# Litigation over Employee 'No Poach' Agreements Continues to Pick Up Steam

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Companies sometimes enter into so-called “no poach” agreements: a pact not to compete for each other’s employees. If such a covenant is not reasonably necessary to any separate, legitimate business collaboration between those companies, the no-poach agreement is considered “naked.” Because they eliminate free competition, naked no poach agreements are per-se unlawful. In October 2016, the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) issued Antitrust Guidance for Human Resources Professionals (the “Guidance”) and an accompanying document called Antitrust Red Flags for Employment Practices (“Red Flags”). The Guidance and Red Flags were a warning to Human Resources professionals that “naked” employee no-poach agreements might be prosecuted criminally by the DOJ going forward.

Before October 2016, the antitrust agencies had typically pursued employment-related antitrust violations as civil antitrust violations. For example, the DOJ entered into consent decrees in 2014 with eight well-known technology-related companies that had reached reciprocal agreements to not “cold-call” or hire each other’s employees. The DOJ contended that these agreements violated Section 1 of the Sherman Act because the agreements were an unreasonable restraint of trade. The no-poach agreements allegedly eliminated competition and deprived employees of access to better job opportunities, compensation, benefits, and working conditions. The DOJ investigation eventually led to civil class actions against Apple, Google, Intel, Adobe, Intuit, Pixar, and Lucasfilm that ultimately settled for over $435 million in total.

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