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2

Overview

Interplay of Antitrust and L&E

Federal and State Enforcement Landscape

State Restrictive Covenant Landscape

Risk Mitigation

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3

3

Antitrust Law Overview

Purpose of antitrust law

- Protect free and fair competition and consumers
- Increased competition may lead to:
 - Lower prices, decreased rates, premiums, co-pays
 - Increased quality of care, services
 - Increased access to care, selection, convenience, and innovation

Antitrust risk arises when competition is lessened through:

1. Coordination among competitors; or
2. A dominant entity's actions harm competition

4

Antitrust Law and Legal Basis for Labor Market Enforcement

- **Sherman Act Section 1** prohibits agreements that unreasonably restrain competition “contracts, combinations, and conspiracies in restraint of trade”
 - Requires proof of agreement between independent entities or individuals that unreasonably restrains trade
 - Can lead to *per se* illegal claims (civil or criminal)—evidence of an agreement is proof of violation
 - **Section 1 Sherman Act prohibits unlawful no-poach and wage-fixing agreements**
- **Sherman Act Section 2** prohibits monopolization, attempted monopolization, exclusionary conduct
- **Clayton Act** prohibits certain mergers/acquisitions, price discrimination
- **Federal Trade Commission (FTC) Act Section 5** prohibits unfair methods of competition – **Section 5 of FTC Act is basis for FTC’s proposed non-compete ban**
- State antitrust laws generally mirror federal laws

5

Antitrust Law – Enforcement

Federal Antitrust Agencies	<ul style="list-style-type: none">• Federal Trade Commission (FTC)<ul style="list-style-type: none">• Bipartisan Commissioners (5 individuals) that vote on cases; career attorneys, economists support the work of FTC• Chair will change under new Administration• U.S. Department of Justice Antitrust Division (DOJ)
State Attorneys General (AGs)	<ul style="list-style-type: none">• Each state AG has one or more Assistant Attorneys General who work on antitrust cases• Many states are enacting or have enacted their own non-compete statutes
Private Plaintiffs	<ul style="list-style-type: none">• Private plaintiffs can bring follow-on antitrust class action lawsuits• Awarded treble damages and attorneys’ fees, if successful

6

Antitrust Enforcement Under Trump 2.0 Comes Into Focus – DOJ Antitrust Division

DOJ Antitrust Top Cop Confirmed: AAG Gail Slater confirmed in March; former policy aide to JD Vance and FTC advisor to Democratic Commissioner Julie Brill

- Internally, there are reports that AAG Slater is fighting to keep DOGE from slashing staff attorneys.
- She publicly stated her support for the more expansive 2023 Merger Guidelines which include Guideline regarding labor market effects of proposed transaction.
- During her confirmation hearing, Slater said she would vigorously enforce antitrust laws with a focus on industries including technology, healthcare and agriculture; inherited the two Google cases that are pending.
- Outlined America First Antitrust policy – target monopoly power to protect the interests of consumers, workers, small businesses and innovators

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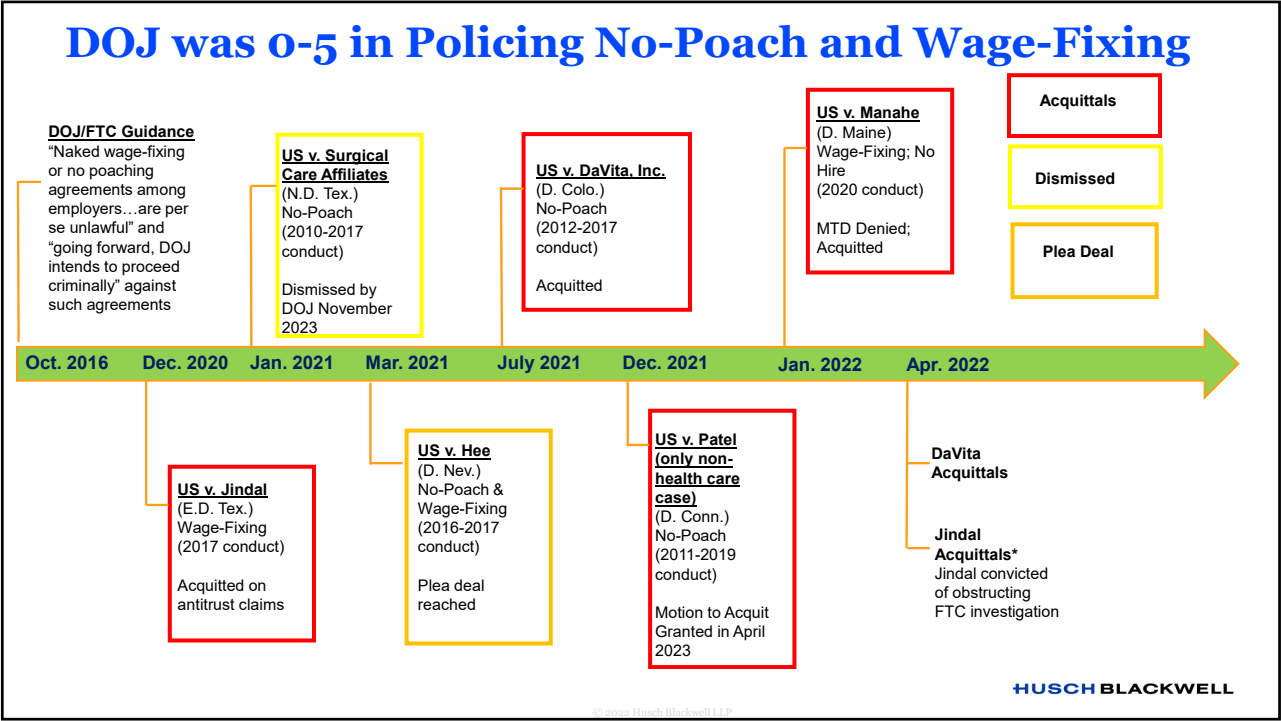
Antitrust Labor Market Enforcement Trend: No-Poach and Wage-Fixing Agreements

- *In 2016 HR Guidance, DOJ states it will prosecute alleged no-poach and wage-fixing agreements – investigations under Trump 1.0*
- **No-poach** is an agreement not to solicit or hire a competitor's employees (includes no cold calling, no direct solicitation); **"naked"** no-poach and non-solicitation agreements are considered by DOJ to be *per se* illegal
- **Wage-fixing** is an agreement to keep wages for employees the same, or within a certain range; can also include agreement as to benefits
- These agreements have the alleged effect of preventing employees from finding a better job and suppress employee wages

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8

8



9

DOJ’s Labor of Love Pays Off: First Conviction for Wage-Fixing in 2025 under Trump 2.0

DOJ Finally Prevails: *U.S. v. Eduardo Lopez* (D. Nev. 2023) indictment alleging Sherman Act Section 1 and wire fraud results in guilty verdict on all counts.

- Nevada home health agency executive Lopez found guilty of wage-fixing for participating in a 3-year conspiracy to fix wages for home health care RNs and LPNs in Las Vegas and for fraudulently failing to disclose the criminal antitrust investigation during the sale of his home health care agency
- **What is different about this case?**
 - Wage-fixing is analogous to price-fixing on the buy-side; easier case to prove than no-poach since many no-poach agreements are “ancillary” to a larger agreement/collaboration which makes them more difficult to prove as *per se* illegal
 - Stronger evidence, including texts (e.g., defendant’s messages about a “mutual agreement” to “stay within the same hourly rate” as his competitors); statements Lopez made to FBI agents that he met with competitors so they could “stay within the arena” on nurse wages; multiple telephone recordings and recordings of an in-person meeting made by the leniency applicant; communications seized from Lopez’s e-mail provider; and victim testimony.

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10

What Does First Conviction Mean for DOJ's Antitrust Enforcement in Labor Market ?

Much Like Biden Administration, Labor Market Is Focus of Trump 2.0

DOJ AAG Slater publicly praised the guilty verdict in *Lopez* and stated the "Antitrust Division will zealously prosecute" those who seek to unjustly profit off of their employees

- Meetings between DOJ AAG Slater and [labor unions](#) regarding priorities like ensuring that the needs and voices of workers are included in the merger review process. They also discussed the importance of robust antitrust enforcement actions that protect American workers from anticompetitive and unfair practices in labor markets and building a strong bipartisan consensus around labor antitrust.

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11

11

Antitrust Enforcement Under Trump 2.0 Comes Into Focus – Federal Trade Commission (FTC)

FTC: Currently comprised of Chair Andrew Ferguson and Republican Commissioners Melissa Holyoak and Mark Meador

- The President fired the two Democratic FTC Commissioners (Bedoya and Slaughter); they filed suit alleging their dismissal is unconstitutional; there are reports that various FTC field offices will be closed.
- FTC Chair reaffirmed his support for 2023 Merger Guidelines and new HSR rules – 2023 Merger Guidelines contain theory of harm based on labor market effects
- FTC launched review of anticompetitive regulations – public comments due by May 27.

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12

12

Antitrust Enforcement Under Trump 2.0 Comes Into Focus – Federal Trade Commission (FTC)

- **FTC Chair Ferguson announced a FTC Labor Markets Task Force** that will prioritize the investigation and prosecution of deceptive, unfair, or anticompetitive conduct in the labor market and bring together expertise from across the agency to coordinate investigations and enforcement actions, such that this conduct is "fully prosecuted as a matter of consumer protection and competition law."
- However, FTC paused its pursuit of appeals of two district court decisions that blocked the FTC's rule banning non-competes, suggesting an expected shift in the government's approach to the rule

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13

13

Antitrust Enforcement Under Trump 2.0 Comes Into Focus - State Attorneys General

State AGs vow to continue vigorous antitrust enforcement in labor markets

- Scrutiny of labor issues on the rise
 - CA AG recently filed suit against Packers Sanitation Services, Inc. alleging it entered into illegal non-poach agreements with its meatpacking and food processing customers under CA Unfair Competition Law and its Non-Compete Law
- Multistate no-poach franchise settlements still ongoing
- Proliferation of non-uniform state notification laws for health care and other transactions which means increased labor market scrutiny

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14

14

Federal Efforts to Restrict Non-Competes

FTC's Rule based on Section 5 of the FTC Act

- November 2022 Section 5 Policy Statement Issued by FTC
- FTC has sole authority to enforce Section 5 of the FTC Act
- On eve of FTC's announcement of proposed non-compete ban, it announced 3 enforcement actions against companies who allegedly imposed illegal non-competes on their workers
 - All 3 companies—security guard company and two glass container manufacturers—settled with the FTC and agreed to cease using/enforcing non-competes

15

15

FTC Non-Compete Rule – 16 C.F.R. § 910

FTC Rule bans *all non-compete agreements with workers on or after September 4, 2024

- *There are exceptions for qualifying non-profits and government entities.
- FTC defines noncompete agreements under § 910.1
 - Any term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from:
 - Seeking or accepting work elsewhere in the U.S. after conclusion of employment; or
 - Operating a business in the U.S. after the conclusion of employment.
 - Includes agreements that “require a worker to pay a penalty for seeking or accepting other work” (i.e., liquidated damages clauses)
 - NDAs, NSAs, or training repayment agreements are not automatically non-competes under the FTC rule, but can be if they fit the above definition.

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16

16

FTC Rule: Exceptions



- Statutory exceptions (§ 910.3):
 - Bona fide sales of business (or sale of ownership interest or sale of business entity's operating assets)
 - Existing causes of action (accrued prior to the effective date)
 - Good faith basis that the rule doesn't apply
- Relevant jurisdictional exceptions:
 - Non-profits
 - Government entities

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17

FTC Rule: Definition of Worker/Employer/Senior Executive



- **“Worker”** = “a natural person who works, whether paid or unpaid, for an employer”
 - Includes independent contractors, externs, interns, volunteers, apprentices, or sole proprietors



- **“Employer”** = any natural person, partnership, corporation, association, or other legal entity who hires or contracts with a worker to work for them
- **“Senior Executive”** = one making over \$151,164 and in a “policy-making position”




- “Policy-making position” = president, CEO, or anyone with final authority to make decisions that control significant aspects of the business

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FTC Rule: Backlash & Challenges

- Ryan LLC (a tax services and software company) filed suit against the FTC in Texas, asserting that FTC needed express congressional authority
 - U.S. Chamber of Commerce also filed suit in Texas a day later, but their case is stayed/being encouraged to join the Ryan LLC suit to avoid inconsistent rulings
 - Injunctive relief to stay the effective date of the rule was ordered; FTC appealed
 - New FTC requested a 120-day pause (to conclude on July 10); injunction prohibiting enforcement still in effect
- ATS Tree Services LLC filed suit against the FTC in Pennsylvania
 - District court denied request to preliminarily enjoin the FTC’s enforcement of the Rule
- Properties of the Villages, Inc. filed suit in Florida and district court ruled similarly to Texas
 - FTC appealed; new FTC requested 120-day pause (to conclude on July 18)

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19

19

Types of State Law Restrictive Covenants

-  • Confidential Information Restriction/Non-Disclosure Agreement
-  • Employee Non-Solicitation Restriction
-  • Resident/Member/Patient Non-Solicitation Restriction
-  • Referral Source/Vendor Non-Solicitation Restriction
-  • Time, Territory and Activity Non-Compete Restriction

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20

20

No Poach Agreements- Restrictive Covenant



- **No poach agreement:** an agreement between two or more organizations not to recruit or hire employees from one another. (Agree to not compete for employees.)
 - Includes collusive franchise agreements in which franchisees are prevented from hiring the employees of other franchisees or the franchisor.
 - 2018 Jimmy Johns case involving a courier in the state of Washington which led to Jimmy Johns agreeing to void all no poaching agreements nationwide after pressure from the Washington AG.



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21

21

Non-Competes in General



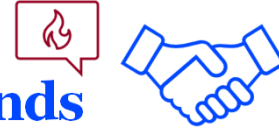
- **Non-competes** (covenants not to compete) are agreements between an employee and an employer where the employee agrees to not work in a similar position in competition against the employer.
- The restrictions on employment are typically regarding **duration, geographical scope, and range of activities.**
- These restrictions must always be **reasonable.**
- Further restrictions are very state-dependent.

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22

22

State Law Non-Compete Trends



- General trend has been moving towards limiting the use and enforceability of non-competes
 - In 2016, Obama administration issued a call to action urging all states to ban most non-competes
 - 2021 Executive Order from President Biden on Promoting Competition in the American Economy (urging “FTC to curtail unfair use of non-competes ... that may unfairly limit worker mobility.”)
- Approximately 9 states have minimal restrictions - the reasonableness of the restrictions and enforceability is left to the courts (NE, KS, MS, OH, WV, SC, WI, MI, NC)
- Majority of states have restrictions of some sort

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23

23



State Law Bans on Non-Competes

- Four states (CA, ND, MN, and OK) have banned non-competes completely
- **California:** Post-employment non-competes void and unenforceable except in the context of a merger or sale of a business.
 - Effective 1/1/24 SB 699: Out-of-state non-competes are void in California regardless of where or when the non-compete was signed, even if the employee was out of state
 - But see U.S.D.C Northern California 11/24 decision in *Poer v. FTI Consulting, Inc.*

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24

24



State Law Bans on Non-Competes

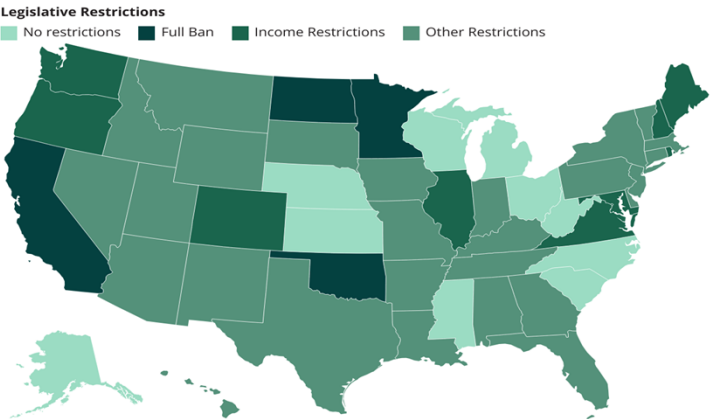
- **Minnesota:** 7/1/23 Prospectively bans all non competes that restrict the employees post employment from performing work for 1) a specific time period, or 2) in a specific territory, or 3) in a capacity similar to the employee’s work for the former employer. (Minn. Stat. § 181.988)
- 5/25/23 –Retroactively voids provisions of a franchise agreement restricting solicitation or hiring of employees or independent contractors of either another franchisee or the franchisor.
- 2024 Law - bans restrictive agreements between businesses, which are effectively no-poach agreements in service provider contracts. (Minn. Stat. § 181.9881)

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25

25

Patchwork at the State Level



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Map: Economic Innovation Group



Source: Economic Innovation Group, State Noncompete Law Tracker, April 23, 2025

26

26

States Banning Non-Competes Based on Income Levels to Protect Low Income Workers

- Colorado:** \$127,091 per year
- Illinois:** \$75,000 per year
- Maine:** \$62,600 per year
- Maryland:** \$46,800 per year
- New Hampshire:** \$30,160 per year
- Oregon:** \$116,427 per year
- Rhode Island:** \$39,125 per year
- Virginia:** \$73,320 per year
- Washington:** \$120,559 per year
- Washington, D.C.:** \$150,000 per year

Note: Significant attention from states following litigation against Jimmy John’s non-compete restricting work for 2 years post-employment at other sandwich shops within 2 miles of any Jimmy John’s

27

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States Impose Bans Based on Occupation or Industry, including the Healthcare Industry

2014 Study: Occupation-specific studies have corroborated these results, showing that 30% of hairstylists are bound by non-competes, 43% of engineers, and 45% of physicians.

Healthcare Industry: At least 15 states have statutes, regulations, or court precedent that restricts non-competes for the medical profession, including states that are generally more permissive with non-competes. States consider unique policy concerns.

Illinois: Bars non-competes between nurse staffing agencies and nurses and certified nursing assistants who are employed, assigned, or referred to a health care facility on a temporary basis and are hired as a permanent employee of a health care facility. Eff. 1/1/25, IL law bars non-competes and non-solicitation agreements with respect to mental health services provided to veterans and first responders by any licensed mental health professional.

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28

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States Impose Bans in the Healthcare Industry, continued

Indiana: IN imposed further limits on non-competes with physicians. Physician non-competes entered into after July 1, 2023 are unenforceable if: 1) the physician's employment terminated without cause by employer; 2) the physician terminates for cause; or 3) a physician's employment contract terminates, and both parties have met their contractual obligations. For agreements entered on or after July 1, 2024, physician non-competes between physician and hospital or its parent company, an affiliated hospital management company or a hospital system AND all physicians, are prohibited..

Iowa: restrictions on non-competes with certain mental health care professionals.

Massachusetts: non-competes are void and unenforceable regarding physician and related health care professional non-competes with respect to their right to practice medicine in any geographic area for any time period after the relationship terminates. Non-competes with registered nurses, practical nurses, psychologists, and licensed social workers are also void.

Arkansas: Eff. July 15, 2025, non-competes are void with physicians and surgeons licensed under Arkansas Medical Practices Act and Osteopathic physicians licensed under AR law within the physician's scope of practice. Non-competes with other medical professionals, such as nurses, chiropractors, dentists, are governed by common law and public policy which disfavors non compete in medical fields due to undue restrictions on the public's right to access a physician of their choice.

Wyoming: Eff. July 1, 2025, a WY statute broadly prohibits non-competes that restricts any person from receiving compensation for performance of skilled and unskilled labor. Voids non-competes that restrict a physician's right to practice medicine.

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29


29

Next Steps

1. Review state non complete laws for the work location of the employees, including salary thresholds, industry bans, and other restrictions.
2. Narrowly tailor the non-compete to the employee’s actual job duties. Decide internally how aggressive you want to be with confidentiality, employee/resident non-solicitation and geographic non-compete language.
3. New employees should be provided non-compete agreement to sign at the start of employment.
4. For current employees, some courts have ruled that continued employment is sufficient consideration.
5. Enforce valid non-compete agreements.

30

Risk Reduction Strategies



- **Identify organization’s status** to determine FTC’s jurisdiction
- **Review organization’s HR practices** to ensure compliance with the new FTC rule
- **Implement policy and procedures** that expressly prohibits applicable non-compete agreements
- **Review existing non-competes** to comply with notice requirement
- **Audit** where in your organization non-competes are used and prepare plan for consistent updates and strengthen other restrictive covenants


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31

31

Questions?



Wendy Arends
Partner, Husch Blackwell LLP
Wendy.Arends@huschblackwell.com



Tracey O'Brien
Senior Counsel, Husch Blackwell LLP
Tracey.O'Brien@huschblackwell.com

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32

32