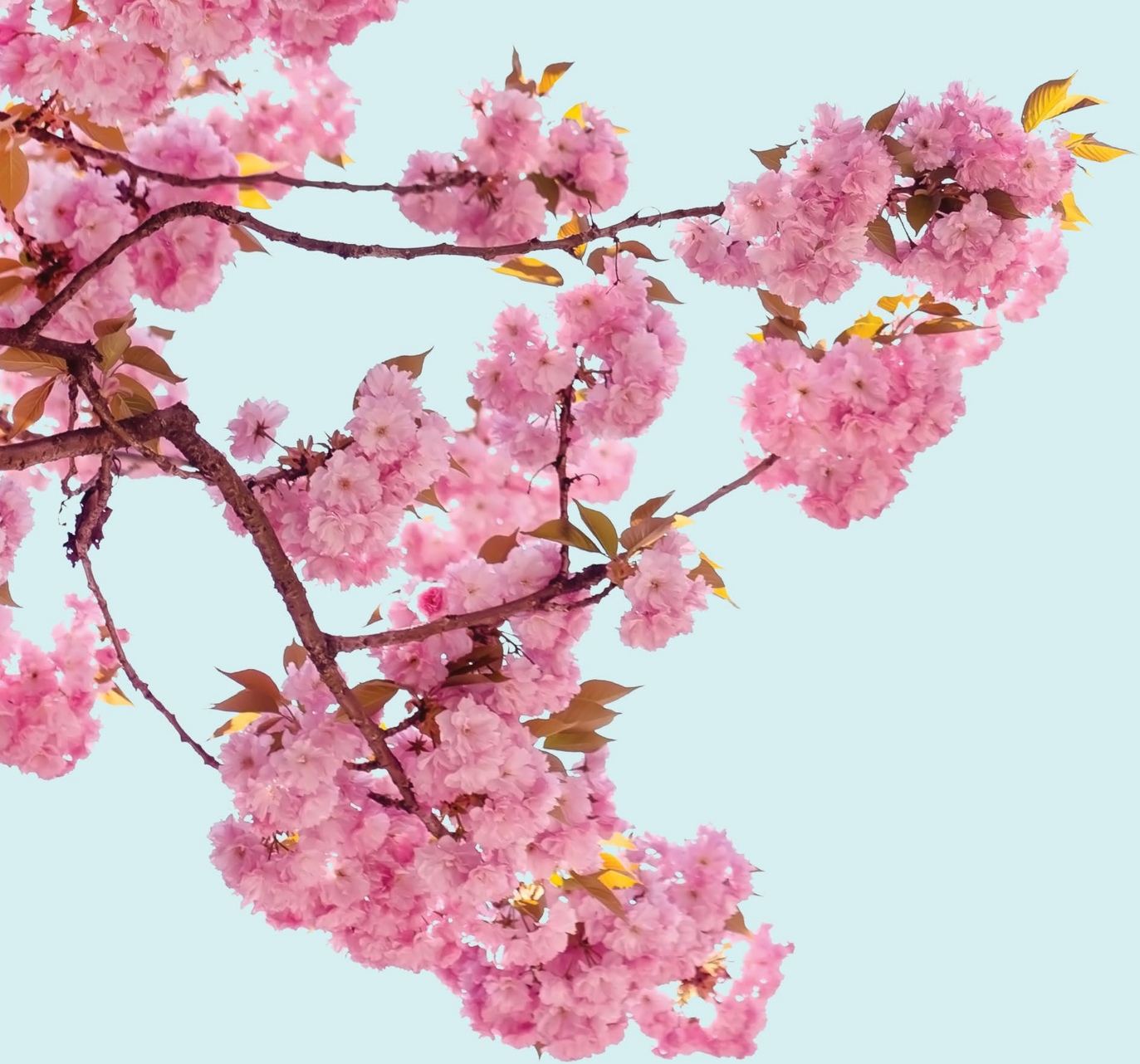

2023 ASA STAFFING LAW CONFERENCE

★ MAY 18–19
WASHINGTON, DC

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Hands Off, They're Mine! Protecting Staffing Agency Employees and Goodwill

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2023 ASA STAFFING LAW CONFERENCE

Hands Off, They're Mine! Protecting Staffing Agency Employees and Goodwill

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2023 ASA STAFFING LAW CONFERENCE

Agenda

- Overview of law and enforcement trends
  - Antitrust law impacting staffing firms
  - Law and trends regarding restrictive covenants

- Compliance do’s and don’ts
  - Antitrust red flags for employment practices
  - Considerations for drafting enforceable restrictive covenants

Overview of Law and Enforcement Trends

U.S. Antitrust Law Impacting Staffing Firms

Overview of Key Antitrust Laws Impacting Staffing Firms

- U.S. law bans anticompetitive conduct among competing firms
- Agreement among competing companies to limit or fix employment terms may violate antitrust laws, including agreements as to:
  - Wages and salaries
  - Benefits
  - Terms of employment
  - Job opportunities (i.e., agreements not to solicit, recruit, or hire)

Overview of Key Antitrust Laws Impacting Staffing Firms

- U.S. Department of Justice now takes the position that wage fixing and no-poach agreements among competing firms can be crimes
  - Presumed to be illegal without looking into the business justification or resulting harm
  - As a result, there are minimal defenses to the conduct
  - No defense that
    - The agreed-upon wages and benefits were reasonable
    - The agreement was necessary to prevent cut-throat competition
    - The conduct stimulated competition among firms
    - The firms were merely attempting to make sure each obtained a fair share of the market

Overview of Key Antitrust Laws Impacting Staffing Firms

- Key to finding a violation is an agreement, or “meeting of the minds,” regardless of whether it is
  - Formal or informal
  - Written or unwritten
  - Spoken or unspoken
- Information sharing is often evidence of an illegal agreement, even if not illegal by itself; can also lead to civil liability if there is an anticompetitive effect
- Firms should make decisions regarding hiring, soliciting, or recruiting independently of other firms

Overview of Key Antitrust Laws Impacting Staffing Firms

- **Criminal penalties** for companies and employees are significant
  - Individuals: up to 10 years in jail
  - Corporations: up to $100 million fine (or twice the gain or loss of the conspiracy)
- **Collateral consequences** of DOJ antitrust investigations can include
  - Follow-on civil litigation (treble damages)
  - Debarment from government contracts
  - Uncovering of misconduct in other industries, business units, or areas of law

Antitrust Enforcement Trends Impacting Staffing Firms

- In 2016, DOJ issued “Antitrust Guidance for Human Resource Professionals” to alert human resource professionals about potential antitrust violations in employment practices
- For the first time, DOJ said that it would investigate and prosecute naked no-poach and wage-fixing agreements criminally
- Since December 2020, DOJ has charged four companies and 16 individuals with wage-fixing or no-poach related charges
  - December 2020: DOJ brought its first criminal wage-fixing case, charging a health care staffing company owner with colluding with competitors to set rates (*U.S. v. Jindal*)
    - Owner and director of a therapist staffing company were charged with allegedly conspiring with other staffing companies to lower the rates paid to physical therapists and physical therapy assistants in Texas
    - In April 2022, Texas federal jury cleared both of all antitrust charges; convicted owner of narrow charge of obstruction of justice
  - January 2021: DOJ brought its first criminal charges against a company for entering into a no-poach agreement (*U.S. v. Surgical Care Affiliates LLC*)
    - Texas federal grand jury indicted Surgical Care Affiliates LLC and SCAI Holdings LLC for allegedly engaging in two separate conspiracies with health care providers to not solicit each other’s senior-level employees
    - Trial rescheduled from January 2023; no date set

Antitrust Enforcement Trends Impacting Staffing Firms

- But DOJ has suffered significant setbacks in prosecuting no-poach and wage-fixing cases criminally
  - Four cases against one company and 13 individuals have gone to trial; all have been acquitted on antitrust charges
    - One individual was convicted on an obstruction of justice charge in *United States v. Jindal*
  - Most recently, in *United States v. Patel*, a Connecticut federal judge granted an order acquitting all defendants
    - Former aerospace engineering company manager from Pratt & Whitney and five staffing company executives were tried for allegedly entering into illegal agreement not to hire each other's employees
    - After the government rested its case a month into trial, the court granted the defendants' motion for acquittal, ruling that no reasonable juror could find that the alleged no-poach agreement was an illegal market allocation scheme
    - Significant blow to the government's legal argument that no-poach agreements can rise to the level of criminal conduct

Antitrust Enforcement Trends Impacting Staffing Firms

- Even outside the courtroom, DOJ has a mixed record in prosecuting these cases
  - Only one company has pled guilty; no individuals have pled guilty
    - Health care staffing company charged in *United States v. Hee;* admitted to conspiring to fix wages for essential workers during the COVID-19 pandemic
  - One executive entered into a "pretrial diversion agreement" with no jail time
    - Manager of the health care staffing company charged in *United States v. Hee*
- Is no-poach no more?
  - Unlikely that DOJ will stop investigating no-poach agreements, even if we see fewer criminal charges
  - Staffing companies still must be on guard; even investigations open companies and employees up to significant cost and collateral consequences

Antitrust Enforcement Trends Impacting Staffing Firms

- Shows DOJ's heightened focus on anticompetitive conduct in the labor market
  - Increase in antitrust cases involving the labor sector generally, civil and criminal
  - DOJ has lived up to its warnings to investigate criminally, and charge, no-poach and wage-fixing agreements
  - Even if DOJ has had limited success in obtaining convictions, companies and individuals have been dragged through lengthy investigations and collateral consequences
- Demonstrates importance of implementing an effective compliance program to detect and deter potential antitrust violations

Laws and Trends Regarding Restrictive Covenants

U.S. Federal Trade Commission Proposed Rule Banning Noncompete Agreements

- In short, the proposed rule makes it unlawful for an employer to enter into, attempt to enter into, or maintain a noncompete with a worker

- Key provisions:
  - Employers cannot represent to a worker that the worker is subject to a noncompete clause without a good faith basis to believe that the worker is actually subject to an enforceable noncompete clause
  - Retroactive effect—employers will be required to rescind existing noncompetes, including by providing specific written notice to employees notifying them that their noncompete is no longer in effect
  - Bans "de facto" noncompetes—i.e., restrictions that have the "effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer" (such as nonsolicitation and nondisclosure provisions)
  - Sale of business exception—only available where the party restricted by the noncompete clause is an owner, member, or partner holding at least a 25% ownership interest in a business entity

FTC Proposed Rule Banning Noncompete Agreements

- Legal challenges are anticipated
  - FTC commissioner Christine S. Wilson acknowledges the rule is “vulnerable to meritorious challenges”

- Alternative proposals and questions from the comment period:
  - Senior executives should be exempted from the rule, or subject to a rebuttable presumption of unenforceability
  - Whether workers should be treated differently based on their rate of pay
  - Whether “no-poach” agreements (when employers agree not to solicit or hire each other’s workers) and wage-fixing agreements (when employers agree to cap compensation) should be barred
  - Whether franchisees should be covered by the proposed rule
  - Whether employers should be obligated to provide advance notice of the noncompete to employees and/or disclose them to the FTC

Examples of Recent State Laws Restricting Restrictive Covenants

- Recent trend of state laws being enacted to ban noncompetes for workers who earn below a certain compensation threshold
- Illinois—
  - Bans noncompetition covenants with employees whose annualized earnings are (currently) $75,000 or less; and bans nonsolicitation covenants with employees whose annualized earnings are (currently) $45,000 or less
  - “A covenant not to compete or a covenant not to solicit is illegal and void unless (1) the employee receives adequate consideration, (2) the covenant is ancillary to a valid employment relationship, (3) the covenant is no greater than is required for the protection of a legitimate business interest of the employer, (4) the covenant does not impose undue hardship on the employee, and (5) the covenant is not injurious to the public.”
  - Employers must advise employees in writing to consult with an attorney before entering into the noncompetition or nonsolicitation covenant, and employers must provide employees with a copy of the covenant at least 14 calendar days before the commencement of the employee’s employment or must give the employee at least 14 calendar days to review the covenant
  - Includes a sale of business exception

Examples of Recent State Laws Restricting Restrictive Covenants

- Colorado—
  - Bans noncompetition covenants with workers whose annualized cash compensation is not equal to or greater than a certain threshold amount (the "threshold amount for highly compensated workers") determined by the Division of Labor Standards and Statistics of the Colorado Department of Labor and Employment—currently $112,500 for 2023
  - Bans nonsolicitation covenants for workers whose annualized cash compensation is less than 60% of the threshold amount for highly compensated workers—currently $67,500 for 2023
  - Restrictive covenants still subject to existing enforceability considerations (e.g., must be tailored to protect legitimate interest of the employer and reasonable in duration, etc.)
  - Colorado also has a notice requirement—new employees must get notice of the actual terms before the employee accepts the offer, and existing employees must get 14 days' notice before the effective date of the covenant
  - Includes a sale of business exception

Examples of Recent State Laws Restricting Restrictive Covenants

- Other jurisdictions solely ban noncompetition covenants, in general, with employees who earn less than a certain threshold amount or who are classified as nonexempt from overtime requirements (e.g., Maine; Maryland; Massachusetts; Nevada; New Hampshire; Oregon; Rhode Island; Virginia; Washington; Washington, DC).

- States with proposed legislation to limit restrictive covenants include Minnesota, New Jersey, and Texas

- Important for staffing firms to ensure they are compliant with applicable state laws in terms of which employees (temporary employees and internal employees or recruiters) are being provided with restrictive covenant agreements

New York Attorney General Enforcement Action

- In the Matter of the Investigation by Barbara D. Underwood, Attorney Gen. of the State of N.Y., of WeWork Cos Inc., Assurance of Discontinuance No. 18-101 (Sept. 18, 2018).
  - Following investigation, NYAG entered into settlement with WeWork to end its use of overly broad noncompetition agreements that it was routinely requiring virtually all employees—regardless of job duties, knowledge of confidential information, or compensation—to sign
  - Illinois attorney general was simultaneously conducting its own investigation of WeWork's noncompetes, which resulted in New York and Illinois reaching a coordinated resolution of the two investigations
  - Per the settlement, more than 800 New York employees, plus more than 600 employees nationwide, were released from their noncompetes—these employees included cleaners, mail associates, executive assistants, baristas
  - Other noncompetes remained enforceable but were revised with less restrictive terms, including a shortened duration from one year to six months, reduced geographic scope, and a narrowly defined scope of competition
  - WeWork was required to notify all current employees and former employees whose employment ended within the prior 12 months of the changes
- The matter resulted in the NYAG releasing "Non-Compete Agreements in New York State—Frequently Asked Questions"

Common Law Reasonableness Standard for Restrictive Covenants

- The New York Court of Appeals decision in *BDO Seidman v. Hirshberg*, 690 N.Y.S.2d 854 (1999) has been the leading authority in New York regarding the enforceability of noncompetes, but this is generally a good framework for states that analyze restrictive covenants under a common law approach

- From *BDO Seidman*:
  - A restraint is reasonable only if it (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.
  - In this context a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public, and not unreasonably burdensome to the employee.

Compliance Do’s and Don’ts

Antitrust Red Flags for Employment Practices

Antitrust Red Flags for Employment Practices

- Antitrust concerns may arise if you or your colleagues
  - Agree with another company about employee salary or other terms of compensation, either at a specific level or within a range
  - Agree with another company to refuse to solicit or hire that other company's employees
  - Agree with another company about employee benefits
  - Agree with another company on other terms of employment
  - Express to competitors that you should not compete too aggressively for employees

Source: Department of Justice

Antitrust Red Flags for Employment Practices

- Antitrust concerns may arise if you or your colleagues
  - Exchange company-specific information about employee compensation or terms of employment with another company
  - Participate in a meeting, such as a trade association meeting, where the above topics are discussed
  - Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings
  - Receive documents that contain another company's internal data about employee compensation

Source: Department of Justice

Antitrust Compliance Do's and Don'ts

- **DO** make staffing and other business-related decisions independently of competing staffing firms and third parties
- **DO** involve the legal or compliance department before any communications with competing staffing firms
- With respect to trade show or trade group meetings, **DO** ensure
  - Agenda is accurate and followed
  - No discussion of commercially sensitive information
  - Counsel is present
  - Minutes are accurate and filed

Antitrust Compliance Do's and Don'ts

- **DON'T** discuss with competing staffing firms, directly or indirectly through third parties
  - Wages and salary, benefits, or terms of employment
  - Commercially sensitive information such as
    - Prices, discounts, or terms or conditions of sale
    - Profits
    - Market share
    - Specific customers
    - Market intelligence
    - Bids or tenders
- **DON'T** reach agreement with competitors, directly or indirectly through third parties, as to
  - Wages or salary, benefits, terms of employment
  - Refusal to solicit or hire or recruit each other's employees ("no-poach" agreement)

Antitrust Compliance Do's and Don'ts

- Not all information exchanges are illegal—proceed with caution where
  - Neutral third party manages the exchange of information
  - Information exchanged is old
  - Information is aggregated and does not identify the source
- Consult your legal or compliance department before exchanging information with competing staffing firms

Considerations for Drafting Enforceable Restrictive Covenants

Considerations for Drafting Enforceable Restrictive Covenants With Recruiters and Salespeople

- In New York and many other jurisdictions where common law governs the enforceability of restrictive covenants (rather than a particular statute), in general, restrictive covenants must be narrowly tailored to the employer's legitimate interests in order to be enforceable—meaning they must not be more restrictive than necessary to serve those interests.

- Goodwill (client, employee, and candidate relationships) as a legitimate and protectable interest—narrow tailoring examples:
  - Limit client nonsolicitation or nonservice covenants to clients for or with whom the particular salesperson (or other employee managed by or reporting to the salesperson) personally performed services or had business dealings during a specific time frame (e.g., one or two years).
  - Limit internal employee nonsolicitation covenants to co-workers employed over a specific period (e.g., one or two years) preceding termination of the recruiter's employment.
  - Limit candidate or temporary employee nonsolicitation covenants to candidates who were referred to a client, or temporary workers who are or were actively working on assignment, within a certain period of time (e.g., one or two years) preceding termination of the recruiter's employment.

Considerations for Drafting Enforceable Restrictive Covenants With Recruiters and Salespeople

- Confidential information and trade secrets as a protectable interest
  - Restrictive covenants will generally be enforceable to the extent necessary to prevent the disclosure or use of confidential information or trade secrets. Therefore, robust confidentiality provisions should be included.
  - For example, client lists, preferences, pricing, availabilities, needs, etc., can be protectable, but such lists may not be protected if they contain readily ascertainable information from outside sources, such as publicly available names and addresses.

Considerations for Drafting Enforceable Restrictive Covenants With Recruiters and Salespeople

- Temporal scope
  - New York courts have generally upheld post-employment noncompetes of six months or less, and post-employment nonsolicits of one year or less, as reasonable and enforceable. Restrictions of more than two years are usually suspect, unless they involve a business owner who sold the business.
  - Durations in between are largely subject to the discretion of the court in balancing the competing interests of the parties.
- Geographic scope
  - May be defined in terms of a geographic location (e.g., a certain mile radius or county) or business parameters (e.g., a particular set of clients or offices)
  - Should bear some relationship to where the recruiter or salesperson worked or to the jurisdictions the recruiter or salesperson serviced (e.g., the jurisdictions in which the recruiter is primarily making placements)
  - In theory, geographic scope should not be a concern in the context of nonsolicitation restrictions since those restrictions should be tailored to specific clients, employees, and candidates with whom the recruiter interacted or for whom the recruiter obtained confidential information

Considerations for Drafting Enforceable Restrictive Covenants With Recruiters and Salespeople

- Other drafting considerations and provisions for a restrictive covenant agreement
  - *Compensation During Restricted Period*. Courts much more likely to enforce a noncompete or restrictive covenant if the employee is getting paid during the restrictive period.
  - *Reason for the Employee's Separation*. Some courts have held that an involuntary termination of employment without cause precludes enforcement of a restrictive covenant, although other courts have held that whether an employee was terminated (with or without cause) or resigned is irrelevant for purposes of enforceability. New York law, for example, remains unsettled on this issue.
  - *Employer's Breach Not a Defense to Enforcement*. A provision that states that any cause of action the recruiter may have against the employer is not a defense to enforcement of the restrictive covenants. Important if the recruiter has a claim that the former employer breached the agreement.

Considerations for Drafting Enforceable Restrictive Covenants With Recruiters and Salespeople

- Other drafting considerations and provisions for a restrictive covenant agreement (continued)
  - *Tolling Provision*. Used to "toll" (or extend) the duration of the restrictive covenant during the period in which the recruiter is in breach of the restrictive covenant or the breach is being litigated.
  - *Injunctive Relief*. Include a provision that the employer is entitled to injunctive relief to prevent or stop a breach or threatened breach of the agreement.
  - *Attorneys' Fees*. Include a provision requiring the recruiter to cover the employer's attorneys' fees and costs to the extent the employer needs to enforce the restrictive covenants due to the recruiter's breach.
  - *Severability/"Blue Pencil*." Gives the court authority to modify an overly broad restrictive covenant in lieu of severing it in its entirety. While a court may blue pencil on its own (without a provision), a blue pencil provision increases the likelihood that the court will do so.

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