WINSTON & STRAWN LLP

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Spotlight on Labor Markets:
Antitrust Considerations for No-Poach and Wage-Fixing Agreements

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Recent headlines show that no-poach and wage-fixing agreements have become a major focus of U.S. antitrust enforcement and private litigation.

3 nurses sue Pennsylvania hospitals over alleged 'no-poach' deal

Alia Paavola - Friday, February 5th, 2021 Print | Email

Duke Pays $54.5M to Settle 'No Poach' Class Action After DOJ Intervenes

The proposed Duke settlement, filed Monday, is the first time the U.S. Justice Department has gotten involved in the injunctive relief provisions of a private class action settlement over alleged illegal poaching of employees.

By **Amanda Bronstad** | May 20, 2019 at 07:05 PM

Rail Equipment Makers Agree to Settle Claims Over 'No-Poach' Agreements for Nearly $49M

The class action stems from allegations that Knorr, Wabtec and a company that was later purchased by Wabtec entered into agreements where they would not poach each other's workers.

Antitrust Regulators Eye Criminal Enforcement in No-Poach Deals

BY SIRI BULUSU

May 17, 2021, 6:30 AM

DOJ Says Antitrust Rules Are No Different For Employers

By **Matthew Perlman**

Law360 (May 5, 2021, 9:08 PM EDT) -- The U.S.

With the bipartisan interest in increased antitrust enforcement and the attention of the plaintiffs' bar on this issue, the focus on labor markets—including in healthcare and other sectors—will continue.

Roadmap

- What Are No-Poach and Wage-Fixing Agreements?
- Legal Standards for No-Poach and Wage-Fixing Claims
- Recent Developments in Government Enforcement & Private Litigation
- The DOJ's First Criminal Prosecutions
- Best Practices for Minimizing Risk

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What Are No-Poach and Wage-Fixing Agreements?

Elements of No-Poach and Wage-Fixing Agreements

1. An agreement
2. Among competing employers
3. To limit or fix the terms of employment for potential hires
4. That constrains individual firm decision-making
5. With regard to wages, salaries, or benefits; terms of employment; or even job opportunities

No-poach clauses can appear in various contexts

- Settlements to resolve business disputes
- Within employment or severance agreements
- Vendor contracts
- Joint venture agreements
- Ancillary agreements to other legitimate collaborations

No-poach agreements can take many forms

- Agreements with another company not to solicit or hire that company's employees
- Agreements that limit employee mobility, like agreements:
  - not to hire
  - not to solicit or cold-call
  - not to recruit certain employees
  - not to permit switching across companies
  - to give notice or get approval before hiring
  - to require certain prerequisites for employment

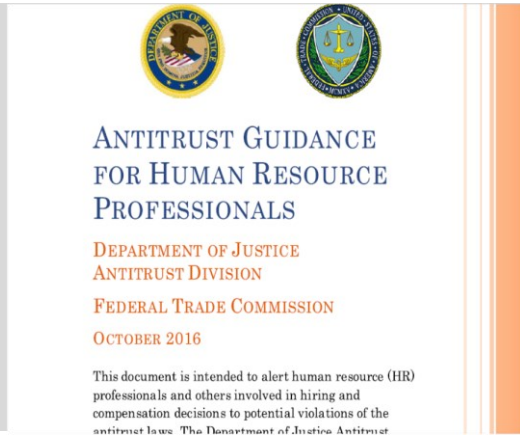
Wage-Fixing Includes Agreements That Affect Any Element of Compensation

- Base salaries
- Overtime
- Sign-on incentives
- Cash, stock, merit, or discretionary bonuses
- Agreeing not to give counter-offers
- Deferred compensation
- Benefits
- Anything that affects the value of compensation

Agreements to set terms of employment state a claim under Section 1 of the Sherman Act. *Anderson v. Shipowners Assoc.*, 272 U.S. 359 (1926).

Competing Employers

> From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.
>
> *- DOJ/FTC, Antitrust Guidance for Human Resources Professionals*


ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust

Any two companies can compete in the labor context so long as they are looking for the same types of employees in the same geographic area.

Massive Criminal and Civil Exposure

- DOJ could bring criminal prosecution against individuals, the company, or both.
- Federal antitrust agencies could also bring civil enforcement actions.
- State attorneys general can bring civil actions.
- Employees could also file civil lawsuits (including class actions) seeking treble damages and attorneys' fees.
- Even when ultimately successful on the merits, a company faces significant litigation costs and reputational harm.

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Legal Standards for No-Poach and Wage-Fixing Claims

Proof of Agreement is Necessary

- Prerequisite to establish a Section 1 violation
- Agreements do not need to be formal or written
  - It is unnecessary to prove an overt, formal agreement among wrongdoers; a mere understanding can suffice
    - *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969)
- But a unilateral decision not to compete is not a violation

Hypothetical: Parental Leave

Allie from Company A mentions to her friend Betty at Company B that she has been working on a new parental leave policy. Betty wants to be helpful and offers to send Allie company B's policy. Company A was debating whether it should extend paid leave, but she chooses not to after Allie learns Company B is not doing so.

Violation?

A. No, Betty was just trying to help.

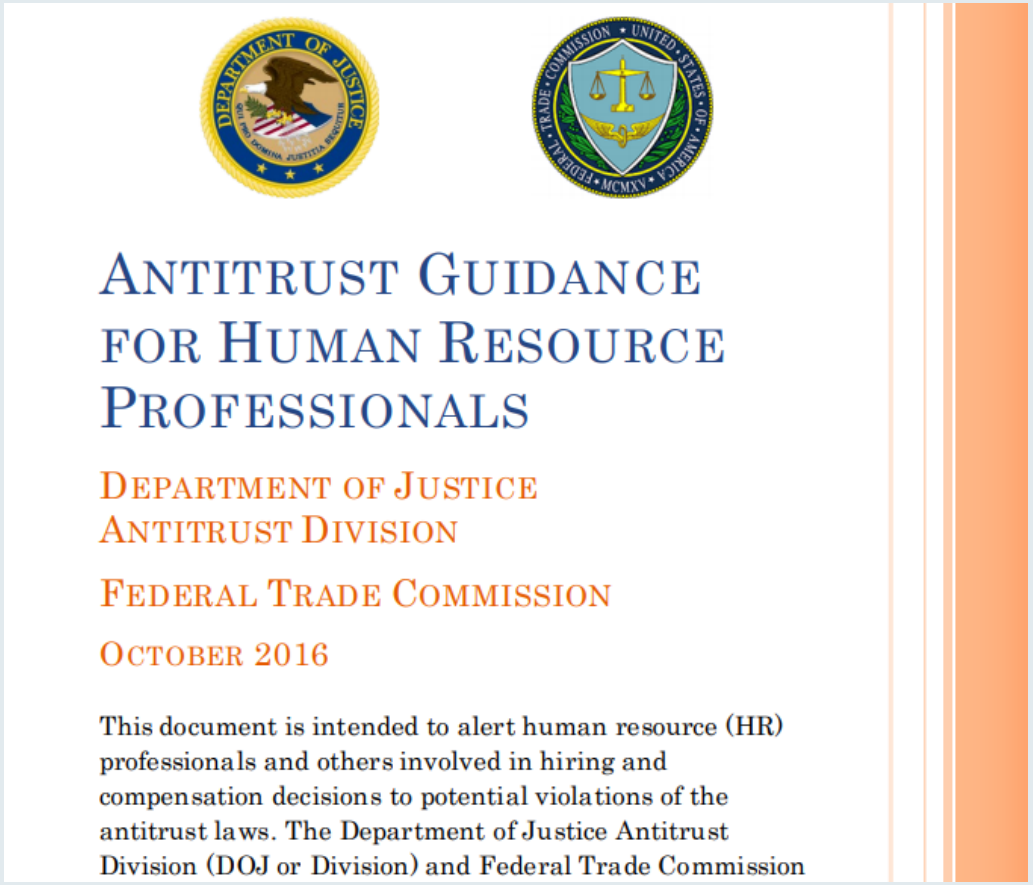
B. Yes, Allie and Betty may have a wage-fixing agreement and could be criminally prosecuted along with Companies A and B.

C. Yes, Allie and Betty agreed to exchange competitively sensitive information and A and B could be subject to civil enforcement, including treble damages.

D. Possibly B or C depending on whether it is inferred from the information exchange that Allie and Betty agreed to limit leave.

“Naked” versus “Ancillary” Agreements

“Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that *if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers*, the agreement is deemed illegal without any inquiry into its competitive effects. *Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.*”



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“Naked” Agreements Are Per Se Illegal

- Some practices always or almost always restrict competition.
- These practices are said to have a “pernicious effect on competition and lack . . . any redeeming virtue.”
  - Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958)
- They are considered “per se” illegal regardless of the economic rationale or the consequences.
- In addition to civil liability, US DOJ can prosecute criminally.

Hypothetical: Efficiencies

Allie, Betty, and Charlie work for companies that spend a lot of money on recruiting each year, but have found that after all of their efforts, recruits will come for the training then jump ship to competitors soon after. They decide they could save a lot of money and time if they agree not to recruit trainees at each other's firms, but established employees are considered fair game.

Violation?

A. No, because they are reducing costs.
B. Not if they use the money they save to increase wages.
C. No, recruiters coordinate like this all the time.
D. Yes, this is a naked no-poach agreement.

Invitations to Collude May Violate the Law

[M]erely inviting a competitor to enter into an illegal agreement may be an antitrust violation – even if the invitation does not result in an agreement to fix wages or otherwise limit competition.

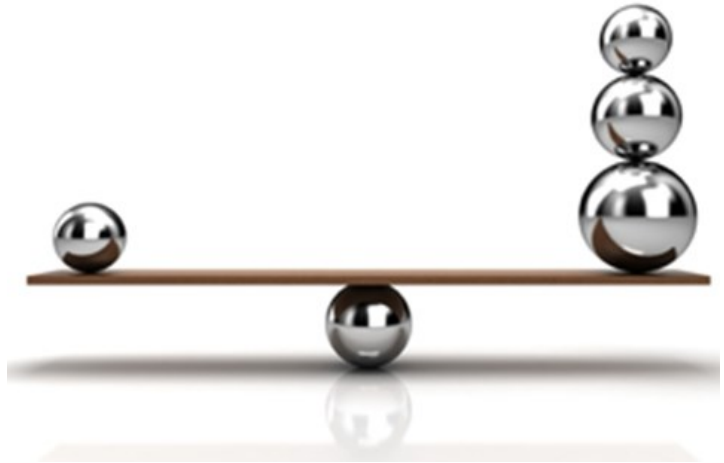
* * *

[P]rivate communications among competitors may violate the FTC Act if (1) the explicit or implicit communication to a competitor (2) sets forth proposed terms of coordination (3) which, if accepted, would constitute a per se antitrust violation.

- DOJ/FTC, Antitrust Guidance for Human Resources Professionals

“Rule of Reason” for “Ancillary” Agreements

Ancillary wage or recruiting restrictions, that are reasonably necessary to achieve the benefits of a larger collaboration, are analyzed under the rule of reason, a fact-based analysis test that considers the nature of the business, the likely effect on the market, and any justifications proffered.



For example, when a company agrees to acquire a business, it might be reasonable in that context to freeze hiring across the seller and purchaser to maintain the value of the asset throughout sale.

1. Must be part of a larger legitimate procompetitive employer collaboration
2. Must be “reasonably necessary” to the collaboration
3. May not be broader than reasonably necessary to achieve the efficiencies from a business collaboration

Hypothetical: Consulting

Company A has been supplying consulting services to Company B. Company B employees like Company A so much when it is on the job site that Company B employees keep leaving to join Company A. Bob from Company B is getting annoyed, so Andrew from Company A and Bob agree that Company A will not hire anyone from Company B.

Violation?

A. No, the restriction is a necessary part of larger, valid collaboration.
B. No, the restriction is ancillary to a consulting agreement.
C. No, they are not competing employers because A is a supplier to B.
D. Probably, the restriction is broader than reasonably necessary.

Section 1 "Rule of Reason" Elements

- Plaintiffs must prove an agreement that causes a substantial anticompetitive effect in a well-defined relevant product and geographic market
- Anticompetitive effect can be shown by either:
  - Direct evidence of actual detrimental effects on competition, such as reduced output or higher prices (lower wages); or
  - Indirect evidence of market power plus some evidence that the challenged restraint causes harm to competition
- Burden-shifting framework:
  - If plaintiff proves anticompetitive effect, burden shifts to defendants to show procompetitive rationale. If defendants succeed, burden shifts back to plaintiff to show that the procompetitive benefits could have been achieved by less restrictive means
- *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018)

Hypothetical: Specialized Employees

Company A provides services to Company B. They enter into a services contract which contains a provision prohibiting either party from soliciting or hiring each other's employees for 30 days after the employee leaves its employing company. The provision states that it is meant to protect the investment each company made into specializing their employees. An employee from Company B is approached by an unaffiliated recruiter with an opportunity at Company A. Company A interviews the employee but tells him that they can't hire him because of the contract unless he first leaves Company B.

Violation?

A. No, Company A has a contractual obligation to Company B.
B. Not if the companies' legitimate interest outweighs the potential harms.
C. Yes, the provision is unreasonably broad.
D. Yes, the employees were not aware of the contractual provision.

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Recent Civil Enforcement and Private Litigation Developments

Investigations Can Begin in Different Ways

Agreements may be uncovered during unrelated investigations.

Wage-fixing & no-poach agreements have been uncovered during Hart-Scott-Rodino (HSR) merger reviews and unrelated civil investigations by DOJ & FTC.

- ***U.S. v. Geisinger Health:*** DOJ's challenge of Geisinger's proposed acquisition of Evangelical Community Hospital exposed an alleged agreement between the two companies, in place since at least 2015, not to poach each other's doctors and nurses.

Investigations can also arise from whistleblowers.

Seaman v. Duke University:

- Duke professor alleging improper no-hire pact between Duke School of Medicine and UNC School of Medicine turned into a class action in 2018 covering 5,500 faculty.

The DOJ's Civil Involvement

- DOJ has brought civil antitrust lawsuits for naked no-poach agreements
  - *In re High-Tech Employee Antitrust Litig.*, No. 11-cv-2509 (N.D. Cal.)
  - *United States v. Knorr-Bremse AG*, No. 18-cv-00747 (D.D.C.)
- The DOJ has filed statement of interests in various private no-poach cases
  - *Seaman, et al. v. Duke University*
  - *Harris v. CJ Star, LLC*; *Richmond v. Bergey Pullman Inc.*; *Stigar v. Dough Dough, Inc.*
- The DOJ has also more recently filed an amicus brief in the Eleventh Circuit in a franchise case, seeking to influence the legal standard that that the appeals court employs for analyzing Section 1 claims. *Arrington et al. v. Burger King Worldwide Inc. et al.*, No. 20-13561 (11th Cir.)

Hypothetical: Tensions

Company A competes with Company B in selling similar goods. Company A is impressed with certain employees working with Company B, and reaches out to those employees directly to recruit them. The employees leave Company B and now work at Company A. Company B management contacts Company A to express their frustration with Company A's recruitment habits. Company A decides to slow down its recruitment from Company B to avoid any further conflict.

Violation?

A. Yes, Company A changed its recruitment practices after speaking with Company B.
B. Yes, Company A and Company B are direct competitors.
C. No, Company A reached the decision on its own.
D. No, Company B is still permitted to hire from Company A.

AG and Private Suits in Fast Food Industry

- State AGs investigating no-poach provisions in franchise agreements, especially at fast food chains
- Private class actions followed
- At least 62 corporate chains have settled nationally
- Disagreement over legal standard of review to apply:
  - **DOJ**: Apply rule of reason because vertical relationship, and no-poach agreements can offer procompetitive benefits (except in limited circumstances)
  - **Washington AG**: Where franchisees and franchisors are "indisputably" horizontal competitors, no poach is per se illegal
  - **California AG**: Vertical no-poach agreements are likely per se illegal under California state law (Cartwright Act)

Notable No-Poach Class Action Settlements

Private class action plaintiffs reached $24 billion in settlements in antitrust cases between 2009 and 2019, with specific examples of no-poach class action settlements listed below.

Case	Year	Total Settlements
In re High-Tech Employee Antitrust Litigation	2015	**$435 million**
In re Animation Workers Antitrust Litigation	2018	**$170 million**
Duke University and University of North Carolina Medical Faculty (*Seaman v. Duke Univ. et al.*)	2019	**$54.5 million**
In re Railway Industry Employee No-Poach Antitrust Litigation	2020	**$49 million**

Private Plaintiffs Continue Pursuing No-Poach Claims

- Private plaintiffs continue to bring no-poach claims in various contexts, in addition to those arising out of DOJ investigations.
- Several of these cases have recently gone through the motion to dismiss stage, with varying levels of success:
  - *Fonseca v. Hewlett-Packard Co.,* No. 19-cv-1748, 2020 WL 4596758 (S.D. Cal. Aug. 11, 2020)
  - *Jien v. Perdue Farms, Inc.*, No. 1:19-cv-2521, 2020 WL 5544183 (D. Md. Sept. 16, 2020) & *Jien v. Perdue Farms, Inc.*, No. 1:19-CV-2521, 2021 WL 927456 (D. Md. Mar. 10, 2021)
  - *Markson v. CRST Int'l, Inc.*, No. 5:17-cv-01261, 2021 WL 1156863 (C.D. Cal. Feb 10, 2021)

Hypothetical: Cost-Saving

Mark starts a group text with managers at other companies in the same market. The industry has been struggling recently, and many companies have had to make cuts and lay off employees. Mark suggests to the group via text that they implement a cap on wages for certain employees, which should help many of the companies during the difficult time. Some of the companies agree with Mark and implement the caps on compensation, but others refuse to do so.

Violation?

A. No, because the compensation cap was not market-wide.
B. No, the companies needed to find cost-saving initiatives.
C. Yes, this is a naked wage-fixing agreement.
D. Not if the companies were paying less than the compensation cap to begin with.

The DOJ's First Criminal No-Poach Prosecutions

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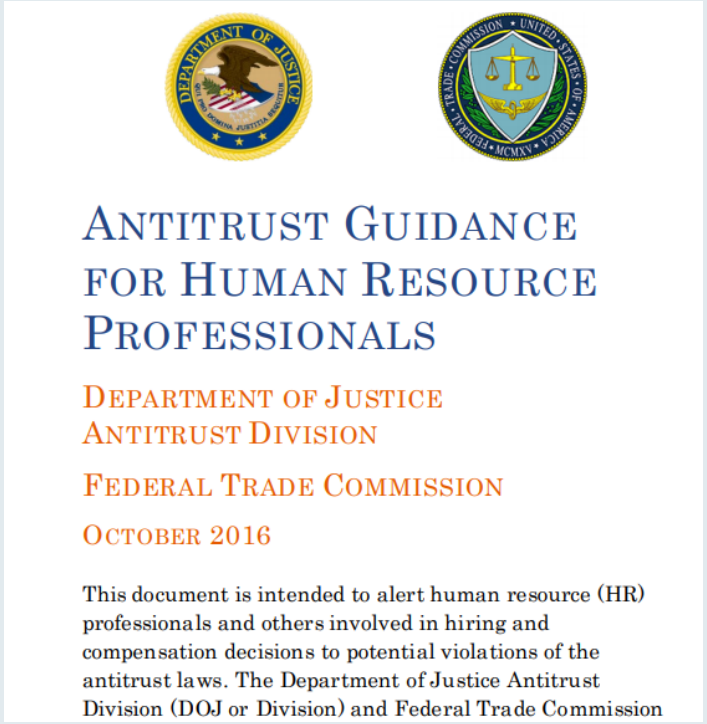
2016 Policy Change Led to Criminal Pursuit

"**Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.** These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel product. . . . **[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.**"



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New Development: First Criminal Prosecutions

- December 2020: First criminal charges for wage-fixing brought against owner of physical therapist staffing company for allegedly agreeing with co-conspirators to fix prices by lowering pay rates to therapists.
  - April 2021: superseding indictment for wage fixing and obstructing the FTC's investigation
- January 2021: DOJ charged health care company with violating Sherman Act for allegedly agreeing with competitors to refrain from soliciting senior-level employees.
- March 2021: indictment charged health care staffing company and executive for colluding to suppress wages of school nurses.

Criminal enforcement will likely continue and even expand under the Biden administration.

Due Process Arguments Against Criminal Liability

- The DOJ is facing efforts to dismiss its "unprecedented" criminal prosecutions for wage-fixing and no-poach agreements.
- Defendants and amicus curiae have challenged the DOJ's efforts, arguing:
  1. The DOJ has failed to allege a per se violation and has usurped the role of Congress and courts
  2. Due process was violated since there was no "fair warning" that the conduct (non-solicitation or wage-fixing) was criminal
  3. A criminal "rule-of-reason" case is incompatible with due process

Ongoing DOJ Investigations

- In November 2019, Deputy Assistant Attorney General for Criminal Enforcement Richard Powers noted that the "Division has a number of active criminal investigations into naked no-poach and wage-fixing agreements."
- The DOJ's open investigations cut across sectors. In addition to health care, the DOJ has been investigating hiring practices in various industries, including:
  - Online Advertising
  - Financial Services
  - Food and Beverage

When employers conspire to allocate employees and fix wages, it robs American workers of higher pay and the ability to bargain for better, higher-paying jobs. . . . Ensuring that American workers receive the benefits of free and fair competition is a top priority, so we will use every investigative tool at our disposal to investigate these crimes and prosecute perpetrators to the full extent of the law.

- Acting Assistant Attorney General Richard A. Powers of the Department of Justice's Antitrust Division

Hypothetical: Tough Hiring Market

Sam works in HR at Company A. She is friends with Tim who works in HR at Company B. Company A and Company B have stores located in the same shopping center in a city that has historically been difficult to hire in. Sam and Tim were discussing over the phone how difficult recruitment has been for their retail stores. To make things easier, they decide to not recruit or hire salespeople from one another.

Violation?

A. No, Company A and Company B have a legitimate interest.
B. Yes, this is a naked no-poach agreement.
C. No, Sam and Tim's arrangement does not rise to an agreement.
D. No, the arrangement is narrowly tailored.

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Best Practices

Best Practices to Ensure Compliance

Investigate: identify and end any risky agreements.

- Going forward, ensure restrictions are necessary and narrowly tailored to achieve a procompetitive purpose of a broader collaboration.
- Ancillary no-poach agreements may be justified in limited contexts, such as in mergers or consulting. Companies entering into such agreements should:
  - Identify the specific legitimate venture to which the agreement is ancillary
  - Document why the agreement is reasonably necessary to achieve the procompetitive venture
  - Identify with reasonable specificity the employees who are subject to the agreement
  - Designate a specific termination date or event
  - Memorialize the agreement in writing and have it signed by all parties

Best Practices to Ensure Compliance

- Ensure the company's HR department has specific guidance which:
  - Reinforces the importance of making unilateral decisions in connection with hiring and compensation practices
  - Requires that any restrictions placed on employees are reasonably related to a procompetitive purpose (e.g., protecting trade secrets, participating in joint ventures, and consummating mergers and acquisitions)
- Train HR professionals and executives involved in recruitment while soliciting feedback.

Potential Alternatives to No-Poach Agreements

- Employers may enter vertical agreements directly with employees if the restrictive covenant serves a legitimate business purpose.
  - Non-compete agreements
  - Agreements not to solicit customers
  - Non-disclosure or confidentiality agreements
  - Separation or settlement agreements
- Employers still need to exercise caution with such agreements and confirm the relevant state laws regarding each before including them in their employment contracts.

Questions?

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