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Presents:

Criminalization of wage-fixing and no-poaching agreements

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On October 20, 2016, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) jointly issued guidance for human resource professionals regarding the applicability of the antitrust laws to the hiring and compensation of employees.[2] The guidance discusses competitive dynamics in the employment marketplace; describes conduct most likely to violate the antitrust laws (focusing on wage-fixing agreements, no poaching agreements, and certain types of information sharing); highlights recent agency enforcement actions against employers; and outlines best practices to mitigate antirust risk. Most notably, the guidance announces a significant enforcement policy shift, stating that henceforth, the DOJ intends to *criminally* investigate and prosecute naked employee wage-fixing and no-poaching agreements.[3]

There is no question that agreements among employers to restrict hiring or fix terms of employment can frequently be anticompetitive, resulting in lower wages or benefits for employees and harm to consumers in the form of reduced output or less innovation. Indeed, such conduct has been successfully challenged in a number of private lawsuits as well as civil enforcement actions brought by the U.S. antitrust agencies.[4] Nonetheless, the agencies' impromptu classification of wage-fixing and no-poaching agreements as hardcore criminal violations ignores well settled principles regarding the establishment of per se offenses, as well as the agency's own analytical framework applied in analogous situations involving joint purchasing of inputs. Moreover, in departing from these underpinnings, the agencies have appropriated antitrust policy- and decision-making authority typically vested in Congress and the Supreme Court.

I. DOJ AND FTC ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

The FTC and DOJ published their *Antitrust Guidance for Human Resource Professionals* in response to an Executive Order issued in April 2016 to "protect American consumers and workers and encourage competition in the U.S. economy."[5] The Order directs federal agencies to identify specific actions that can be taken to address antitrust violations and promote competition through regulation and rulemaking, and to submit recommendations to the President.[6] The Order is clearly focused on the impact of competition on employees, as reflected in its title, preamble, and several provisions discussing "reduced opportunities for workers" stemming from anticompetitive conduct, the extent to which "competitive markets . . . create[] opportunities for American workers," and the need for "workers to have access to the information needed to make informed choices . . . ."[7] Against this backdrop, the DOJ and FTC guidance declares that "[n]aked wage-fixing or no poaching

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2 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), *available at* www.justice.gov/atr/file/903511/download, [hereinafter ANTITRUST GUIDANCE FOR HR PROFESSIONALS].

3 *Id.* at 4.

4 *See, e.g., In re* High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103 (N.D. Cal. 2012); Amended Complaint, United States v. Ebay, Inc., No. 12-CV05869 EJD (N.D. Cal. 2013), *available at* www.justice.gov/atr/case-document/file/494671/download; Complaint, U.S. v. Lucasfilm Ltd., No. 1:10-cv-02220 (D.D.C. 2010), *available at* www.justice.gov/atr/case-document/file/501671/download; Complaint, United States v. Adobe Systems, et al., No. 1:10-cv-01629 (D.D.C. 2010), *available at* www.justice.gov/atr/case-document/file/483451/download; Complaint, United States v. Arizona Hosp. & Healthcare Ass'n & AzHHA Service Corp., No. CV07-1030-PHX (D. Ariz. 2007), *available at* www.justice.gov/atr/case-document/file/487196/download.

5 Exec. Order No. 13725, 81 Fed. Reg. 23417 (Apr. 15, 2016).

6 *Id.*

7 *Id.* at 2.

agreements among employers . . . are per se illegal under the antitrust laws[,]" and that "[g]oing forward, the DOJ intends to proceed criminally against such agreements.[8]

II. CRIMINALIZATION OF WAGE-FIXING AND NO-POACHING AGREEMENTS CONFLICTS WITH LEGAL PRECEDENT, ANTITRUST PRINCIPLES, AND SEPARATION OF POWERS

A. Reclassification of Wage-Fixing and No-Poaching Agreements as Per Se Offenses Lacks a Sufficient Jurisprudential Basis

The agencies' principal rationale for recasting wage-fixing and no-poaching agreements as per se illegal criminal offenses is that such agreements are "irredeemable" and bereft of any competitive virtue.[9] This classification, however, is conclusory and lacks the jurisprudential foundation required to establish a new per se, let alone criminal, offense. Because the per se rule forecloses inquiry into the justifications or competitive effects of a restraint, the Supreme Court has strictly limited its application to conduct that is manifestly anticompetitive,,"[10] "would always or almost always tend to restrict competition"[11] and "lack[s] . . . any redeeming virtue."[12] Furthermore, the Court has held that "[i]t is only after considerable experience with certain business relationships that *courts* classify them as per se violations of the Sherman Act."[13] Importantly, these decisions make clear that courts – rather than agencies – have the authority to classify offenses, provided a sufficient experiential basis exists.

Unlike well-trodden offenses such as price fixing, bid rigging, and market allocation, wage-fixing and no-poaching agreements have not undergone sufficient maturation in the courts to warrant outright classification as per se offenses. The continuing uncertainty in this area is illustrated by *In re High-Tech Employee Antitrust Litigation*,[14] a recent decision addressing antitrust claims involving no-poaching agreements. In that case, employees sued technology companies alleging that they conspired to eliminate competition between them for skilled labor by entering into agreements preventing recruiters from cold-calling employees of other companies, diminishing the plaintiffs'

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8 ANTITRUST GUIDANCE FOR HR PROFESSIONALS, *supra* note 2, at 4.

9 *See id.* (adding that "[t]he 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.").

10 *See, e.g.,* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) ("[P]er se rules are appropriate only for 'conduct that is manifestly anticompetitive.'"); Broad. Music, Inc. v. CBS, 441 U.S. 1, 8 (1979) (noting that "certain agreements or practices are so plainly anticompetitive . . . that they are conclusively presumed illegal without further examination . . . .") (internal quotations omitted).

11 Broad. Music, 441 U.S. at 19-20.

12 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

13 United States v. Topco Assocs., 405 U.S. 596, 607-08 (1972) (emphasis added); *see also, e.g.,* Ariz. v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 350 n.19 (1982) (discussing the "established position that a new per se rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged."); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432-33 (1990) (noting that the per se rule "reflect[s] a longstanding judgment that the prohibited practices by their nature have a substantial potential for impact on competition.") (quotations omitted).

14 856 F. Supp. 2d (N.D. Cal. 2012).

compensation and employment prospects.[15] Although the court denied the defendants' motions to dismiss, holding that the plaintiffs successfully pled a per se violation under Section 1 of the Sherman Act, it explicitly left open the question of whether the per se rule or the rule of reason applies.[16]

While the boundaries of the per se rule have historically been defined by the courts, the DOJ itself has frequently analyzed wage-fixing and no-poaching agreements under the rule of reason, further undercutting the rationale for suddenly repositioning such agreements as per se illegal criminal offenses. For example, in 2013, the DOJ sued eBay alleging that it had entered into a no-solicitation and no-hiring agreement with Intuit, which restricted competition between the companies for employees and harmed employees by reducing their salaries, benefits, and employment opportunities.[17] The DOJ claimed that agreement was per se unlawful under Section 1 of the Sherman Act. However, it also claimed in the alternative that the agreement was an "unreasonable restraint of trade … under an abbreviated or 'quick look' rule of reason analysis," explaining that "[t]he principal tendency of the agreement . . . is to restrain competition, as the nature of the restraint is obvious and the agreement has no legitimate procompetitive justification."[18]

Similarly, in 2007, the DOJ sued Arizona Hospital and Healthcare Association (AzHHA), a trade association that operated a group purchasing organization (AzHHA Registry), which contracted with staffing agencies to provide temporary nurses for AzHHA member hospitals. The DOJ alleged that AZHHA, with the agreement of member hospitals, used the AzHHA Registry to implement a uniform rate schedule that established the rates agencies could charge hospitals for temporary nurses. The DOJ claimed that the arrangement reduced competition among hospitals for temporary nursing services, causing caused bill rates paid to agencies (and, in turn, wages paid to temporary nurses) to fall below competitive levels. Notably, in claiming that AzHHA's conduct violated Section 1 of the Sherman Act, the DOJ made no mention per se illegality. Rather, the DOJ's complaint undertakes a full effects analysis under the rule of reason, defining a relevant market, assessing AzHHA's market power, detailing competitive effects, and considering (while ultimately dismissing) potential efficiencies and economies of scale.[19]

In contrast, in its complaint against Adobe and other technology companies, which was filed in conjunction with a Stipulation and Final Judgment accepted by the defendants and that preceded the private action in *In re High Tech* described above, the DOJ claimed that the defendants' alleged no-poaching agreements were per se illegal.[20] The DOJ asserted a basis for per se treatment by citing to only one prior consent decree and an inapposite Circuit Court case involving customer allocation.[21] The DOJ's various approaches in the *Adobe*, *AzHHA*, and *eBay* matters make clear that its historical treatment of wage-fixing and no-poaching agreements has been too haphazard to justify the per se criminal categorization announced in the new guidelines.

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15 *Id.* at 1110-11.

16 *Id.* at 1122 (noting that "the Court need not engage in a market analysis until the Court decides whether to apply a per se or rule of reason analysis.").

17 Amended Complaint, United States v. eBay, Inc., No. 12-CV05869 EJD, (N.D. Cal. 2013), *available at* www.justice.gov/atr/case-document/file/494671/download.

18 *Id.* at 9-10.

19 Complaint, United States v. Arizona Hosp. & Healthcare Ass'n & AzHHA Service Corp., No. CV07-1030-PHX at 2 (D. Ariz. 2007), *available at* www.justice.gov/atr/case-document/file/487196/download (finding that "[e]fficiencies do not explain or justify the Registry's conduct," and that the restraint at issue "has not been reasonably necessary to achieve any benefits, such as greater quality assurance.").

20 Complaint, U.S. v. Adobe Systems, et. al., No. 1:10-cv-01629 (D.D.C. 2010).

21 Competitive Impact Statement, U.S. v. Adobe Systems, et. al., No. 1:10-cv-01629 at 7 (D.D.C. 2010) (citing Complaint, United States v. Ass'n of Family Practice Residency Doctors, No. 96-575-CV-W-2 at 6 (W.D.Mo. May 28, 1996) and U.S. v. Cooperative Theaters of Ohio, Inc., 845 F.2d 1367 (6th Cir. 1988)).

B. Criminalization of Wage-Fixing and No-Poaching Agreements Disregards Fundamental Antitrust Principles

In addition to departing from judicial standards governing per se treatment and prior agency practice, the agencies' reclassification of wage-fixing and no-poaching agreements disregards fundamental antitrust principles applied in analogous situations such as joint purchasing and foreign price fixing. The courts and antitrust agencies have long recognized that joint purchasing involving agreements among competitors to buy necessary inputs can yield efficiencies and be procompetitive. As the DOJ and FTC explain in their *Antitrust Guidelines for Collaborations Among Competitors*, joint purchasing agreements "may be procompetitive . . . enabl[ing] participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies."[22] In the hiring context, employers are purchasers of a key input: labor. It follows that agreements among employers regarding the purchase of labor—including with respect to wages or benefits—*could* produce procompetitive effects ultimately benefitting consumers downstream. This *potential* arguably undermines the case for per se classification reserved exclusively for conduct where ill effects are *inevitable*.

The agencies attempt to bridge this important gap by stressing that the guidance applies only to "naked" wage-fixing and no-poaching agreements, and explaining in passing that "if [an] agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, [it] is deemed illegal without any inquiry into its competitive effects" and that "[l]egitimate joint ventures . . . are not considered per se illegal under the antitrust laws."[23] While these clarifications are useful, they do not go far enough and warrant further elucidation. Moreover, classifying wage-fixing and no-poaching agreements as hardcore offenses not subject to even quick-look analysis significantly decreases the likelihood that procompetitive benefits will be detected and taken into account, even where they might exist.

The analytical shortcomings of the DOJ's re-classification of wage fixing are even more evident when examined through the lens of foreign wage fixing. Under the Foreign Trade Antitrust Improvements Act ("FTAIA"), it is well settled that the Sherman Act does not apply to foreign conduct unless such conduct has a direct, substantial, and reasonably foreseeable effect on U.S. commerce.[24] This standard has frequently been applied to claims alleging foreign pricing fixing activity due to its effect on U.S. commerce.[25] Consider, however, the implications of a foreign wage-fixing agreement that depresses the wages of foreign workers manufacturing goods ultimately sold in the U.S. Under the FTAIA framework, the only plausible domestic effect of the conduct would be a *reduction* in the price of the goods sold in the U.S. (at least to the extent that labor represented a

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[22] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 3.31(a) (Apr. 2000), *available at* www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[23] ANTITRUST GUIDANCE FOR HR PROFESSIONALS, *supra* note 2, at 3.

[24] 15 U.S.C. § 6a; *see also, e.g.,* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162-63 (2004); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION § 3.2 (Jan. 13, 2017) (explaining that "[t]he FTAIA places 'conduct involving trade or commerce ... with foreign nations' beyond the reach [the antitrust] statutes, unless the conduct satisfies the FTAIA's effects exception."); *see generally* Richard W. Beckler & Matthew H. Kirtland, Extraterritorial Application of U.S. Antitrust Law: What is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?, 38 TEX. INT'L L.J. 11 (2003).

[25] *See, e.g.,* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); Lotes Co. v. Hon Hai Precision Industries Co., 753 F.3d. 395, 398, 411-12 (2d Cir. 2014); United States v. Hsiung, 758 F.3d 1074 (9th Cir. 2014); Motorola Mobility LLC v. AU Optronics Corp, 746 F.3d 842 (2014).

variable cost of production). Thus, even if the domestic effects of the foreign wage fixing were direct, substantial and reasonably foreseeable, it would not "always or almost always" restrict competition in the U.S.; to the contrary, it would *never or almost never* have such an effect.

C. *The Agencies' Broadening of the Per Se Rule Appropriates Authority Vested in the Courts and Congress*

The DOJ and FTC share concurrent responsibility for enforcing the antitrust laws. The agencies' methods, priorities, experience, and guidance are all indispensable tools for consumers, companies, and courts to understand the scope of antitrust laws and, as a practical matter, how they are enforced. However, the law itself is a creature of Congress and the courts, originating in statute (principally, the Sherman Act, the Clayton Act, and the FTC Act) and developing gradually through jurisprudence. When commercial, economic, or political modalities have necessitated expansion or contraction of the antitrust laws, Congress has responded by enacting legislation (for instance, the HSR Act and statutory exemptions in various regulated industries) and courts have adapted through judicial interpretation.

As seminal cases like *Northern Pacific Railway*,[26] *Broadcast Music*,[27] and *Business Electronics*[28] make clear, the per se rule is a judicial construct whose contours have been carefully shaped over time by the courts. The agencies' announcement that wage-fixing and no-poaching agreements are per se offenses subject to criminal prosecution appropriates authority squarely vested in Congress and the courts. While the DOJ has discretion to determine which antitrust offenses will be pursued as per se or criminal offenses, in so doing, it cannot disregard judicial precedent and, more broadly, the principle of separation of powers by redefining offenses altogether.

III. CONCLUSION

Wage-fixing and no-poaching agreements can (and often do) harm competition among employers for labor, resulting in lower wages or benefits for employees and harm to consumers in the form of reduced output or less innovation. While the FTC and DOJ should continue to pursue unlawful wage-fixing and no-poaching agreements, they should do so in a manner that is analytically sound and consistent with legislative and judicial precedent. The agencies' reclassification of wage-fixing and no-poaching agreements as criminal, per se illegal offenses in the *Antitrust Guidance for Human Resource Professionals* fails these requirements.

[26] 356 U.S. 1 (1958).
[27] 441 U.S. 1 (1979).
[28] 485 U.S. 717 (1988).