

Antitrust Scrutiny of Employment Practices

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Santa Clara, California
San Francisco Bay Area
Association of Corporate Counsel

Drinker Biddle®

Overview

- Governing legal principles
- 2014 Hi-Tech consent decrees followed by private class actions
- DOJ/FTC 2016 Guidance for HR Professionals
- Increased litigation following Guidance
- Steps to avoid antitrust exposure

No Poaching Agreements

Not about cooking food by submerging in liquid



No Poaching Agreements

Closer to illegal fishing or hunting



No Poaching Agreements

Employment Context:

Companies agree
not to hire each
others' employees



Key Antitrust Statutes at Issue re No Poach Agreements

Sherman Act Section 1, 15 U.S.C. § 1:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”



Criminal Penalties and Civil Remedies

- Can be a felony
 - Individual sentence up to 10 years in prison and \$1 million fine
 - Corporations can be fined the greater of up to \$100 million or twice the gain or loss
- Civil incentives: treble damages and attorneys' fees

Key Antitrust Statutes at Issue re No Poach Agreements

Cartwright Act, Cal. Bus. & Prof. Code §§ 16720-16770

- In general, the Cartwright Act prohibits the same type of conduct that violates Section 1 of the Sherman Act
- Generally, California courts look to federal Sherman Act cases for interpretation of the Cartwright Act



A Significant Distinction under the Cartwright Act vs. Federal Law re RPM Vertical Restraint

- Resale price maintenance agreements previously *per se* illegal under the Sherman Act and now evaluated under the rule of reason
- Unpublished opinions and California AG Antitrust Division's position is that vertical price resale price agreements remain *per se* illegal

Contract, Combination, or Conspiracy

- Agreement express or implied
- “Conscious commitment to a common scheme”
- “Gentleman’s agreement,” an “off the record conversation,” a “knowing wink”
- Direct or circumstantial proof (e.g., discussion of competitively sensitive information)



Per Se Illegality

Agreement among actual or potential competitors that requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice to be condemned



Per Se Illegality

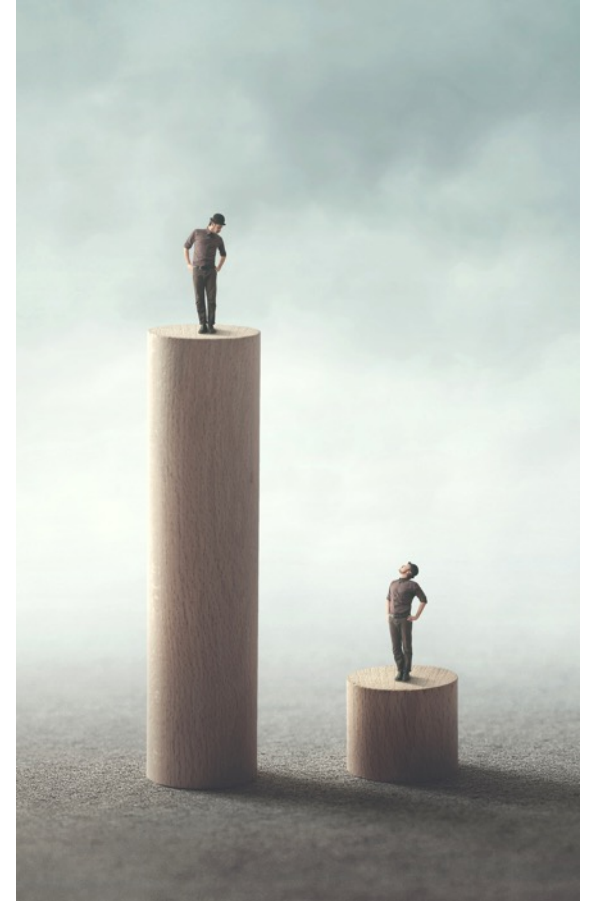
Classic examples:

- Price fixing
- Market allocation of geographic territories or specific customers
- Bid rigging



Rule of Reason

- Evaluation of whether there is an unreasonable restraint on competition.
- Analyzes the competitive effect of the restraint in a properly defined relevant product and geographic market.
- Balances the anticompetitive effects against the procompetitive justifications.



Enforcement Actions against Tech Companies that entered into No Poach Agreements

DOJ brought three civil enforcement actions against technology companies that entered into no poach agreements with competitors

- eBay and Intuit
- Lucasfilm and Pixar
- Adobe, Apple, Google, Intel, Intuit, and Pixar

Resulted in consent decrees in 2010

High-Tech Employee Antitrust Litigation

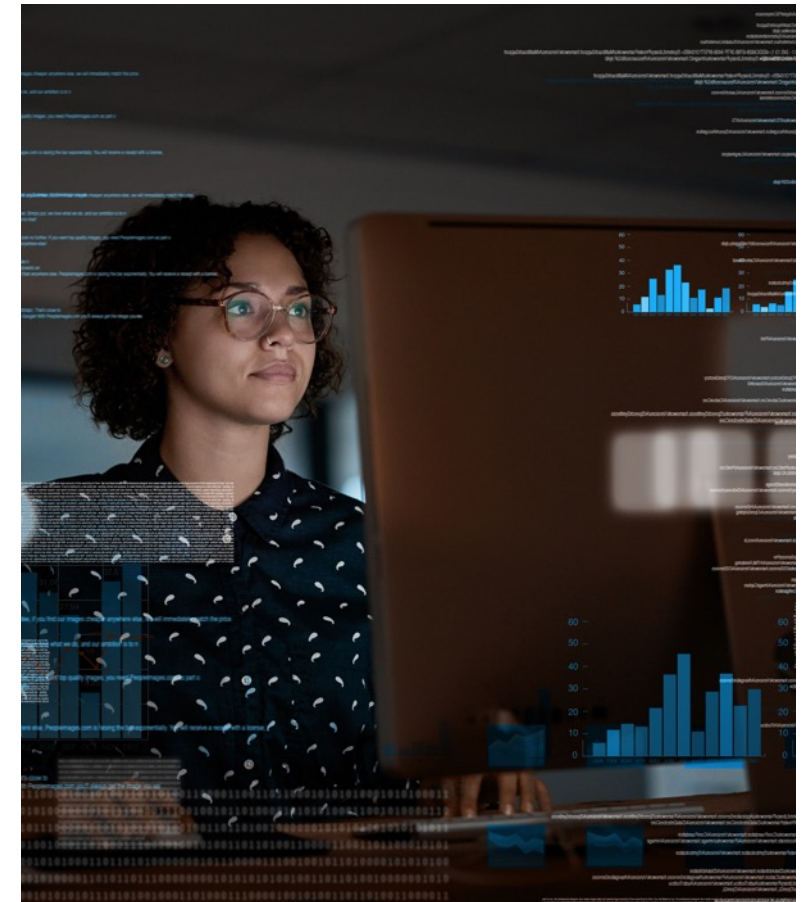
2011 Private plaintiffs' antitrust litigation under Cartwright Act:

Alleged “an interconnected web of express agreements, each with the active involvement and participation of a company under control of Steve Jobs...and/or a company that shared at least one member of Apple’s board of directors.”



High-Tech Employee Antitrust Litigation

- 2013 class certified of all employees (64,000) of defendants from Jan. 1, 2005 through Jan. 1, 2010
- 2015 settlement by 7 companies totaling \$435 million



In re Animation Workers Antitrust Litigation

- Claims that defendants conspired to suppress compensation by agreeing not to solicit each other's animation or visual effect employees and to coordinate compensation policies
- 2015 and 2016 settlements totaling \$150 million



2016 Guidance for HR Professionals

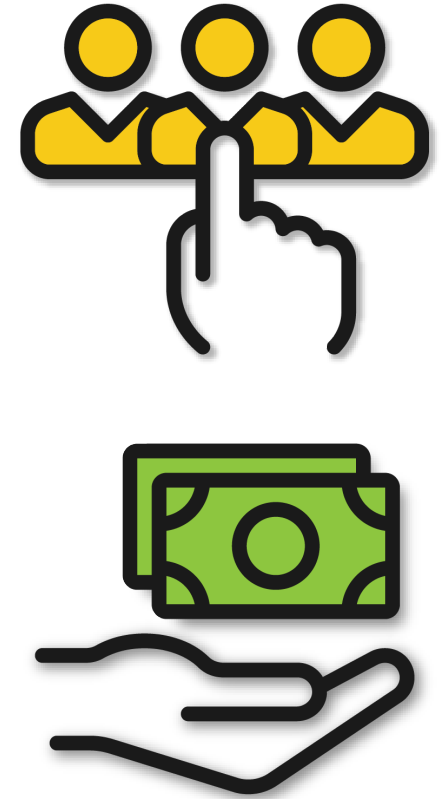
“The DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other’s employees.”

- Fines
- Imprisonment



DOJ/FTC 2016 Guidance – Definition of “Competitors”

- Not a traditional product market definition
- “Firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.”



2016 Guidance – Red Flags



Agreeing with another company:

- About employee salary or other terms of compensation, either at a specific level or within a range
- To refuse to solicit or hire that other company's employees
- As to employee benefits or other terms of employment

2016 Guidance – Red Flags



- Expressing to competitors that the companies should not compete too aggressively for employees
- Exchanging specific information about employee compensation or terms of employment
- Participating in a meeting, such as a trade association meeting, where the above topics are discussed

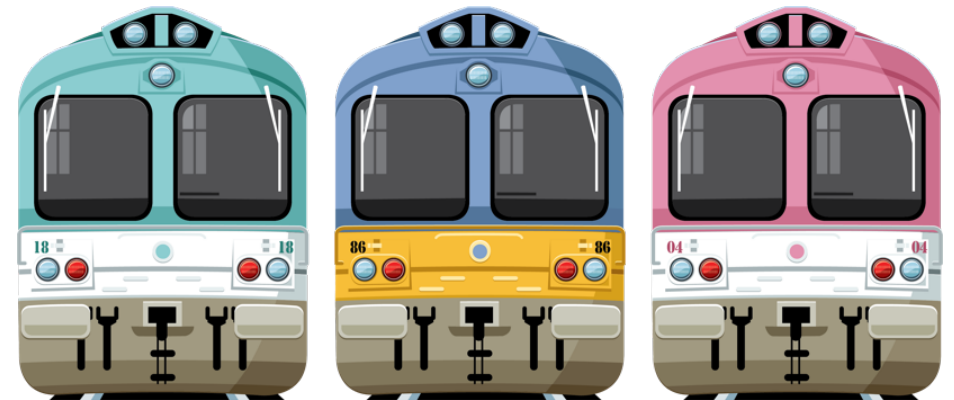
2016 Guidance – Red Flags



- Discussing the above topics with colleagues at other companies, including during social events or in other non-professional settings.
- Receiving documents that contain another company's internal data about employee compensation.

Railroad Employment Antitrust Litigation

- **2018 DOJ consent decree:**
Civil, not criminal, prosecution
because conduct ended before
October 2016 Guidelines
- **2018 Private litigation:**
2019 DOJ filing stating
case involves naked
no poach agreements and
per se violations



Duke and University of North Carolina Class Litigation

- No poaching of medical school personnel
- 2018: injunctive relief settlement by UNC (state action); class of medical school faculty certified and class certification denied as to non-faculty
- March 2019 filing by DOJ: apply *per se* standard
- May 2019 Duke \$54.5 M settlement



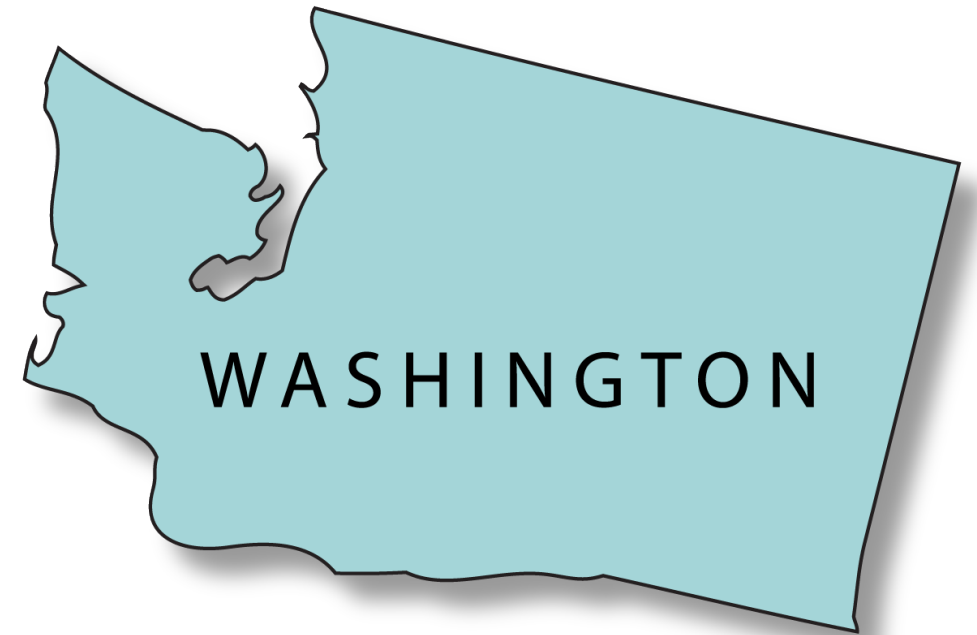
State Attorneys General Investigation

In 2018, Attorneys General from 10 states, including California, launched a joint investigation into the hiring practices of certain national fast-food companies.



Most Active: Washington State's Attorney General

- Announced goal is to eliminate the use of no poach clauses nationwide
- Since 2018, settlements from nearly 30 fast food chains to remove no poach clauses from franchise agreements



Washington AG Targets Additional 13 Industries

- Hotels
- Car repair services
- Gyms
- Home health care services
- Cleaning Services
- Convenience stores
- Tax preparation
- Parcel services
- Electronics repair services
- Child care
- Custom window covering services
- Travel services
- Insurance adjuster services

Settlements with additional 12 national chains

Fast Food Franchise Class Actions

- **Settled class actions:** Carl's Jr., Auntie Anne's, Arby's, and others
- **Pending class actions:** McDonald's, Domino's, Jimmy John's, Cinnabon, Shell, H&R Block Inc., Jackson Hewitt, Jiffy Lube, and others



Per se or Rule of Reason?

- Plaintiffs seek *per se* treatment
- Defendants argue **rule of reason**:
 - Like exclusive dealing and territorial agreements, absent market power, agreements promote interbrand competition
- Courts have denied motions to dismiss using intermediate quick look analysis, a form of truncated rule of reason

Per se or Rule of Reason?

DOJ intervenes in civil cases to file briefs supporting rule of reason standard:

- Vertical restraint in agreement between the franchisor and franchisee
- Restraint “reasonably necessary to a separate, legitimate business transaction or collaboration”

Per se or Rule of Reason?

- Expect the California AG and Plaintiffs' bar to argue for *per se* treatment under the Cartwright Act
- Recall *per se* treatment under the Cartwright Act for vertical restraint of resale price maintenance

Other Issues to Be on the Look Out: Wage fixing

- 2018 FTC settlement with staffing companies for colluding to lower the wages paid to therapists.
- Defendants agreed to lower their employee wages to the same level and attempted to persuade their competitors to follow their lead.



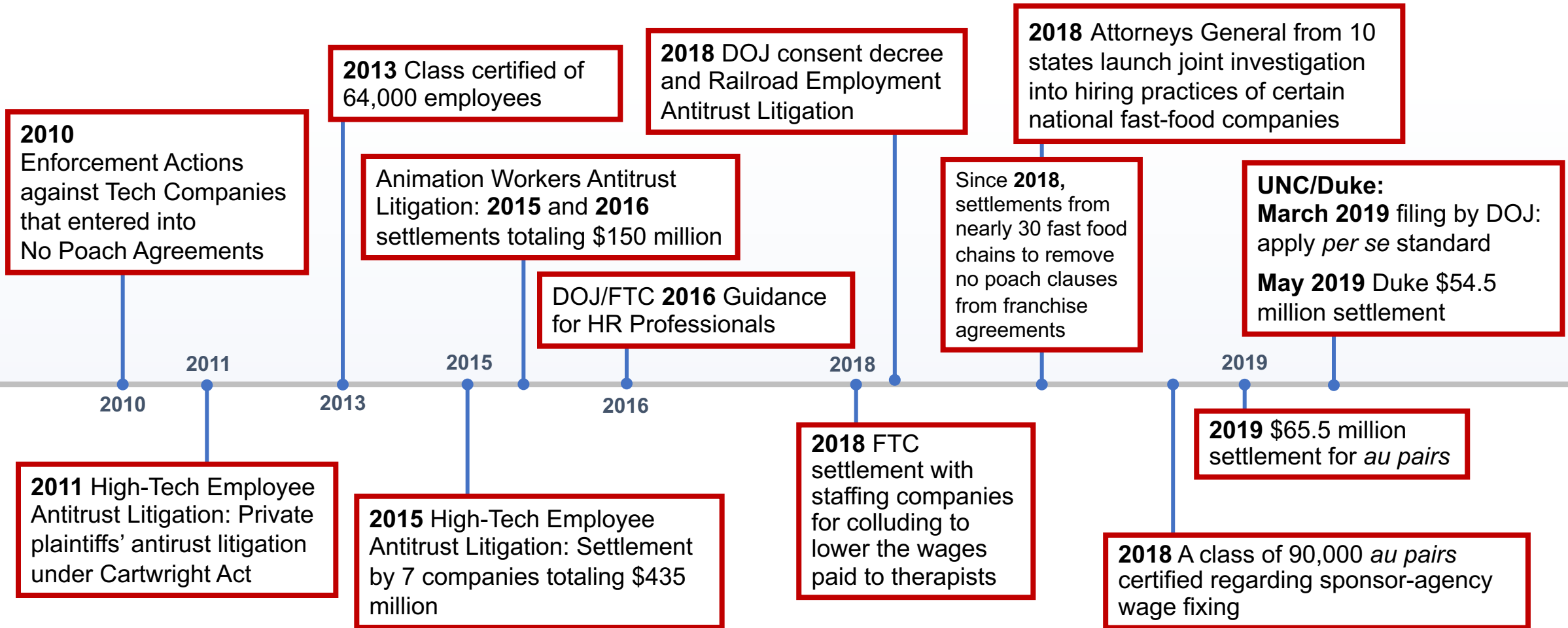
Other Issues to Be on the Look Out: Wage fixing

- 2018 Colorado federal court certified a class of 90,000 *au pairs* regarding claims that 15 *au pair* sponsor agencies entered into wage fixing agreement not to exceed the federally mandated minimum wage
- 2019 \$65.5 million settlement

Au Pair Wage Fixing Allegations

- Defendants' direct statements suggesting an agreement and statements that the wages would be the same at any agency
- Advertising wages at the same amount
- Loose statements at an industry event that the agencies did not want *au pairs* shopping for higher wages

Litigation Timeline



What to Do to Minimize Exposure

DOJ/FTC: Employers on notice after October 2016 Guidance

Audit employment-related contracts

- Does the company have any agreements containing a no poach clause?
- If so, evaluate whether the clause will be considered anticompetitive



May Be Permissible if Reasonably Necessary for a Lawful Objective

- Mergers or acquisitions
- Contracts with, *e.g.*, consultants, providers of temporary employees, resellers, and OEM's
- The function of a legitimate collaboration (*e.g.*, R&D)
- Settlement of legal disputes

Minimizing Exposure – Training

HR personnel, hiring decision-makers, and those involved in those involved in compensation decisions:

- Review the agencies' *Antitrust Red Flags for Employment Practices* in the 2016 Guidelines
- Review the FAQs in the 2016 Guidelines



Minimizing Exposure – Create or Update Antitrust Compliance Manual to Address

- No poach and wage fixing agreements
- Not sharing with other employers competitively sensitive employment information: *e.g.*, current or prospective wages, salaries, or benefits.
 - Any information sharing must be managed by third party, anonymized, aggregated with enough participants to prevent reverse engineering, and sufficiently historic.

Minimizing Exposure – Trade Association Activity

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

Adam Smith, The Wealth Of Nations, Chapter VIII, ¶ c 27, frequently quoted by Plaintiffs’ attorneys

Minimizing Exposure – Trade Association Activity

- Do not participate in a TA without an antitrust policy
- Discuss only those subjects on the meeting agenda
- Do not discuss competitively sensitive information at meetings or when socializing



If Considering Entering into a Agreement with Another Company Regarding Hiring, Evaluate

- The reasons for restrictions on hiring
- Whether the agreement is connected to the purchase or sale of assets or technology
- If the agreement is reasonably necessary to protect intellectual property, trade secrets or other protectable information

If Considering Entering into a Agreement with Another Company Regarding Hiring, Consider

- Whether there are there less restrictive means available
- Whether to consult with antitrust counsel



Questions?



Thank you!



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Paul J. Riehle (pronounced “really”) has litigated antitrust, RICO, and other complex litigation matters for more than 30 years. He has tried cases to verdict in federal court in California and Arizona, as well as in all but one county in the San Francisco Bay Area. Paul also provides antitrust advice and counseling, including on minimum advertised pricing for internet sales, in connection with mergers and acquisitions, and for trade and standard-setting organizations.

Paul is the recent past-Chair of the California State Bar’s Antitrust, Unfair Competition Law, & Privacy Section. He is a member of the Board of Representatives of the California Lawyers Association, the second largest voluntary bar association in the United States. He is a founding and current Board member of a 20-year old international humanitarian non-profit organization, has been a judicial arbitrator for more than 25 years, and serves as a mediator.