIDANCE, *supra* note 1, at 2.

²⁹ *See* Press Release: High Tech Companies, *supra* note 4.

³⁰ *See* 2016 ANTITRUST GUIDANCE, *supra* note 1, at 1.

³¹ *See* Briley, *supra* note 15.

³² *See* 2016 ANTITRUST GUIDANCE, *supra* note 1, at 2.

³³ Press Release, Dep't of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), *available at* <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals> [hereinafter Press Release: Guidance for Human Resource Professionals].

³⁴ *See* 2016 ANTITRUST GUIDANCE, *supra* note 1, at 2.

³⁵ *See id.*

III. THE AGENCIES' OCTOBER 2016 ANTITRUST GUIDANCE AND PAST PRACTICE

The Agencies' October 2016 Antitrust Guidance set the stage for an increased concentration on violations of the antitrust laws in the employment marketplace. Noting that "competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment[,]" the Agencies cautioned that "[i]t 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."³⁶ Specifically, the Agencies stated that it is illegal for an individual to "agree with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements)" or to "agree with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called 'no poaching' agreements)."³⁷ Further stating that "[n]aked wage-fixing and no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws[,]" the Agencies promised that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."³⁸ The Agencies explained that by "naked" wage-fixing or no-poaching agreements, they mean agreements that are separate from or not reasonably necessary to a larger legitimate collaboration between the employers.³⁹

The Agencies' pronouncement in the 2016 Antitrust Guidance regarding wage-fixing and no-poaching agreements followed several civil enforcement actions that the Agencies pursued since the 1990s. In 2007, the DOJ sued the Arizona Hospital and Healthcare Association ("AzHHA"), which through its subsidiary runs a group purchasing organization that contracts with nursing agencies to provide temporary nursing services for most Arizona hospitals.⁴⁰ The DOJ alleged that AzHHA, acting on behalf of most of the hospitals in Arizona, "set bill rates below the levels its member hospitals could otherwise have achieved by negotiating independently with each agency" and "imposed other noncompetitive contractual terms on participating agencies."⁴¹ The case resulted in a consent judgment.⁴²

In 2010 and 2012, the DOJ also filed civil enforcement actions against technology companies in three separate cases, alleging that the companies entered into no-poaching agreements with competitors in violation of the antitrust laws.⁴³ In each of the cases, the competitors agreed not to cold call each

³⁶ *See id.*

³⁷ *Id.* at 3.

³⁸ *Id.* The joint antitrust guidance also discusses the potential illegality under the antitrust laws of sharing of sensitive information with competitors, although this article does not specifically address that issue.

³⁹ *See id.*

⁴⁰ *See* Complaint ¶ 2, *United States v. Ariz. Hosp. & Healthcare Ass'n*, No. CV07-1030-PHX (D. Ariz. May 22, 2007).

⁴¹ *Id.* ¶ 4.

⁴² *See* Final Judgment, *United States v. Ariz. Hosp. & Healthcare Ass'n*, No. CV07-1030-PHX (D. Ariz. Sept. 12, 2007); *see also* 2016 ANTITRUST GUIDANCE, *supra* note 1, at 3.

⁴³ *See* Complaint ¶ 1, *United States v. eBay, Inc.*, No. CV12-58690 (N.D. Cal. Nov. 16, 2012); Complaint ¶ 2, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010); *Adobe* Complaint ¶¶ 1-2.

other's employees.⁴⁴ Two of the cases also involved agreements to limit hiring of employees from competitor companies.⁴⁵ All three cases likewise resulted in consent judgments.⁴⁶

In a 1992 action, the FTC alleged that several nursing homes illegally agreed to boycott a nurse registry that attempted to raise prices for nurses providing short-term services, and in doing so conspired to eliminate competition among themselves for temporary nursing services, which depressed the price of those services.⁴⁷ The nursing homes entered into a consent judgment.⁴⁸ And in 1995, the FTC announced a settlement with the trade association representing most of the nation's best-known fashion designers and the organization which produces the two major fashion shows for the industry each year.⁴⁹ The FTC had alleged that the co-conspirators attempted to reduce the fees and other terms of compensation for models.⁵⁰ As part of the settlement, the defendants agreed not to enter into or continue any agreement to raise, lower, or fix the price, terms, or other forms or conditions of compensation for modeling or modeling agency services.⁵¹

A review of the Agencies' past practice demonstrates that they have been pursuing antitrust cases against employers for many years (albeit civilly). Nevertheless, because the Agencies issued the 2016 Antitrust Guidance during the Obama administration, it was unclear whether the Agencies' pledge to vigorously investigate and penalize antitrust violations in the employment area would carry over to the Trump administration. That question has been answered in recent speeches by Trump-era DOJ officials.

IV. COMMENTS OF TRUMP-ERA DOJ OFFICIALS

Any doubts as to whether the Agencies' pledge to pursue civil and criminal enforcement of the antitrust laws in the hiring and compensation space would continue post-Obama administration have been resolved by recent comments of DOJ officials in the Trump administration. In remarks delivered at the Global Antitrust Enforcement Symposium on September 12, 2017, then-Acting Assistant Attorney General for the DOJ Antitrust Division Andrew Finch reiterated the DOJ's commitment to enforcement of the antitrust laws in the employment marketplace. Finch said:

⁴⁴ See Complaint ¶ 2, *eBay, Inc.*, No. CV12-58690 (N.D. Cal. Nov. 16, 2012); Complaint ¶ 2, *Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010); *Adobe* Complaint ¶ 2; see also 2016 ANTITRUST GUIDANCE, *supra* note 1, at 4.

⁴⁵ See Complaint ¶¶ 1-2, *eBay, Inc.*, No. CV12-58690 (N.D. Cal. Nov. 16, 2012); Complaint ¶ 2, *Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010); see also 2016 ANTITRUST GUIDANCE, *supra* note 1, at 4.

⁴⁶ See Final Judgment, *eBay, Inc.*, No. CV12-58690 (N.D. Cal. Sept. 2, 2014); Order, *Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. June 3, 2011); Final Judgment, *Adobe Sys., Inc.*, No. 1:10-cv-01629 (D.D.C. Mar. 17, 2011); see also 2016 ANTITRUST GUIDANCE, *supra* note 1, at 4; Press Release: *eBay*, *supra* note 4; Press Release: *Lucasfilm*, *supra* note 4; Press Release: High Tech Companies, *supra* note 4.

⁴⁷ See Complaint ¶¶ 11-14, *In re Debes Corp.*, No. C-3390 (F.T.C. Aug. 4, 1992); see also 2016 ANTITRUST GUIDANCE, *supra* note 1, at 4.

⁴⁸ See Decision and Order, *Debes Corp.*, No. C-3390 (F.T.C. Aug. 4, 1992); see also 2016 ANTITRUST GUIDANCE, *supra* note 1, at 4.

⁴⁹ See Press Release, Fed. Trade Comm'n, Council of Fashion Designers of Am. (June 9, 1995), available at <https://www.ftc.gov/news-events/press-releases/1995/06/council-fashion-designers-america> [hereinafter Press Release: Council of Fashion Designers]; see also 2016 ANTITRUST GUIDANCE, *supra* note 1, at 4.

⁵⁰ See Press Release: Council of Fashion Designers, *supra* note 37; see also 2016 ANTITRUST GUIDANCE, *supra* note 1, at 4.

⁵¹ See Press Release: Council of Fashion Designers, *supra* note 37.

There is one area in which application of the *per se* rule has received attention recently. In October 2016, the Division and the FTC issued their Antitrust Guidance for Human Resources Professionals. The Guidelines cautioned that naked agreements among employers not to recruit certain employees, or not to compete on employee compensation, are *per se* illegal and may thereafter be prosecuted criminally.

Here again, it is the horizontal nature of the agreement—the elimination of competition between employers—that justifies *per se* treatment for these types of agreements. Companies that sell different products or services might not compete for consumers, but they still can compete for workers. That horizontal element is important in assessing whether their agreements on employee hiring or terms of compensation are *per se* unlawful.

This is a point worth reiterating for the practitioners in the audience. Your clients should be on notice that a business across the street from them—or, for that matter, across the country—might not be a competitor in the sale of any product or service, but it might still be a competitor for certain types of employees such that a naked no-poaching agreement, or wage-fixing agreement, between them would receive *per se* condemnation.⁵²

In the 2016 Antitrust Guidance, the Agencies stated, “Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment.”⁵³ Finch’s remarks emphasize the seriousness with which the Agencies take their task of protecting competition among companies for employees.

During a speech at the January 19, 2018 conference sponsored by the Antitrust Research foundation at George Mason University in Virginia, Makan Delrahim likewise underscored the Agencies’ focus on no-poaching and wage-fixing agreements among employers.⁵⁴ In that presentation, Delrahim compared no-poaching agreements to price-fixing, a standard *per se* illegal criminal violation of Section 1 of the Sherman Antitrust Act.⁵⁵ The 2016 Antitrust Guidance cautioned that “[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.”⁵⁶ In his remarks, Delrahim said, “In the coming months you will see some announcements,” referencing to

⁵² Andrew Finch, Then-Acting Attorney Gen., U.S. Dep’t of Justice Antitrust Div., Remarks at Global Antitrust Enforcement Symposium (Sept. 12, 2017), available at <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust>.

⁵³ 2016 ANTITRUST GUIDANCE, *supra* note 1, at 2.

⁵⁴ See Makan Delrahim, Assistant Attorney Gen., U.S. Dep’t of Justice Antitrust Div., Panel at the Antitrust Research Foundation Conference: What’s Ahead at the Justice Department? (Jan. 19, 2018), available at <http://www.antitrustresearchfoundation.org/>.

⁵⁵ See *id.*; see also Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are In The Works*, LAW360 (Jan. 19, 2018, 5:18 PM), available at <https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works>.

⁵⁶ 2016 ANTITRUST GUIDANCE, *supra* note 1, at 4.

forthcoming criminal actions against companies that have entered into no-poaching agreements.⁵⁷ He specified that the DOJ intends to treat no-poaching agreements that have continued after the Agencies' issued the 2016 Antitrust Guidance more seriously than conduct that preceded the issuance of the report; the former will be treated criminally, while the latter may be treated criminally.⁵⁸ Finally, Delrahim said that the 2016 Antitrust Guidance was "less of a guidance and more of a reminder," perhaps referring to the fact that the Agencies have been enforcing the antitrust laws in this area via civil lawsuits since at least the 1990s.⁵⁹

On January 23, 2018, Finch (now the Principal Deputy Assistant Attorney General for the DOJ's Antitrust Division) gave remarks at the Heritage Foundation in which he again noted that the DOJ "will continue to monitor closely . . . 'employee no-poach agreements.' Agreements between employers that eliminate competition for employees in the form of no-poach agreements are *per se* violations of the Sherman Act."⁶⁰ Emphasizing the points made by Delrahim less than a week before, Finch continued:

For agreements that began after the date of [the Agencies' issuance of the 2016 Antitrust Guidance for Human Resource Professionals], or that began before but continued after that announcement, the Division expects to pursue criminal charges. As our Assistant Attorney General explained last week, the Division expects to initiate multiple no-poach enforcement actions in the coming months.⁶¹

The DOJ's intention to prosecute employers who illegally agree not to poach each others' employees, or to fix wages or other terms of compensation, is clear.

V. CONSIDERATIONS MOVING FORWARD

As the 2016 Antitrust Guidance and Assistant Attorney General Makan Delrahim's recent statements made clear, employers and antitrust law practitioners are functioning in a new legal climate. Moving forward, practitioners should review the Silicon Valley cases,⁶² the DOJ's statements on enforcement,⁶³ and the 2016 Antitrust Guidance.⁶⁴ Those materials should be used to develop prophylactic advice for clients engaged in various employment markets, especially markets for highly skilled talent. Preventative measures to preserve competition may also serve to protect clients engaged in collaboration

⁵⁷ Tyler, *supra* note 10.

⁵⁸ *See id.*

⁵⁹ *Id.*; *see also supra* notes 28-39 and accompanying text.

⁶⁰ Andrew Finch, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., Remarks at the Heritage Foundation (Jan. 23, 2018), *available at* <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-c-finch-delivers-remarks-heritage>.

⁶¹ *Id.*

⁶² Assistant Attorney General Delrahim references civil actions brought by the Department against Lucasfilm, Apple, Google, Adobe, Pixar, and others. *See* Delrahim, *supra* note 42. Settlements can be found within the DOJ's database. *See generally Antitrust Case Filings*, DEP'T OF JUSTICE, <https://www.justice.gov/atr/antitrust-case-filings-alpha>.

⁶³ *See* Press Release: Guidance for Human Resource Professionals, *supra* note 21; Press Release: Protecting Our Nation's Workforce, *supra* note 6.

⁶⁴ *See* 2016 ANTITRUST GUIDANCE, *supra* note 1.

agreements, the technology industry, or any other competitive employment market.

The DOJ has stated that no-poaching agreements ancillary to legitimate collaboration between employers are not considered naked⁶⁵ collusive conduct.⁶⁶ Specifically, no-poaching agreements that are reasonably necessary for collaboration efforts, and that are included in agreements for collaboration, are unlikely to be challenged,⁶⁷ while agreements that are broader than necessary for those collaborations will be considered suspect.⁶⁸

No-poaching agreements that are overbroad, such as agreements with no limit on geography, job function, product group, or time period, will generally be subject to criminal investigation.⁶⁹ Narrowly tailored agreements designed to facilitate limited joint ventures or other significant collaboration, however, are unlikely to be considered as *per se* violations.⁷⁰ Any agreements between competitors should protect individual decision-making. Agreements must not include provisions for policing by competitors⁷¹ and should avoid information-sharing measures.⁷²

Employers should also consider informing their employees prior to entering into any agreement with competitors impacting recruiting or hiring decisions. The DOJ's complaint in *United States v. Adobe Systems, Inc.* suggested that no-poaching agreements may have more legitimacy if employers give employees the opportunity to respond before the employer enters into such an agreement.⁷³

VI. CONCLUSION

As of the date of publication of this article, the DOJ has not announced specific criminal indictments against companies or individuals who have entered into no-poaching or wage-fixing agreements in violation of the antitrust laws, but the DOJ has confirmed that it has open civil and criminal investigations into no-poaching agreements in several sectors.⁷⁴ Per the recent remarks of DOJ officials Makan Delrahim and Andrew Finch, such announcements can be expected in the coming months. Nonetheless, the DOJ has expressed a sustained commitment to challenging no-poaching agreements and to bringing criminal

⁶⁵ No-poaching agreements that are not considered to be naked restraints may also be investigated or challenged civilly, but this article is primarily concerned with *per se* violations.

⁶⁶ See, e.g., *Adobe* Complaint ¶ 16; 2016 ANTITRUST GUIDANCE, *supra* note 1, at 3.

⁶⁷ See *Adobe* Complaint ¶ 16 (“The lack of necessity for these broad agreements is further demonstrated by the fact that Defendants engaged in substantial collaborations that either did not include no cold call agreements or contained narrowly tailored hiring restrictions.”); 2016 ANTITRUST GUIDANCE, *supra* note 1, at 3.

⁶⁸ See, e.g., *Adobe* Complaint ¶ 16. Breadth of the agreement should be restricted to that which is “reasonably necessary for the formation or implementation of any collaboration effort.” *Id.*

⁶⁹ See *id.*

⁷⁰ See 2016 ANTITRUST GUIDANCE, *supra* note 1, at 3.

⁷¹ See, e.g., *Adobe* Complaint ¶ 20.

⁷² See 2016 ANTITRUST GUIDANCE, *supra* note 1, at 3.

⁷³ See, e.g., *Adobe* Complaint ¶¶ 18, 22, 25, 28, 31.

⁷⁴ See Matthew Perlman, *Knorr-Bremse, Wabtec Settle DOJ's Worker No-Poach Case*, Law360 (Apr. 3, 2018, 9:32 AM), <https://www.law360.com/articles/1029313/knorr-bremse-wabtec-settle-doj-s-worker-no-poach-case> (“A DOJ official added Tuesday that the division still has open civil and criminal investigations into other no-poach agreements in the rail equipment industry as well as in other sectors.”).

prosecutions against employers engaged in naked no-poaching agreements. According to recent DOJ statements, naked no-poaching agreements that are collusive and anticompetitive, and that negatively affect employers, employees, and consumers by eliminating market competition, will be challenged as violations of Section 1 of the Sherman Act.

For now, employers should be aware that the Agencies are actively investigating potential antitrust violations in the employment marketplace and should take steps to reduce the risk that they will be implicated in those investigations. Companies should check that their antitrust training materials educate employees about these issues (including the risk of individual criminal liability), as well as ensure that human resource professionals involved in recruitment and compensation receive antitrust training. Also, any agreements between companies regarding hiring, wage, and other employment practices should be carefully reviewed by antitrust counsel to ensure compliance with antitrust and competition laws. In particular, companies should ensure that any such agreements are not “naked” no-poaching or wage-fixing agreements to avoid criminal liability. Moreover, antitrust law practitioners should develop preventative strategies for clients engaged in employment markets, especially markets for highly skilled labor.

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