

Winston Sponsors, Speaks at ABA's Litigation Section Annual Conference 2023

APRIL 19, 2023

Winston & Strawn proudly sponsored the American Bar Association's Litigation Section Annual Conference on April 19-21, 2023, in Atlanta, Georgia. The three-day conference brought together top U.S. litigation professionals to discuss timely legal issues and the latest in trial advocacy, litigation strategy, and case management.

On April 19, Associate Nasir Hussain led a panel titled "Hands Off My Human Capital? What You Need to Know About Antitrust in Labor and Employment Markets," which provided insights about the most active and rapidly developing areas of antitrust law. Nas moderated the discussion with litigators in the antitrust defense bar, plaintiffs' bar, and criminal enforcement section of the Department of Justice's Antitrust Division (DOJ).

Key takeaways from the panel include:

- The modern era of antitrust challenges to labor practices was spurred in large part by the DOJ's civil enforcement action against large technology companies around 2010, which was followed by several private class actions challenging agreements and conduct that restricted employees' earning capabilities and job mobility.
- In 2016, the DOJ and Federal Trade Commission (FTC) issued guidance to human resources professionals in which they warned that certain types of agreements between employers regarding the hiring and compensation of employees would be prosecuted criminally. For several years following this guidance, no criminal cases were brought, but that changed in the last three years during which at least six criminal cases have been filed against individuals and employers alleging antitrust violations.
- These cases are unique in that the relevant "product market" is people—i.e., employees—and in many cases, an employee's skills are transferrable between different industries and sectors. For example, an IT professional who works for a healthcare company can just as easily work for an insurance company. In this context, parties that are in a vertical business relationship (e.g., a company and its outside consultant/contractor) can be considered competitors.
- While most of the criminal cases DOJ has pursued against defendants accused of committing antitrust violations in the labor market have resulted in acquittals, the DOJ has secured multiple favorable rulings from district courts that have found certain types of agreements between employers relating to the hiring or compensation of employees (e.g., no-poach and wage-fixing agreements) can be *per se*

- The issue of whether certain agreements in this context are *per se* illegal or subject to a rule of reason analysis is hotly contested and the subject of active litigation.
- Combating anticompetitive conduct in the labor market is a key enforcement priority for the Biden administration and several states' attorneys general as they seek to protect employees' mobility and their ability to command competitive wages. The DOJ has increased civil and criminal enforcement activity and filed statements of interest and amicus briefs in private civil litigation challenging labor market conduct. Recent policy decisions—including the FTC's proposed ban on non-compete agreements in line with President Biden's urging, a recent memorandum of understanding between the FTC and the NLRB, and President Biden's executive order focused on labor and employment antitrust issues—reflect the administration's continued focus on competition in labor markets.
- Dealing with accusations of anticompetitive conduct can be costly for companies and individuals, even when they ultimately prevail on the substantive issues.

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