Working hard or hardly working? Antitrust labour markets: an update from the United States

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Introduction

Labour's importance to economic growth, robust competition and our personal wellbeing gets people talking.

> 'Labor is the great producer of wealth; it moves all other causes.'
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> *Former United States Secretary of State Daniel Webster (b 1782–d 1852) (Attributed)*

> 'All labor that uplifts humanity has dignity and importance and should be undertaken with painstaking excellence.'
>
> *Martin Luther King Jr (1963)*

> '[T]here is something special about work. People are the very objects of the law's solicitude and, for many Americans, one's labor is essential to his or her sense of dignity. Labor is both a unit with economic value and an expression of identity of values.'
>
> *Former United States Assistant Attorney General Makan Delrahim (2019)*

> 'Although antitrust law in recent decades generally has neglected monopsony concerns and harms to workers, I strongly believe that merger investigations must scrutinize the impact on labor markets.'
>
> *Federal Trade Commission Chair Lina M Khan (2022)*

> '[A] lack of competition in labor markets harms the American economy and the American people – workers, consumers, and businesses alike. Employer concentration and anticompetitive labor practices undermine the free and fair labor markets upon which the integrity of our economy depends [...] Simply put, they are barriers to the American dream [...]
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> 'We continue to aggressively prosecute antitrust violations that undermine competition in labor markets or otherwise harm workers – no matter the industry, no matter the company, no matter the individual.'
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> *Attorney General Merrick B Garland (2022)*[1]

Indeed, concern for competition in labour markets is currently rippling throughout the United States, spearheaded by the White House, the Department of Justice (DoJ), Antitrust Division and the Federal Trade Commission (FTC). After nearly a century of adopting a 'hands off' approach to labour markets, federal antitrust enforcers now seek to regulate competition in and around labour markets, bringing new types of cases, challenging new types of conduct, issuing new guidelines, and revoking decades old guidance. Companies and their counsel alike are wondering: what will they do next?

Not to be outdone, a growing cohort of US state enforcers are also sounding alarms, cracking down on so called 'no-poach' agreements, passing new laws banning or restricting noncompete provisions, and recovering millions of dollars in antitrust fines.

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1 For an analysis of the opposing view – why '[f]or the most part, antitrust law does not touch workers' lives, which are heavily influenced by direct forms of regulation whose consequences are often too clear. It is just not the case that some novel expansion of the antitrust laws would help the position of workers' – *see* Richard A Epstein, *The Application of Antitrust Laws to Labor Markets – Then and Now*, 15 NYUJ of Law & Liberty 327 (2022).

Does all this attention to labour markets mean that US enforcers and private plaintiffs have suddenly realised there are arguments to be made that US antitrust laws can reach anti-competitive conduct in labour markets? Not exactly.

Rather, the US Supreme Court recognised almost 100 years ago that the Sherman Act applies to labour markets. But since this 1926 historical precedent[2] receives little attention, and to put in context the new-found focus on antitrust labour markets, in this article we provide an overview of the evolution of the antitrust laws and their application to labour, markets and assess current enforcement and investigation efforts – public and private – related to labour markets. We conclude by offering thoughts as to the future of antitrust laws as applied to labour markets in the United States.

Evolution of the antitrust laws as applied to labour markets

From the beginning, antitrust laws in the US have aimed to protect competition – that is, to protect markets from anticompetitive conduct. But the notoriously short (and some say, vague) language of the Sherman Act complicated this effort. Section 1 of the Sherman Act prohibits every 'contract, combination, or conspiracy in restraint of trade or commerce,' while Section 2 makes it unlawful to 'monopolize, attempt to monopolize, or combine or conspire to monopolize any part of the trade or commerce'.[3] But what does it mean to restrain trade or commerce? To monopolise or attempt to monopolise? What is a combination? What is a part of trade or commerce?

The legislative history does little to answer these questions. As one leading treatise notes, '[t]he legislative history of the Sherman Act does not point consistently in any single direction, particularly on the all-important questions of protection of consumers versus protection of competitors and the role that economic efficiency should play in antitrust analysis.'[4]

Enter the courts. Courts interpreting the Sherman Act generally agreed that the Act outlawed agreements between direct competitors to fix prices, allocate customers or rig bids. By 1927, the US Supreme Court held that parties to a price-fixing conspiracy could not justify their agreement by arguing that the

2 *Anderson v Shipowners Ass'n*, 272 US 359 (1926). In *Anderson*, the plaintiff, a sailor, sued on his behalf and on behalf of the members of his union, a group of associations that owned, operated, and controlled substantially all the merchant vessels in the ports of the Pacific Coast, alleging that they entered into an agreement to control the employment of all sailors in violation of the Sherman Act. The Supreme Court held that the agreement violated the Sherman Act, which necessitated a holding that the Sherman Act applied to labour markets. See *ibid.*

3 15 USC, ss 1–2.

4 Phillip E Areeda and Herbert Hovenkamp, *Antitrust Law,* para 103c (4th & 5th eds, Wolters Kluwer, 2021).

price they set was reasonable; rather, the parties' price agreement was itself illegal, regardless of the actual price they set or reasons for it.[5] The courts also agreed that company size alone did not constitute a violation of the Sherman Act.[6] Beyond that, however, the law continued to lack clarity.

The haze caused unintended consequences in the labour market. A number of suits were brought against labour unions, alleging that strikes organised by the unions violated the Sherman Act.[7] While the plain language of the Sherman Act seemed to permit claims against striking labour unions, this seems to have been an unintended consequence; in the wake of these suits, Congress passed Section 6 of the Clayton Act, exempting labour organisations and their members from antitrust liability for lawful actions, and Section 20 of the Sherman Act, prohibiting injunctions against activities such as strikes and boycotts resulting from disputes over terms or conditions of employment.[8]

Despite this attempt at clarification, questions remained. Did the new provisions apply to independent contractors?[9] What role did market concentration play in determining a violation? When does a merger become anti-competitive?

In the mid-1940s, and in the decades that followed, enforcers, litigants, and courts began to answer some of these questions; they started focusing on preventing

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5 *See United States v Trenton Potteries Co*, 273 US 392, 397-401 (1927). Today, this categorical prohibition on certain forms of conduct is called *per se* illegality.

6 *See United States v United States Steel Corp*, 251 US 417 (1920).

7 For example, in *United States v Workingmen's Amalgamated Council*, 54 F 994 (ED La 1893), the US sued a labour union, arguing that a strike organised by the union constituted a conspiracy to restrain trade in violation of the Sherman Act because the striking dock labourers prevented the manning and loading of ships at the port of New Orleans, thereby restraining trade. The court agreed, granting the government's request for an injunction. The defendants appealed and, while the appeal was pending, the government withdraw the suit. *See* CJ Primm, *Labor Unions and the Anti-Trust Law: A Review of Decisions*, 18:2 J of Pol Econ. 129, 129-30 (1910). Similarly, in 1894, another group of lawsuits was brought against striking railway workers and their union leaders, contending that strikes that prevented transportation of passengers and freight violated the Sherman Act. *Ibid*, at 130-31. Again, the courts granted requests for injunctions, halting the strikes. *Ibid*, at 131.

8 15 USC, ss 12, 20.

9 The Supreme Court seemed to answer this question in 1942, when it held that the Sherman Act only protects a bona fide group representing labourers. *See Columbia River Packers Ass'n v Hinton*, 315 US 143, 147 (1942). And, the Court later made clear that the statutory exemption applies to 'bona fide labor organization[s], and not an independent contractor or entrepreneur.' *HA Artists & Assocs v Actors' Equity Ass'n*, 451 US 704, 717 n 20 (1981). But, there may still be a lack of clarity on this issue. *See Confederacion Hipica de P.R., Inc. v Confederacion de Jinetes Puertorriquenos, Inc*, 30 F 4th 306, 314 (1st Cir, 2022) (holding, relying on *Columbia River Packers*, that the key question when determining whether the Sherman Act offered protection was not whether the defendants were independent contractors or labourers, but instead whether the dispute centres on labour rather than on prices of goods).

market concentration, which brought an avalanche of antitrust cases. Now, mergers that would result in the combined entity having a market share exceeding 30 per cent constituted a *prima facie* case for prohibiting the merger under Section 7 of the Clayton Act.[10] And, the *per se* standard applied to vertical territory restraints[11] and maximum resale price maintenance.[12]

A growing cohort of economists, sometimes referred to as the 'Chicago School', started pushing back. By the 1970s, with economic analysis becoming more rigorous, enforcers and courts alike took a more nuanced approach to certain conduct, applying a rule of reason standard in certain cases – they weighed anticompetitive effects of certain conduct against any procompetitive benefits.

Then, the Supreme Court weighed in, holding that the antitrust laws protect competition, not individual competitors.[13] Stated differently, the Court clarified that just because a company undertakes conduct to the detriment of a competitor does not mean that the antitrust laws have been violated. Rather, there must be harm to the competitive process itself, such that the fundamental nature of competition in a particular market has been damaged. Most often, that harm is reflected in higher prices, reduced innovation, and/or reduced output.[14]

Pre-2000

Through all of this (and to recap) – through more than 130 years of interpretation and enforcement – enforcers, litigants, and courts typically applied antitrust laws to the sale of products and the provision of services; they remained relatively hands-off the labour markets (excluding the union striking cases described above). Although the Supreme Court held that the Sherman Act applies to labour markets in 1926,[15] only a few federal monopsony[16] cases have ever been brought.[17] Similarly,

10 *See United States v Philadelphia Nat'l Bank*, 374 US 321, 364-65 (1963). Assistant Attorney General for Antitrust, Jonathan Kanter, remarked at the ABA Antitrust Section's Spring Meeting on 12 April 2024, that he views *Philadelphia National Bank* and other cases from this era as controlling precedents today, despite courts of appeal having questioned whether these cases have fallen behind current antitrust legal principles. See FTC Enforcers Summit 2024 Tr., at 4 (8 April 2024), available at www.ftc.gov/system/files/ftc_gov/pdf/Transcript-FTC-Enforcers-Summit_4.8.24.pdf.

11 *See United States v Arnold Schwinn & Co*, 388 US 365 (1967), *overruled by Continental TV, Inc v GTE Sylvania Inc*, 433 US 36 (1977).

12 *See Albrecht v Herald Co*, 390 US 145 (1968), *overruled by State Oil Co v Khan*, 522 US 3 (1997).

13 *See Brunswick Corp v Pueblo Bowl-O-Mat, Inc*, 429 US 477, 488 (1977).

14 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, Chapter 1' (DoJ), available at www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1, accessed 12 June 2024.

15 *See Anderson*, n 3.

16 A monopsonist is 'often thought of as the flip side of monopoly. A monopolist is a seller with no rivals; a monopsonist is a buyer with no rivals'. Monopsony, *Black's Law Dictionary* (11th ed, Thomson Reuters, 2019).

17 Eric A Posner, *The Rise of the Labor-Antitrust Movement*, (2021) Comp Pol'y Int'l.

state antitrust enforcers typically focused on downstream anticompetitive conduct, rather than upstream labour markets.[18]

2010

Fast forward to the first decade of the present century. Antitrust enforcers turned their attention to labour markets. In 2010, the DoJ filed a civil complaint against Adobe, Apple, Google, Intel, Intuit and Pixar, alleging the companies violated Section 1 of the Sherman Act by entering a number of agreements not to recruit employees from one another.[19] The companies settled quickly, agreeing to cease the conduct at issue for five years.[20]

That same year, the DoJ filed a similar civil lawsuit against Lucasfilm, alleging the company reached an agreement with Pixar (1) to avoid cold calling each other's employees, (2) to notify each other when making an offer to an individual employed by the other, and (3) to avoid providing a counteroffer that was higher than the competing company's offer.[21] The DoJ alleged that the agreement restrained competition between the companies for skilled digital animators.[22] Lucasfilm also settled quickly, agreeing to cease the conduct at issue for five years.[23]

These DoJ cases then spawned a class action lawsuit brought on behalf of more than 64,000 employees of the named companies.[24] The case eventually settled, with four companies – Adobe, Apple, Google, and Intel – agreeing to pay $415m into a settlement fund.[25]

2016

A few short years later, the DoJ reiterated its focus on labour markets, jointly publishing *Antitrust Guidance for Human Resources Professionals* with the Federal

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18 Although all fifty states have their own antitrust and/or consumer protection laws (most of which overlap with the Sherman Act and a few which purport to go further in protecting competition), state enforcers have traditionally followed the lead of federal enforcers. The absence of federal monopsony labour markets cases, therefore, may explain the dearth of state monopsony labour markets cases.

19 *United States v Adobe Sys*, No 10-cv-1629, 2011 US Dist LEXIS 83756, at 1 (DDC 18 March 2011).

20 Press Release, 'Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements' (DoJ, 24 September 2010), www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

21 Compl, *United States v Lucasfilm Ltd.*, No 1:10-cv-02220 (DDC 21 December 2010).

22 *Ibid.*

23 Order, *United States v Lucasfilm Ltd*, No 1:10-cv-02220 (D.D.C. 30 June 2011).

24 In re *High-Tech Employee Antitrust Litig*, 856 F Supp 2d 1103, 1107 (ND Cal 2012)

25 *See* www.hightechemployeelawsuit.com/frequently-asked-questions.aspx.

Trade Commission.[26] Although the agencies positioned their statement as a reaffirmation of the state of the law as it already existed, practitioners recognised that the statement demonstrated, at minimum, a shift in focus; the agencies would be looking for new types of cases to bring to reinforce the statement.

This joint guidance – directed at human resources professionals, but applicable to all – made clear the agencies' position that certain agreements relating to labour markets are *per se* antitrust violations and placed executives on notice that entering into such agreements could subject them to criminal prosecution.[27] A chill wind swept through HR departments across the country, closely followed by a proliferation of antitrust compliance training programmes directed at HR professionals.

The guidance addressed two types of potentially unlawful activity: (1) agreements between companies that constrain individual firm decision-making regarding hiring and compensation; and (2) the exchange of confidential, competitively sensitive employment information.[28] The former includes agreements to fix compensation[29] and agreements not to recruit others' employees,[30] while the latter is typically referred to as 'information exchange.'

2020–2021

As the Trump Administration was winding down, in December 2020 and again in January 2021, the DoJ indicted its first criminal defendants for allegedly entering into anticompetitive agreements restraining labour markets, namely alleged wage-fixing and no-poach agreements, respectively. These were the first indictments following on the 2016 *Antitrust Guidance for Human Resources Professionals*. More criminal indictments followed in 2021 and beyond, and are discussed below.

2022

After the Biden Administration settled in, in July 2022 the DoJ and the National Labor Relations Board signed a Memorandum of Understanding, working to

26 *Antitrust Guidance for Human Resources Professionals* (DoJ & FTC, October 2016), www.justice.gov/atr/file/903511/download.

27 *Ibid*, 3 ('Agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal.').

28 *Ibid*. 3–6.

29 These agreements are typically referred to as 'wage-fixing.'

30 These agreements are typically referred to as 'no-poach' or 'no-solicit' agreements. Although there may be factual distinctions between a no-poach agreement and a no-solicit agreement (eg, a no-poach agreement often functions as a prohibition on hiring while a no-solicit agreement often imposes a predicate notification on hiring, but does not wholly prohibit hiring), for purposes of this article, we use the terms interchangeably, focusing on no-poach agreements.

strengthen their partnership, better protect competitive labour markets, and ensure that workers are able to freely exercise their rights under the labour laws.[31] The Memorandum acknowledges that the agencies 'share an interest in promoting the free flow of commerce and fair competition in labor markets' and 'share an interest in protecting workers who have been harmed or may be at risk of being harmed as a result of interference with the rights of workers to obtain fair market compensation and to freely exercise their legal rights under the labor laws.'[32]

That same month, the FTC also signed a Memorandum of Understanding with the National Labor Relations Board, acknowledging their shared interest in policing competition in labour markets.[33] Specifically, the Memorandum acknowledges that both agencies share several 'issues of common regulatory interest[,]' including:

> 'labor market developments relating to the 'gig economy' and other alternative work arrangements; claims and disclosures about earnings and costs associated with gig and other work; the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions; the extent and impact of labor market concentration; the impact of algorithmic decision-making on workers; the ability of workers to act collectively; and the classification and treatment of workers'.[34]

The Memorandum is intended to facilitate three objectives: (1) information sharing and cross-agency consultations on an ad hoc basis for official law enforcement purposes, in a manner consistent with and permitted by the laws and regulations that govern the FTC and National Labor Relations Board; (2) cross-agency training to educate each agency about the laws and regulations enforced by the other agency; and (3) coordinated outreach and education as appropriate.[35]

Nearly simultaneously, FTC Chair Lina Khan, responding to a letter from Senator Elizabeth Warren, noted that she:

> 'shared [Senator Warren's] concern that monopsony power in labor markets may enable firms to harm workers in a host of ways, including through undermining their rights and dignity. Although antitrust law in recent decades generally has neglected monopsony concerns and harms to workers, [she]

31 Press Release, 'Justice Department and National Labor Relations Board Announce Partnership to Protect Workers', (DoJ, 26 July 2022), www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers.

32 Memorandum of Understanding Between the US DoJ & the NLRB, (26 July 2022), www.justice.gov/opa/press-release/file/1522096/download.

33 Memorandum of Understanding Between the FTC & the NLRB Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest, (19 July 2022), www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf.

34 *Ibid*, 1.

35 *Ibid*.

> strongly believe[s] that merger investigations must scrutinize the impact on labor markets'.[36]

Not to be outdone, Attorney General Merrick B Garland, speaking at the White House Roundtable on the State of Labor Market Competition in the US Economy, remarked:

> '[A] lack of competition in labor markets harms the American economy and the American people – workers, consumers, and businesses alike. Employer concentration and anticompetitive labor practices undermine the free and fair labor markets upon which the integrity of our economy depends. They deny workers fair wages, fair terms of employment, and just working conditions. They inhibit innovation. They rob aspiring entrepreneurs of a fair chance to start their own businesses.
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> Simply put, they are barriers to the American dream. Allowing these practices to go unchecked undermines public trust in the fairness of our economic institutions, and in the rule of law itself. That is why protecting American workers from anticompetitive labor practices and employer concentration is central to the Justice Department's antitrust enforcement and advocacy work[...] We continue to aggressively prosecutive antitrust violations that undermine competition in labor markets or otherwise harm workers – no matter the industry, no matter the company, no matter the individual.'[37]

2023–2024

A year later, in July of 2023, the DoJ and the FTC followed through on these commitments, jointly proposing new merger guidelines (intended to replace the *2010 Horizontal Merger Guidelines* and the *2020 Vertical Merger Guidelines*). Once again, a focus on labour markets crept up in an area where it was previously absent: the draft guidelines included labour markets as a consideration in evaluating the likely effects of a merger, noting that 'when a merger involves competing buyers, the Agencies examine whether it may substantially lessen competition for workers or other sellers'.[38]

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36 Ltr from Lina M. Khan to Senator Elizabeth Warren (9 June 2022), www.warren.senate.gov/imo/media/doc/Response%20Letter%20to%20FTC%20Chair%20Lina%20M.%20Khan%20to%20Sen.%20Warren%20re%20Microsoft%20Activision.pdf.

37 Speech, *Attorney General Merrick B Garland Delivers Remarks at the White House Roundtable on the State of Labor Market Concentration in the US Economy*, (US DoJ, 7 March 2022), www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-white-house-roundtable-state-labor.

38 Merger Guidelines (US DoJ & the FTC, 2023), at 3, www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

These new guidelines were issued in December of 2023,[39] although recent commentary from the DoJ suggests that changes may be coming. While speaking at the 2024 Antitrust Spring Meeting, Deputy Assistant Attorney General Andrew Forman noted that the agencies plan to issue a revised rule in the near future aiming to strike 'an appropriate balance' between modernising the filing system and avoiding the creation of a new burden on merging companies.[40]

At the same time, the DoJ and the FTC issued a Notice of Proposed Rulemaking to amend the premerger notification form and instructions, as well as the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[41] This Notice represented the first ever major overhaul of the HSR Act.

Importantly for our purposes, under the proposed changes to the HSR Rules, the parties are asked to produce Standard Occupational Classification codes (as defined by the Bureau of Labor Statistics) for the five largest categories of workers employed by either party.[42] The parties would also be required to disclose the aggregate number of classified employees in each Economic Research Service commuting zone (as defined by the Department of Agriculture) where the parties have an overlapping Standard Occupation Classification code.[43] And, the parties would be required to disclose any penalties or decisions issued against them by the Department of Labor, Wage and Hour Division, the National Labor Relations Board, and/or the Occupational Safety and Health Administration.[44]

Overall, as enforcers shift their focus to labour markets, we see an uptick in the number of cases in this area. Indeed, the DoJ has pursued at least eight cases, though with little success. Private class action plaintiffs are likewise pursuing numerous cases, although, notwithstanding the nine-digit settlements of the early high-tech employment cases, it is premature in many of these newer cases to determine the likelihood of their success. In 2024, the FTC brought its first challenge to a proposed merger based on alleged harm to an alleged labour market. Separately, the Commission has its aim firmly targeted on minimising the use and enforcement of noncompete employment restrictions. Not to be left behind, a number of state legislatures and state attorneys' general are also focused on labour markets, particularly (like the FTC) on reigning in noncompete restrictions.

39 Press Release, '*Justice Department and Federal Trade Commission Release 2023 Merger Guidelines*' (DoJ, 18 December 2023), www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines.

40 Ben Remaly, 'DOJ official: HSR rule changes being scaled down', (*Global Competition Review*, 11 April 2024), https://globalcompetitionreview.com/gcr-usa/article/doj-official-hsr-rule-changes-being-scaled-down.

41 Press Release, 'FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review' (Federal Trade Commission, 27 June 2023), www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

The asserted antitrust violations in labour markets fall into four types of conduct

Antitrust enforcement relative to labour markets tends to focus on four types of conduct: (1) wage-fixing, (2) no-poach agreements, (3) information exchange, and (4) noncompete agreements.

Wage-fixing

A wage-fixing agreement is an agreement between two or more companies regarding employees' salaries or other terms of compensation.[45] Wage-fixing is alleged to be a form of price-fixing, which has long been subject to *per se* treatment in the US. To prove wage-fixing, therefore, the DoJ asserts that it must prove only that two companies entered into an agreement to fix wages.[46] At that point, it contends, liability attaches.

Private plaintiffs, however, must also prove standing and injury to prevail and recover damages. Stated another way, unlike the DoJ, private plaintiffs must prove (1) 'standing under Article III of the United States Constitution[,]' (2) injury – that is, 'a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision'– and (3) antitrust standing (ie, 'an injury stemming from conduct that the antitrust laws are actually meant to prevent[,]' which 'can result from either the legal violation itself or anticompetitive actions made possible by the violation').[47]

No-poach agreements

'A no-poaching agreement generally refers to an agreement between competing employers not to solicit, recruit, hire without prior approval, or otherwise compete for employees.'[48] Recently, the DoJ argued that no-poach agreements are a form of market allocation and, therefore, are subject to the *per se* rule, rather than the rule of

45 *No More No-poach: The Antitrust Division Continues to Investigate and Prosecute 'No-poach' and Wage-Fixing Agreements*, (DoJ, Spring 2018), www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

46 See *Stop & Shop Supermarket Co v Blue Cross & Blue Shield*, 373 F 3d 57, 61 (1st Cir, 2004) (explaining that when the *per se* rule applies, 'liability attaches without need for proof of power, intent, or impact').

47 *Butler v Jimmy John's Franchise, LLC*, 331 F Supp 3d 786, 791 (SD Ill, 2018).

48 *Aya Healthcare Servs v AMN Healthcare, Inc*, 613 F Supp 3d 3d 1308, 1330 (SD Cal, 2020). The court's reference to 'competing employers' here refers to companies competing for employees; it does not refer to companies that are competitors based on the goods or services they offer.

reason standard. This distinction is key: if the *per se* rule applies, then the agreement is deemed illegal unless defendants establish an ancillary restraints defence.[49]

Courts confronted with the question of which standard to apply have largely agreed with the DoJ, permitting cases to move forward on *per se* grounds (though, as described below, they have disagreed about how the standard applies and have ultimately found liability in few if any cases).

At least one court, however, has required the DoJ to prove that the no-poach agreement meaningfully limited competition in a market.[50] In that case, the DoJ was ultimately unable to meet the standard because, according to the court, unlike the motion to dismiss stage where '[t]here were no facts in the Indictment that would have suggested that the alleged agreement did not actually allocate the market to a meaningful extent,' on 'a full factual record' the government failed to meet its burden.[51]

State antitrust enforcers have also signalled recent interest in no-poach matters. Washington State has been one of the states leading the charge. In January of 2018, Washington launched an initiative to challenge no-poach clauses in franchise agreements.[52] The state then entered into settlement agreements with McDonald's Corp, CKE Restaurants Holdings, Carl's Jr and Jimmy John's, requiring the companies to end their alleged practice of prohibiting workers from moving from one fast-food franchise to another (within each company's umbrella).[53]

Subsequently, Pennsylvania and Massachusetts followed Washington's lead, entering into agreements with Arby's, Dunkin', Five Guys Holdings and Little Caesar Enterprises that required the companies to remove no-poach language from their franchise agreements.[54]

More recently, Illinois filed suit against a group of temp agencies, alleging they violated Illinois' Antitrust Act when they agreed not to hire each other's employees when staffing a common client.[55] The case rose to the Illinois Supreme Court via two certified questions from a county judge, asking (1) whether the definition of 'service' under the Illinois Antitrust Act excludes all labour services from the law's coverage, and (2) whether the *per se* rule that applies to conspiracies among

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49 See eg, *Giardino v Saks & Co*, No 23-600 (2d Cir, 7 August 2023).

50 *See* Ruling and Order on Motions, *United States v Patel*, No 3:21-cr-220 (VAB)(RAR) (D Conn, 28 April 2023).

51 *Ibid*, at 12 n 2.

52 '*Initiative to Eliminate No Poach Clauses in Franchise Agreements*' (Washington State Office of the Attorney General, 2018), www.atg.wa.gov/labor-and-antitrust.

53 Stephen Joyce, 'California Leads States in Probing Employers' "No Poach" Pacts' (Bloomberg Law, 19 October 2022), https://news.bloomberglaw.com/antitrust/california-leads-states-in-probing-employers-no-poach-pacts.

54 *Ibid*.

55 *Ibid*.

competitors extends to alleged horizontal agreements facilitated by a vertical noncompetitor.[56]

The Illinois Supreme Court ultimately held that the Illinois Antitrust Act does not exempt 'agreements between competitors to hold down wages and to limit employment opportunities for their employees'.[57] The Court declined to answer the second certified question.[58]

New York has also entered the fray. For example, in October of 2022, the New York Attorney General's Office (NYAGO) announced a $195,000 settlement with the owner of a ski resort, following an investigation that revealed the owner had entered into an agreement with another ski resort operator not to hire each other's employees.[59] And, in October of 2023, NYAGO announced a $4.5m settlement with First American Financial Corporation, following an investigation revealing that First American had entered into no-poach agreements with several of its competitors.[60]

Most recently, the US Supreme Court turned down an opportunity to weigh in on which standard applies in a related area: franchise no-poach agreements. McDonalds initially prevailed in the district court on which standard to apply but the court of appeal disagreed.

A former McDonald's employee filed a proposed class action suit alleging that McDonald's violated the Sherman Act by prohibiting its franchises from "employ[ing] or seek[ing] to employ any person" who at the time is, or within the preceding six months has been, employed by McDonald's, by any of its subsidiaries, or by any other franchise'.[61] McDonald's moved for judgment on the pleadings.[62] The district court agreed with McDonald's, applying the rule of reason and finding

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56 Celeste Bott, 'Ill Judge Questions Possibly "Absurd" Antitrust Law Carveout' (Law360, 15 November 2023), www.law360.com/competition/articles/1767044?nl_pk=b1604221-d99a-41dd-bd8f-a214b947d213&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-11-16&read_more=1&nlsidx=0&nlaidx=5.

57 *See Illinois v Elite Staffing, Inc*, No 128763, at 2 (Ill, 19 January 2024).

58 *Ibid*.

59 Press Release, 'Attorney General James Takes Action Against Central New York Ski Resorts for Unfair and Illegal Practices', (Office of the New York State Attorney General, 21 October 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-takes-action-against-central-new-york-ski-resorts-unfair.

60 Press Release, 'Attorney General James Secures $4.5 Million from Title Insurance Company for Harmful Labor Practices' (Office of the New York State Attorney General, 27 October 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-secures-45-million-title-insurance-company-harmful-labor.

61 Compl, *Deslandes v McDonald's USA, LLC*, No 1:17-cv-04857, at para 4 (ND Ill, 28 June 2017).

62 McDonald's moved for judgment on the pleadings following amended complaints, motions to dismiss, and discovery, and moved, in the alternative, for summary judgment.

the plaintiff's complaint deficient.[63] The district court also found that, in any event, the no-poach clause in the agreement was ancillary.[64]

The plaintiff appealed to the Seventh Circuit, which ultimately revived the case, concluding that the district judge had 'jettisoned the *per se* rule too early' and improperly held the complaint deficient because ancillary restraints is a defence; complaints need not anticipate and plead around defences.[65]

McDonald's then filed a petition for a writ of *certiorari*, seeking Supreme Court review of '(1) whether intra-brand hiring restraints are presumptively subject to *per se* Sherman Act analysis whenever they have a horizontal component; and (2) whether courts assessing a restraint under the Sherman Act must ignore procompetitive effects in related markets'.[66] The Supreme Court denied the petition, leaving unanswered the question of which standard applies – at least, for now. The case is now back in the district court in pretrial proceedings.

Information exchange

In certain circumstances, exchanging competitively sensitive information between competitors can give rise to an antitrust violation.[67] Not all information exchange, however, is an antitrust violation; courts and enforcers alike have recognised that such exchanges can be procompetitive depending on the circumstances.

In the 1990s and early 2010s, the DoJ issued three policy statements to guide companies, in part, in determining when an information exchange was permitted:

1. *DoJ and FTC Antitrust Enforcement Policy Statements in the Health Care Area* (15 September 1993);
2. *Statements of Antitrust Enforcement Policy in Health Care* (1 August 1996); and
3. *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (20 October 2011).

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63 Mem Op & Order, *Deslandes v McDonald's USA, LLC*, No 1:17-cv-04857, at 7–13 (ND Ill, 28 June 2022).

64 *Ibid.*

65 *Deslandes v McDonald's USA, LLC*, No 22-2333, at 4–7 (7th Cir. 25 August 2023).

66 Petition for Writ of Certiorari at i, *McDonald's USA, LLC v Deslandes*, Nos 22-2333, 22-2334 (21 November 2023), www.supremecourt.gov/DocketPDF/23/23-562/290252/20231121105821533_Deslandes%20–%20Cert%20Petition.pdf, and 18 March 2024 order denying petition, www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-562.html.

67 See *United States v Container Corp of Am* 393 US 333 (1969) (reversing an order granting dismissal in a price information exchange case and finding that the exchange of pricing information violated the Sherman Act); *In re Flat Glass Antitrust Litig*, 385 F 3d 350 (3d Cir, 2004) (finding that a jury could infer that the exchange of pricing information was a concerted action designed to fix prices).

These policy statements created safe harbours for the exchange of price and cost information – a policy not to challenge the exchanges 'absent extraordinary circumstances'.[68] Although originally aimed at the healthcare industry, enforcers and courts alike applied the guidance to information exchange more broadly and in other industries as well.

Lest anyone construe the policy statements as broadly permitting information exchanges no matter the subject matter, the DoJ brought a series of civil suits based on alleged violations of the information exchange policies. For example, in November 2018, the DoJ sued six broadcasting companies – Sinclair Broadcast Group, Raycom Media, Tribune Media Company, Meredith Corporation, Griffin Communications and Dreamcatcher Broadcasting – alleging that the companies violated Section 1 of the Sherman Act by 'exchanging competitively sensitive information with and among competing broadcast television stations', namely, exchanging pacing[69] information.[70] That same month, the Department entered into a settlement with the six defendants, pursuant to which the companies would cease sharing pacing information with each other and would each appoint an antitrust compliance officer.[71]

A few years later, in February of 2023, the DoJ went further: it threw the antitrust community for a loop by withdrawing its support for all three policies.[72] This withdrawal removes the safe harbour for information exchange, creating new risks for companies that engage in the practice. The DoJ did not replace the guidance. Instead, it said that conduct would have to be evaluated on a case-by-case basis, citing new technology (particularly artificial intelligence and algorithmic software) as the driving force behind the position shift.

68 *Statements of Antitrust Enforcement Policy in Health Care* (1 August 1996). For example, this protection permitted companies to participate in industry surveys without fear of prosecution, so long as the survey was managed by a third party, the information provided was historical, the information was aggregated to protect the identity of the underlying sources, and a sufficient number of sources were aggregated to prevent competitors from linking particular data to an individual source.

69 Pacing indicates how each station is performing versus the rest of the market and provides insight into each station's remaining spot advertising inventory for the period. See Compl., *United States v Sinclair Broadcast Group, Inc*, No 1:18-cv-2609 (DDC, 13 November 2018). This information is used when setting pricing for advertising.

70 *Ibid.*

71 Press Release, 'Justice Department Requires Six Broadcast Television Companies to Terminate and Refrain from Unlawful Sharing of Competitively Sensitive Information' (DoJ, 13 November 2018), www.justice.gov/opa/pr/justice-department-requires-six-broadcast-television-companies-terminate-and-refrain-unlawful.

72 Press Release, 'Justice Department Withdraws Outdated Enforcement Policy Statements' (DoJ, 3 February 2023), www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

Moreover, the withdrawal left unclear the state of other guidance that relied on the now withdrawn policies. For example, according to the 2016 *Antitrust Guidance for Human Resources Professionals*, exchanging competitively sensitive employment information is similar to the exchange of pricing information – both have the potential to adversely impact competition in the market.[73] The 2016 guidance notes that companies can mitigate the risk of an antitrust violation by ensuring that they exchange only historical, aggregated information with safeguards to ensure the information will not be used to limit competition.[74] But this guidance relied on the safe harbours in the now withdrawn policy statements. The 2016 guidance, however, has not been withdrawn, creating some uncertainty regarding the enforcers' approach to information exchange.

Regardless of the state of the safe harbour, information exchange is typically not subject to *per se* treatment, unless it involves actionable pricing information or other competitively sensitive information giving a leg up to a competitor.[75] Instead, it is often analysed under the rule of reason.[76] Under the rule of reason:

> 'The factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate facts to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration.'[77]

In September of 2023, the DoJ filed its first suit (post guidance withdrawal) based on information exchange: it sued Agri Stats – an analytics company that compiles, aggregates and disseminates data among competing meat processors.[78] In the complaint, the DoJ

73 *Antitrust Guidance for Human Resources Professionals* (DoJ and FTC, October 2016), www.justice.gov/atr/file/903511/download.

74 *Ibid*.

75 See eg, *United States v Container Corp*, 393 US 333 (1969). In *Container Corp*, competitors had a reciprocal arrangement in which they would periodically verify prices charged to a specific customer. *Ibid*, at 335. Underlying this arrangement was an understanding and expectation that they each would comply with a request to furnish data to the other. *Ibid*, The Court held that these stand-alone instances of information exchanges, when taken together, were best understood as an agreement to exchange price information, and 'the inferences [were] irresistible that the exchange of price information had an anticompetitive effect in the industry, chilling the vigor of price competition'. *Ibid*, at 337. Justice Fortas's concurrence notes that a 'tacit agreement to exchange information about current prices' is in itself an antitrust violation since it facilitates price coordination, which has the effect of limiting price competition. *Ibid*, at 340.

76 *See United States v United States Gypsum Co*, 438 US 422, 441 n 16 (1978) (stating that 'we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act').

77 *Leegin Creative Leather Prods v PSKS, Inc*, 551 US 877, 885-86 (2007) (internal quotation and citations omitted).

78 *See* Complaint, *United States v Agri Stats, Inc*, No 23-cv-03009 (D Minn, 28 September 2023).

alleges that Agri Stats violated Section 1 of the Sherman Act by facilitating anticompetitive information exchanges in the US broiler chicken, pork and turkey markets that were used to stabilise and raise prices, and restrict supply.[79] Agri Stats has filed a motion to dismiss and the case is ongoing.

The *Agri Stats* complaint follows several consent decrees reached by the DoJ with poultry processing companies that allegedly violated Section 1 by suppressing workers' wages by sharing sensitive employee compensation information.[80]

Noncompete agreements

A noncompete agreement is an agreement between an employer and an employee whereby the employee agrees not to work for a competitor of the employer for a period of time following departure from the employer.[81] This type of agreement was designed to protect employers by, for example, preventing an employee from taking trade secrets or other competitively sensitive information directly to a competitor.

Historically, the validity and enforcement of noncompete agreements has been governed by state law. And states viewed non-compete through very different lenses. California has long been famous for prohibiting the enforcement of noncompete agreements that limit an employee's future job prospects.[82] Some suggest Silicon Valley's early and meteoric success is at least partly attributable to California's ban, which led to open and frequent tech-employee mobility to competitors and start-ups.[83]

California has recently gone further, however, by passing SB 699 and AB 1076, which expand the ways employees may challenge noncompete agreements and took effect on 1 January 2024. Specifically, SB 699 expands California's ban on noncompete agreements to include certain out-of-state agreements and creates a private right of action for employees who have agreements that include these restrictive covenants. AB 1076 expressly provides that Section 16600 (the

79 *Ibid*.

80 *See*, eg, Final Judgment, *United States v Cargill Meat Solutions Corp*, No 1:22-cv-01821-SAG (D Md, 22 August 2023) (as to George's Inc) and Final Judgment, *United States v Cargill Meat Solutions Corp*, No 1:22-cv-01821-SAG (D Md, 5 June 2023) (as to Webber, Meng, Sahl & Co, and Cargill Meat Solutions Corp), www.justice.gov/atr/case/usv-cargill-meat-solutions-corp-et-al.

81 Lina M. Khan, 'Lina Khan: Noncompetes Depress Wages and Kill Innovation', (*New York Times*, 9 January 2023), www.nytimes.com/2023/01/09/opinion/linakhan-ftc-noncompete.html (stating that '[w]hen you're subject to a noncompete clause, you lose your right to go work for a competing company or start your own, typically within a certain geographic area and for a certain period of time').

82 Cal Bus & Prof Code, 16600.

83 Timothy B. Lee, 'A little-known California law is Silicon Valley's secret weapon' (*Vox*, 13 February 2017), www.vox.com/new-money/2017/2/13/14580874/google-self-driving-noncompetes.

statutory prohibition on restraints on competition) should be 'read broadly' to 'void application of any noncompete agreement in the employment context'. Importantly, these statutes purport to apply retroactively.

Other states, including North Dakota and Oklahoma, historically permitted noncompete agreements, but passed laws in 2022 banning such agreements.[84] In June of 2023, New York sought to join them, passing a bill that would ban almost all new noncompete agreements.[85] That bill was later vetoed by Governor Hochul.[86]

Colorado, Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, Virginia and Washington take yet another approach – banning noncompete agreements unless the worker earns above a certain threshold.[87]

Although noncompete agreements were not addressed in the 2016 *Antitrust Guidance for Human Resources Professionals*, antitrust enforcers have recently signalled an interest in curtailing such agreements.[88] For example, in February of 2022, the DoJ filed a Statement of Interest in a Nevada state court case, arguing that 'non-compete agreements limit competition in design and effect', potentially in violation

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84 Leah Shepherd, 'More States Block Noncompete Agreements', (*SHRM*, 15 September 2022), www.shrm.org/topics-tools/employment-law-compliance/states-block-noncompete-agreements.

85 Section 191-d(2).

86 'New York governor vetoes bill that would ban noncompete agreements' (AP News, 23 December 2023), https://apnews.com/article/noncompete-agreement-bill-veto-new-york-61e53ad13f41f1da574740438ee34e63. Not to be deterred, there are currently three noncompete bans under consideration in New York City. The first (Bill No Int 0140-2024) would operate as a total ban on noncompete agreements, while the second (Bill No Int 1046-2024) would ban noncompete agreements for low-wage workers. The third (Bill No Int 0275-2024) would ban noncompete agreements for freelance workers. While none of these bills has passed in the New York City Council yet, they reflect a local concern for protection against noncompete agreements.

87 *Ibid*. Illinois adopted this view in 2022, when it passed an amendment to the Illinois Freedom to Work Act. Whereas Illinois previously prohibited employers from entering into noncompete agreements with employees who earned $13 per hour or less, Illinois now bans noncompete agreements for employees earning $75,000 per year or less; that salary threshold has scheduled increases in 2027 ($80,000), 2032 ($85,000), and 2037 ($90,000). The Act also prohibits noncompete agreements in the construction industry generally, with limited exceptions for shareholders, partners, or owners of companies in the construction industry. Additionally, the Act prohibits noncompete agreements for individuals covered by a collective bargaining agreement under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act. www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0860.

88 Although not an antitrust enforcer, the National Labor Relations Board has also signalled recent interest in noncompete agreements. See Press Release, 'NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act' (National Labor Relations Board, 30 May 2023), www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national (stating that the memorandum 'explains that overbroad non-compete agreements are unlawful because they chill employees from exercising their rights under Section 7 of the National Labor Relations Act').

of the Sherman Act.[89] Stated another way, the DoJ argued that the noncompete at issue was akin to a no-hire agreement between competitors and, therefore, should be subject to *per se* treatment.

Almost a year later, in January of 2023, the FTC proposed a rule that would fully ban noncompete clauses nationwide (with limited exceptions).[90] As proposed, the rule would ban companies from enforcing nearly all noncompete clauses against their employees on the basis that the use of noncompete agreements 'suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses'.[91]

More specifically, the Commission's proposed rule would make it illegal for employers to: (1) enter into or attempt to enter into a noncompete clause with employees and independent contractors; (2) maintain a noncompete clause with a worker that was executed prior to the rule's effective date; and (3) represent to a worker, under certain circumstances, that the worker is subject to a noncompete clause.[92]

The proposed rule was subject to a public comment period, which ended on 19 April 2023.[93] The Commission then reviewed the nearly 27,000 comments it received before issuing its final vote on the proposed rule.[94] That vote occurred on 23 April 2024.

The Commission voted, split three to two along Democrat–Republican party lines, to approve a final rule preventing all for-profit employers nationwide from using non-compete agreements for any worker, regardless of whether the agreement

89 Statement of Interest of the United States at 2, *Beck v Pickert Medical Group*, No CV21-02092 (2d Dist Washoe Cty, 25 February 2022) (*hereinafter* Statement of Interest). According to the DoJ, the noncompete agreement at issue was not merely a vertical restraint, but also a horizontal one because, at the time the agreement was made, the employees could sell their services to both the intermediate-contractor and the ultimate purchaser. *Ibid*.

90 *See* www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

91 Press Release, 'FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition' (FTC, 5 January 2023), www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

92 *Ibid*.

93 Press Release, 'FTC Extends Public Comment Period on Its Proposed Rule to Ban Noncompete Clauses Until April 19' (FTC, 6 March 2023), www.ftc.gov/news-events/news/press-releases/2023/03/ftc-extends-public-comment-period-its-proposed-rule-ban-noncompete-clauses-until-april-19.

94 Dan Papscun, 'FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses', (Bloomberg Law, 10 May 2023), https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses.

is designed to protect legitimate business interests of employers.[95] The final rule declares that it is an unfair method of competition – and therefore a violation of Section 5 of the FTC Act – for businesses to impose non-compete restrictions on workers on or after the final rule's effective date, which is 120 days after publication in the Federal Register.[96]

Notably, the final rule has some differences from the version articulated in the notice for proposed rulemaking. Specifically, the final rule permits existing noncompete agreements for senior executives – defined as workers earning more than $151,164 annually and who are in policy-making positions – to remain in force (although new noncompete agreements for senior executives remain prohibited).[97] And, the final rule eliminated the provision that would have required employers to legally modify existing noncompete agreements by formally rescinding them. Instead, employers must provide notice to workers bound to an existing noncompete that the noncompete will not be enforced against them in the future.[98]

The final rule already faces legal challenges. On 24 April 2024, the day after the Commission voted to approve the final rule, the US Chamber of Commerce, Business Roundtable, Texas Association of Business and Longview Chamber of Commerce filed suit against the Commission in the United States District Court for the Eastern District of Texas, arguing that the Commission lacks the authority to issue the rule because Congress never gave the Commission general rulemaking authority and, instead, limited the Commission's authority to writing regulations in specific contexts.[99]

The Chamber of Commerce and the other plaintiffs seek (1) a declaratory judgment that the rule is arbitrary, capricious or otherwise contrary to the law within the meaning of the Administrative Procedure Act; (2) an order vacating and setting aside the rule in its entirety; (3) an order permanently enjoining the Commission from enforcing the noncompete rule against plaintiffs' members; (4) an order issuing all process necessary and appropriate to delay the effective date and implementation of the rule pending the conclusion of that case; (5) an order awarding plaintiffs reasonable costs, including attorneys' fees; and (6) any other relief the court deems just and equitable.[100]

As of the date of this article, the Commission has not yet answered the complaint. Interestingly, putting aside the legal formalities, both sides to the dispute assert

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95 Press Release, 'FTC Announces Rule Banning Noncompetes' (FTC, 23 April 2024), www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

99 See Compl, *Chamber of Commerce v FTC*, No 6:24-cv-00148 (ED Tex, 24 April 2024).

100 *Ibid.*

that their position on noncompete agreements best serves the US economy. FTC Chair Lena Kahn remarked:

> 'Noncompete clauses keep wages low, suppress new ideas, and rob the American economy of dynamism, including from the more than 8,500 new startups that would be created a year once noncompetes are banned. The FTC's final rule to ban noncompetes will ensure Americans have the freedom to pursue a new job, start a new business, or bring a new idea to the market.'[101]

On the other side, the US Chamber of Commerce issued a press release asserting:

> 'The Federal Trade Commission's decision to ban employer noncompete agreements across the economy is not only unlawful but also a blatant power grab that will undermine American businesses' ability to remain competitive [...] [T]he FTC has never been granted the constitutional and statutory authority to write its own competition rules. Noncompete agreements are either upheld or dismissed under well-established state laws governing their use [...] This decision sets a dangerous precedent for government micromanagement of business and can harm employers, workers, and our economy.'[102]

Time will tell which side is right on the law – and whether the prevailing position boosts the economy.

Labour market investigations and litigation remain robust

Since issuing the 2016 *Antitrust Guidelines for Human Resources Professionals*, the DoJ has criminally charged companies and individuals alike for wage-fixing and entering into no-poach agreements. Private enforcement has also increased, as plaintiffs file follow-on actions in the wake of the government investigations.

Additionally, the FTC has opened investigations into both companies' and individuals' use of noncompete agreements and has brought its first merger challenge based on alleged harm to the labor market. State Attorneys General have also brought civil actions concerning alleged antitrust violations in labor markets.

The US DoJ, Antitrust Division

In the past few years, the DoJ has sought and obtained a number of antitrust criminal indictments charging both companies and individuals with wage-fixing and market allocation via no-poach agreements. Very few have been successfully prosecuted. The DoJ has also pursued civil cases, where it has been much more successful. The cases are discussed following Table 1, which summarises the outcomes – and the DoJ's win-loss record.

101 *See* n 95 above.

102 Press Release, *US Chamber to Sue FTC Over Unlawful Power Grab on Noncompete Agreements Ban*, (US Chamber of Commerce, 23 April 2024), www.uschamber.com/finance/antitrust/u-s-chamber-to-sue-ftc-over-unlawful-power-grab-on-noncompete-agreements-ban.

Case	Claim Alleged	DoJ Outcome
United States v Neeraj Jindal; John Rodgers	Wage-fixing in healthcare	Loss at trial
United States v Surgical Care Affiliates, LLC	No-poach in healthcare	Loss via voluntary dismissal with prejudice
United States v DaVita, Inc	No-poach in healthcare	Loss at trial
United States v Hee	No-poach, wage-fixing in nursing	Win via plea agreement
United States v Patel	No-poach in aerospace	Loss via defendants' Rule 29 motion granted
United States v Manahe	No-poach, wage-fixing in home healthcare	Loss at trial
United States v Lopez	Wage-fixing in healthcare	Ongoing
United States v Bertelsmann	Challenge to merger based, in part, on harm to workers including high-profile, high-income book authors	Win at trial; merger blocked

Table 1: The DoJ's case record

United States v Neeraj Jindal; John Rodgers – Criminal (DoJ loss)

On 9 December 2020, the DoJ indicted physical therapist staffing company owner Neeraj Jindal with violating the Sherman Act by 'enter[ing] into and engag[ing] in a conspiracy to suppress competition by agreeing to fix prices by lowering the pay rates to [physical therapists] and [physical therapist assistants]'.[103]

Thereafter, the DoJ obtained a superseding indictment, charging one of Jindal's alleged co-conspirators, John Rodgers, with the same Sherman Act violation.[104] Jindal and Rodgers filed motions to dismiss the indictment, arguing that the indictment failed to identify a *per se* violation and, therefore, did not charge a criminal violation.[105] The court denied the motion, holding that '[f]or over 100 years, the Supreme Court has consistently held that price-fixing agreements are unlawful *per se* under the Sherman Act', and that the indictment alleged a form of price-fixing via fixing pay rates.[106]

A jury trial began on 4 April 2022.[107] The DoJ argued to the jury that Jindal and Rodgers learned that their biggest client would be cutting the amount it paid the

103 Indictment, *United States v Jindal*, No 4:20-CR-358 (ED Tex 9 December 2020).
104 First Superseding Indictment, *United States v Neeraj Jindal*, No 4:20-CR-358 (ED Tex, 15 April 2021).
105 Mot. to Dismiss Count One of the First Superseding Indictment, *United States v Jindal*, No 4:20-CR-358 (ED Tex, 25 May 2021).
106 Mem. Opinion & Order, *United States v Jindal*, No 4:20-CR-358 (ED Tex, 29 November 2021).
107 Minute Entry for proceedings held before District Judge Amos L. Mazzant, III, *United States v Jindal*, No 4:20-CR-358 (ED Tex, 4 April 2022).

company to supply physical therapists and physical therapist assistants by 23 per cent at the same time they were trying to sell their company.[108] According to the DoJ, Jindal and Rodgers panicked because the reduction would cause the value of the company to drop, potentially spoiling the deal.[109]

The DoJ contended that, rather than competing for employees and in light of the reduced revenue they forecasted, Jindal and Rodgers reached out to five competitors and secured an agreement with one to collectively lower the rates they would pay physical therapists and assistants.[110]

The jury, however, disagreed with the DoJ. On 14 April 2022, after nine days of trial and only five and a half hours of deliberations, the jury returned a verdict of not guilty on all Sherman Act violation charges.[111]

In a post-trial interview, one juror revealed that although she 'th[ought] what they [the defendants] did was wrong'. the government evidence 'was just too vague' to convict.[112] Additionally, the juror noted that the government's cooperating witness – an alleged co-conspirator who received an immunity deal – offered testimony that contradicted her prior testimony before the FTC, without offering a credible reason for the contradictions.[113] This caused 'her credibility [...] [to go] down the drain' and the jurors to view the witness as 'very sketchy'.[114]

United States v Surgical Care Affiliates, LLC and *United States v DaVita, Inc* – Criminal (DoJ loss)

On 5 January 2021, the DoJ indicted outpatient medical care facilities owners and operators SCA and SCAI Holdings, LLC, charging both with violating the Sherman Act by 'enter[ing] into and engag[ing] in a conspiracy to suppress competition [with certain competitors] for the services of senior-level employees by agreeing not to solicit each other's senior-level employees'.[115] Thereafter, SCA filed a motion to dismiss the indictment, arguing that it failed to state a *per se* offense and that the novelty of the government's theory demonstrates that SCA was not on fair notice

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108 Katie Buehler, 'DOJ Tells Texas Jury Staffing Firm's Wage Fixing Was A Crime' (*Law360*, 5 April 2022), www.law360.com/articles/1480041.

109 *Ibid.*

110 *Ibid.*

111 Verdict of the Jury, *United States v Jindal*, No 4:20-CR-358 (ED Tex, 14 April 2022), www.law360.com/articles/1484191/attachments/0. The jury found Jindal guilty of obstruction of justice in connection with the proceedings before the FTC. *Ibid.*

112 Bryan Koenig, 'DOJ 'Dropped the Ball' in 1st Wage-Fixing Case, Juror Says' (*Law 360*, 20 May 2022), www.law360.com/articles/1494304/doj-dropped-the-ball-in-1st-wage-fixing-case-juror-says.

113 *Ibid.*

114 *Ibid.*

115 Indictment, *United States v Surgical Care Affiliates, LLC*, No 3-21-cr-00011 (ND Tex, 5 January 2021), www.justice.gov/opa/press-release/file/1351266/download.

that its conduct was criminal, thereby violating fundamental rules of due process.[116] The DoJ opposed the motion, arguing that the agreement not to solicit constituted an agreement to allocate the market, which is *per se* unlawful.[117] Ultimately, the DoJ moved to dismiss the case with prejudice and the court granted the motion.[118]

Six months after issuing the SCA indictment, on 14 July 2021, the DoJ unveiled an indictment charging some of SCA's alleged co-conspirators, DaVita (formerly DaVita Healthcare Partners) and its CEO, Kent Thiry, with violating the Sherman Act by 'enter[ing] into and engag[ing] in a conspiracy with SCA to suppress competition between them for the services of senior-level employees by agreeing not to solicit each other's senior-level employees'.[119]

On 14 September 2021, defendants filed a joint motion to dismiss, making the same arguments SCA had made in its then-pending motion.[120] The DoJ successfully opposed DaVita's motion, and the court denied the motion to dismiss, holding that '[s]ome non-solicitation agreements [including the one at issue here] can be properly categorized as horizontal market allocation agreements', and, therefore, are subject to the *per se* rule.[121] The court cautioned the government, however, that not all non-solicitation agreements are subject to the *per se* rule.[122] Rather, to fall subject to *per se* treatment, there must be some showing of market allocation – that is, there must be a sufficient factual showing that the non-solicitation agreement at issue allocated the market.[123]

A jury trial began on 4 April 2022.[124] The trial lasted eight days, during which time the DoJ argued DaVita and its former CEO, Thiry, 'cheated' by forming agreements with competitors not to solicit employees from each other, rather than competing openly and freely for employees.[125] The defence disagreed, arguing that Thiry's intent was never to prevent competition or allocate a market; instead,

116 Motion to Dismiss, *United States v Surgical Care Affiliates, LLC*, No 3-21-cr-00011 (ND Tex, 26 March 2021).

117 United States' Opp to Def's Motion to Dismiss, *United States v Surgical Care Affiliates, LLC*, No 3-21-cr-00011 (ND Tex, 30 April 2021).

118 United States' Motion to Dismiss, *United States v Surgical Care Affiliates, LLC*, No 3-21-cr-00011 (ND Tex, 13 November 2023).

119 Indictment, *United States v DaVita, Inc.*, No 21-cr-00229-RBJ (D Colo 14 July 2021), www.justice.gov/opa/press-release/file/1412606/download.

120 Def's J Motion to Dismiss, *United States v DaVita, Inc.*, No 21-cr-00229-RBJ (D Colo, 14 September 2021).

121 Order Denying Def's Motion to Dismiss, *United States v DaVita, Inc*, No 21-cr-00229-RBJ (D Colo, 28 January 2022).

122 *Ibid.*

123 *Ibid.*

124 Minute Entry for proceedings held before Judge R Brooke Jackson, *United States v DaVita, Inc*, No 21-cr-00229-RBJ (D. Colo. 4 April 2022).

125 Matthew Perlman, '"Outraged" DaVita CEO Plotted to Keep Employees, Court Told' (*Law360*, 4 April 2022), www.law360.com/articles/1480374.

they argued, Thiry wanted to know about possible departures so that he could compete for those workers.[126]

The jury agreed with the defence; after two days of deliberations, they returned a verdict of not guilty on all counts as to all defendants.[127]

United States v Hee – Criminal (DoJ win via plea)

On 30 March 2021, the DoJ unveiled an indictment charging nursing staffing company VDA OC (formerly Advantage On Call) and its regional manager, Ryan Hee, with violating the Sherman Act by 'enter[ing] into and engag[ing] in a conspiracy to suppress and eliminate competition for the services of nurses by agreeing to allocate nurses and to fix the wages of those nurses'.[128]

On 27 October 2022, VDA OC entered a guilty plea.[129] Pursuant to the terms of the plea deal, VDA OC was sentenced to pay a $400 special assessment, a $62,000 fine and $72,000 in restitution.[130]

Then, on 23 January 2023, the United States and Hee entered a Pretrial Diversion Agreement, deferring prosecution of the charged offence for a period of six months, with an effective date of 12 September 2022.[131] Hee agreed to perform 180 hours of community service in the healthcare or education field within the six-month term of supervision and the US agreed to dismiss the indictment against him upon his successful completion of the community service.[132] The court ordered dismissal of the indictment on 14 March 2023.[133]

United States v Patel – Criminal (DoJ loss)

On 15 December 2021, the DoJ charged six aerospace industry executives and managers with violating the Sherman Act by engaging in a conspiracy to 'suppress competition [...] by agreeing to restrict the hiring and recruiting of engineers

126 Cara Salvatore, 'DaVita, Ex-CEO Acquitted In Antitrust No-Poach Trial' (*Law360*, 15 April 2022), www.law360.com/articles/1484766/davita-ex-ceo-acquitted-in-antitrust-no-poach-trial.

127 Verdict, *United States v DaVita, Inc*, No 21-cr-00229-RBJ (D Colo, 15 April 2022).

128 Indictment, *United States v Hee*, No 2:21-cr-00098 (D Nev, 26 March 2021), www.justice.gov/opa/press-release/file/1381556/download.

129 Plea Agreement, *United States v Hee*, No 2:21-cr-00098 (D Nev, 27 October 2022).

130 Minutes of Proceedings, *United States v Hee*, No 2:21-cr-00098 (D Nev, 27 October 2022).

131 United States' Rule 48 Motion to Dismiss the Indictment as to Ryan Hee, *United States v Hee*, No 2:21-cr-00098 (D Nev, 13 March 2023).

132 *Ibid.*

133 Order Granting United States' Rule 48 Motion to Dismiss the Indictment as to Ryan Hee, *United States v Hee*, No 2:21-cr-00098 (D Nev, 14 March 2023).

and other skilled-labor employees'.[134] Notably, one of the individuals indicted, Mahest Patel, was an intermediary between the supply companies and an aerospace company and was allegedly responsible for enforcing the agreement.[135]

A jury trial began on March 29, 2023.[136] Following the conclusion of the United States' case-in-chief, the defendants filed a joint Rule 29 motion for judgment of acquittal.[137] They argued that the government's evidence failed to establish a single, overarching conspiracy to allocate employees, that there was no evidence of intent to allocate a market, and that the business arrangement was ancillary to a legitimate business collaboration.[138]

The court agreed with defendants, granting their Rule 29 motion and dismissing the case before the jury could deliberate.[139] In granting the motion, the judge held that a market allocation agreement requires evidence that meaningful competition was limited in the relevant market and, based on the facts the government presented, no reasonable juror could find that an illegal conspiracy to allocate the market existed.[140]

United States v Manahe – Criminal (DoJ loss)

On 27 January 2022, the DoJ charged four employees of home healthcare agencies in Maine with engaging in a conspiracy to 'suppress and eliminate competition for the services of PSS [personal support specialist] workers by agreeing to fix the rates paid to PSS workers and by agreeing not to hire each other's PSS workers' between April and May 2020.[141]

Four months later, on 31 May 2022, defendant Faysal Kalayaf Manahe filed a motion to dismiss, which the other defendants later joined.[142] The defendants argued that the indictment must be dismissed because applying the *per se* rule to the alleged non-solicitation agreement violates the Fifth and Sixth Amendments

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134 Indictment, *United States v Patel*, No 3:21-cr-220 (D Conn, 15 December 2021), www.justice.gov/opa/press-release/file/1457091/download.

135 *Ibid*.

136 Minute Entry for proceedings held before Judge Victor A Bolden, *United States v Patel*, No 3:21-cr-220 (VAB)(RAR) (D Conn, 29 March 2023).

137 Mem of Law in Support of Defs' J Motion for Judgment of Acquittal, *United States v Patel*, No 3:21-cr-220 (VAB)(RAR) (D Conn, 24 April 2023).

138 *Ibid*, 2–5.

139 Ruling and Order on Motions, *United States v Patel*, No 3:21-cr-220 (VAB)(RAR) (D Conn, 28 April 2023).

140 *Ibid*.

141 Indictment, *United States v Manahe*, No 2:22-CR-13-JAW (D Maine, 27 January 2022), www.justice.gov/opa/press-release/file/1466611/download.

142 Def Faysal Kalayaf Manahe's Motion to Dismiss with Incorporated Mem of Law, *United States v Manahe*, No 2:22-CR-13-JAW (D Maine, 31 May 2022).

and, even if it did not, the indictment failed to state a *per se* claim.[143] The defendants also contended that dismissal was required because the indictment alleged an ancillary restraint subject to a rule of reason analysis, which was not properly alleged in the indictment.[144]

The DoJ opposed the motion, arguing that the indictment should not be dismissed because it alleged a *per se* violation of Section 1 of the Sherman Act and the Sherman Act as construed by the courts provided the notice required by the due process clause.[145] The court agreed with the government and denied the motion to dismiss.[146] Notably, however, the court stated it would permit the defendants 'to contest whether there was an agreement and argue that their conduct was merely ancillary to a procompetitive purpose' at trial.[147]

A jury trial occurred in March of 2023 and lasted approximately two weeks.[148] Ultimately, the jury voted not guilty as to all four defendants.[149]

United States v Lopez – Criminal (DoJ case in progress)

On 15 March 2023, the DoJ indicted a healthcare staffing executive for 'knowingly enter[ing] into and engag[ing] in a conspiracy to suppress and eliminate competition for the services of nurses employed by the [uncharged] co-conspirator companies by agreeing to fix the wages of those nurses' between March 2016 and May 2019.[150]

On 6 September 2023, the DoJ obtained a superseding indictment, adding charges for wire fraud, stemming from alleged failure to disclose the pending criminal charges when completing certain paperwork accompanying the sale of his business.[151]

A jury trial is set to begin on 7 October 2024.[152]

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143 *Ibid*, 8–24, 26–28.

144 *Ibid*, 24–26.

145 United States' Opp to Defs' Motion to Dismiss the Indictment, *United States v Manahe*, No 2:22-CR-13-JAW (D Maine, 21 June 2022).

146 Order on Mots to Dismiss the Indictment & for a Preliminary Hearing Concerning Conspiracy Evidence, *United States v Manahe*, No 2:22-CR-13-JAW (D Maine, 8 August 2022).

147 *Ibid*, 1.

148 Cara Salvatore, 'Home Health Execs Acquitted in Latest DOJ Antitrust Loss' (*Law360*, 22 March 2023), www.law360.com/articles/1586974.

149 Jury Verdict Form, *United States v Manahe*, No 2:22-CR-13-JAW (D Maine, 22 March 2023).

150 Indictment, *United States v Lopez*, No 2:23-cr-0055-CDS-DJA (D Nev, 15 March 2023), www.law360.com/articles/1586646/attachments/0.

151 Superseding Indictment, *United States v Lopez*, No 2:23-cr-0055-CDS-DJA (D Nev, 6 September 2023).

152 Findings and Order on Stipulation to Continue Pretrial Motions, Calendar Call, and Trial Deadlines, *United States v Lopez*, No 2:23-cr-0055-CDS-DJA (D Nev, 17 November 2023).

UNITED STATES V BERTELSMANN – CIVIL (DOJ WIN AT BENCH TRIAL)

In January 2021, the DoJ filed a civil complaint seeking to block the acquisition of Simon & Schuster, by Bertelsmann SE & Co KGaA (the parent company of Penguin Random House).[153] The DoJ alleged that the acquisition would enable Penguin Random House to exert outsized influence over which books are published in the United States and how much authors are paid for their work.[154]

The case went to trial in 2022. At trial, one of the government's key themes was that the merger would reduce author compensation. Key witnesses for the government included best-selling authors Stephen King, Charles Duhigg and Andrew Solomon. Ultimately, the DoJ prevailed; the district court entered an order enjoining the proposed merger.[155]

Undeterred by the string of losses at trial in the criminal cases, the DoJ continues to focus on the labour markets. In March of 2023, when speaking to the antitrust law bar, Assistant Attorney General Jonathan Kanter emphasized that wage-fixing and no-poach cases 'are righteous cases and [the DoJ, Antitrust Division] will continue when the facts and the law support it to bring those cases'.[156] Nevertheless, a year has passed since these remarks and the DoJ has yet to bring another civil case focused on the labour market.

Private plaintiffs

In the wake of the criminal cases described in Section A above, private plaintiffs have filed suits alleging civil violations based on the same conduct. In the US, Section 4 of the Clayton Act permits private plaintiff suits for violations of the Sherman Act, providing for the recovery of damages by 'any person injured in his business or property by reason of anything forbidden in the antitrust laws'.[157] And state laws often provide for a private right of recovery as well. While the ability to bring private suits has long been established, it is too early to determine how most of these newer cases will fare. Recall, however, plaintiffs' early huge success, achieving a $415m civil settlement in the high-tech no-poach class action litigation.[158]

153 Compl, *United States v Bertelsmann*, No 1:21-cv-02886 (DDC 2 November 2021). Penguin Random House is the world's largest book publisher and Simon & Schuster is its close rival.

154 *Ibid*.

155 Press Release, 'Decision Protects Authors and Promotes Diversity and Quality of Top-Selling Books' (DoJ, 31 October 2022), www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed#:~:text=WASHINGTON%20%2D%20Today%2C%20the%20US%20District,billion%20acquisition%20of%20Simon%20%26%20Schuster.

156 Lauren Briggerman, Kirby Behre and Helen Marsh, 'Is 'No Poach' No More?' (*Law.com*, 31 May 2023), www.law.com/litigationdaily/2023/05/31/is-no-poach-no-more/.

157 Clayton Act of 1914, s 4.

158 *See* www.hightechemployeelawsuit.com/frequently-asked-questions.aspx.

More recently, a proposed class of employees filed suit following the *Surgical Care Affiliates* and *DaVita* criminal cases discussed above, alleging the purported agreements to refrain from soliciting each other's senior-level employees harmed competition via market allocation.[159] That civil case survived a motion to dismiss and is now in the midst of discovery, with class certification motions yet to be filed.[160]

Similarly, a proposed class of employees filed suit following the *Patel* case, alleging the purported agreements to restrict recruitment and hiring of aerospace engineers and other skilled workers harmed competition via market allocation.[161] The defendants filed a motion to dismiss,[162] which the court denied.[163] Thereafter, following fact discovery, the plaintiffs filed a motion for class certification (partially under seal) and the defendants opposed (also partially under seal), arguing individual issues predominate over common evidence, superiority is not satisfied, and the named plaintiffs were not typical or adequate because the statute of limitations is an affirmative defence to their claims.[164] The court has not yet ruled on the motion. In the meantime, plaintiffs reached a $7.4m settlement with defendant Cyient and an agreement in principle to settle with defendants QuEST Global Services-NAParametric Solutions and Agilis Engineering.[165]

Private plaintiffs have also filed suit in cases unconnected to the criminal allegations described above. For example, a group of former Saks employees filed suit against Saks Fifth Avenue, Gucci, Louis Vuitton, and other luxury fashion houses. The plaintiffs allege that the companies agreed not to hire Saks' workers for six months following the workers' departures from Saks.[166] The defendants filed a motion to dismiss, which the court granted, finding that any agreement was ancillary to the broader business relationships because Saks sells the luxury fashion houses' products in their stores and the brands operate rented space in Saks' stores.[167] Plaintiffs have appealed and the case is currently pending before the Second Circuit.[168]

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159 Am Compl, In re *Outpatient Medical Center Employee Antitrust Litig*, No 1:21-cv-00305 (ND Ill, 9 August 2021).

160 *See generally* In re *Outpatient Medical Center Employee Antitrust Litig* Docket.

161 Ruling & Order on Pls' Motion for Reconsideration, *Borozny v Raytheon Technologies Corp, Pratt & Whitney Division* et al, No 3:21-cv-01657-SVN (D Conn, 30 May 2023).

162 Motion to Dismiss, *Borozny v Raytheon Technologies Corp, Pratt & Whitney Division* et al, No 3:21-cv-01657-SVN (D Conn, 8 July 2022).

163 Order, *Borozny v Raytheon Technologies Corp, Pratt & Whitney Division* et al, No 3:21-cv-01657-SVN (D Conn, 20 January 2023).

164 Belcan Engineering Group, LLC's Opp to Pls' Motion for Class Cert, *Borozny v Raytheon Technologies Corp, Pratt & Whitney Division* et al, No 3:21-cv-01657-SVN (D Conn, 29 January 2024).

165 Notice of Settlement, *Borozny v Raytheon Technologies Corp, Pratt & Whitney Division* et al, No 3:21-cv-01657-SVN (D Conn, 24 January 2024).

166 Compl, *Giordano v Saks Inc* et al, No 1:20-cv-00833 (EDNY, 14 February 2020).

167 Order, *Giordano v Saks Inc* et al, No 1:20-cv-00833 (EDNY, 21 March 2023).

168 *See generally* Docket, *Giordano v Saks Inc* et al, No 23-600-cv (2d Cir).

The Federal Trade Commission

The FTC has also entered the arena. On 4 January 2023, the Commission announced that it had entered consent orders against three companies and two individuals to resolve allegations that the companies' use of noncompete agreements constituted an unfair method of competition in violation of Section 5 of the FTC Act.[169] The orders enjoined the companies and individuals from enforcing or threatening to enforce their noncompete agreements and required them, for the next ten years, to provide a clear and conspicuous notice to any new relevant employee that they may freely seek or accept a job with any company or person, run their own business, or compete with them at any time following their employment.[170] These cases represent the first time the Commission sued to halt noncompete restrictions.[171]

Additionally, in February 2024, the FTC brought its first attempt to block a merger based at least in part on harm to competition in the labour market: it sued to block Kroger's acquisition of grocery rival Albertsons.[172] The Commission asserts antitrust concerns that the merger would substantially lessen competition across several localised geographic areas where the supermarket chains directly compete through individual stores, resulting in potential price increases for grocery and household products for local consumers.[173] Additionally, the Commission alleges that the merger will substantially lessen competition for union labour, claiming that the two stores compete aggressively to hire and keep workers in overlapping market areas.[174] As of the date of this article, the case remains pending.

Conclusion

Although slow to get started, antitrust enforcement in labour markets is gaining speed as government enforcers and private plaintiffs alike pursue claims against companies and individuals for conduct allegedly harming competition, compensation, hiring, worker mobility, and more. Governments – both federal and state – are pursuing these claims through criminal indictments, civil lawsuits

169 Press Release, 'FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers' (FTC, 4 January 2023), www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers.

170 *Ibid.*

171 *Ibid.*

172 Compl, *The Kroger Company and Albertsons Companies, Inc*, FTC Docket No D-9428 (26 February 2024).

173 *Ibid*, para 1.

174 *Ibid.*

or rulemaking, while private plaintiffs continue to use private lawsuits, such as class actions, to exert pressure on an important factor for companies: their wallets.

As federal and state antitrust enforcers and private plaintiffs continue to bring actions related to labour markets, win-loss records possibly may shift from favouring defendants to favouring enforcers and/or private plaintiffs. Companies and practitioners alike should consider following these cases, legislative changes, and rule-making announcements closely. Companies should consider:

- reviewing participation in, and limiting, information exchanges with other companies – particularly competitors. Consider having counsel weigh in on the types, participants, frequency, limits, contents and justifications for information exchanges;
- determining the extent to which they are using (or have used) noncompete agreements with employees, what law purportedly applies, and in which state(s) those agreements were entered into;
- adding antitrust considerations in labour markets to their internal training and compliance programmes, particularly for employees in their HR departments;
- analysing the labour market implications of a desired or proposed acquisition, including with whom the merging companies compete for their various types of employees;
- looking for ancillary justifications for agreements, conduct and/or contemplated mergers that implicate labour markets;
- continuing to monitor changes in the law, particularly changes to the legality of information sharing and noncompete agreements;
- undertaking reviews of their internal hiring processes, determining whether they have barred hiring from any particular company, and, if so, why (ie, determine whether the bar is due to unilateral decision-making or a bilateral agreement or 'understanding' whether formal or informal); and
- seeking expert antitrust advice on concerns and/or future plans that may be implicated by these new developments.

While future enforcement within antitrust and labour markets remains somewhat unclear – such as the future of criminal no-poach cases, the legal standard that applies, and the new merger guidelines' focus on labour markets – one thing remains clear: the application of federal and state antitrust laws to labour markets isn't going away. Labour has people talking – and governments acting.

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