Beyond the Mixed Signals: Noncompete Clauses and Other Antitrust Labor Issues in 2025

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Today's Presenters

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David Chiappetta litigates complex commercial disputes, focusing on antitrust and unfair business practice claims, class actions, and intellectual property (IP) matters. David also advises clients on issues relating to antitrust law and trade regulation, including joint ventures, pricing policies, product development, contractual and technological restraints, use of market power, and regulatory compliance.

David regularly advocates on clients' behalf before federal and state government enforcement agencies and represents clients in civil and criminal investigations. His handling of these matters is informed by his experience prosecuting cases for the Australian Competition and Consumer Commission (ACCC), where he gained significant insight into the mindset of a government regulator.

David also has extensive experience in the payments industry, having represented networks, processors, acquirers, merchants, and lenders for over two decades.

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Julie Lucht defends clients in employment discrimination and other employment-related litigation. This includes defending clients in class-action litigation and in lawsuits involving the Equal Employment Opportunity Commission. Julie also represents clients in arbitration, mediation, and other alternative dispute resolution proceedings.

Complementing her work as a litigator, Julie provides strategic counsel to clients, including drafting employee handbooks, separation and termination agreements, equal employment opportunity policies, sexual harassment policies, employee leave policies, reasonable accommodation policies, and employment contracts. She has particular experience with disability and leave law issues and frequently presents on those topics.

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Rolf Ali is an antitrust and competition lawyer with a focus on the technology, media, energy, and resources sectors.

Rolf advises clients from a variety of industries on all aspects of global antitrust and competition law. He has experience in EU and UK competition law, including multijurisdictional merger control, abuse of dominance issues, distribution issues, and anticompetitive agreements, as well as related EU regulations such as the Digital Markets Act.

Rolf has advised clients in a variety of sectors, particularly in relation to technology and digital markets.

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Marisa Ball is an associate in the firm's Antitrust & Unfair Competition practice, where she represents clients in complex class-action litigation as well as in government investigations. Marisa's litigation experience includes drafting pleadings and dispositive motions, managing discovery, taking depositions and preparing clients for depositions, negotiating the scope of government subpoenas, and developing case strategy and defenses.

Marisa is a graduate of the University of Chicago Law School, where she served on the Latinx Law Students Association board and was a student attorney with the law school's Employment Law Clinic and the Global Human Rights Clinic.

Marisa maintains an active pro bono practice, working on various immigration, asylum, and civil rights matters.

Agenda

1. Overview of Noncompetes
2. The Biden FTC's Noncompete Ban
3. Trump’s FTC Changes Course
4. State Law
5. EU and UK Perspective
6. Questions?

Overview of Noncompetes

Noncompete Overview

What is a noncompete agreement?

- Contracts restricting employees from joining competitors or starting similar businesses for a specified time/geographic area after employment ends.

What is their purpose?

- Protect business interests, trade secrets, customer relationships.
- Discourage employees from leaving to immediately compete using proprietary knowledge.
- Safeguard investments in employee training and business development.

Controversy?

- Critics argue noncompetes limit worker mobility and suppress wage growth.
- Often applied to low-wage roles or in situations where the protection isn't justified.

Noncompete Overview

Brief History of Noncompetes

- Over time, United States federal and state laws have evolved to regulate enforcement of noncompete agreements.
- Widespread public attention didn't arise until 2014, when Jimmy John's made headlines for requiring its sandwich makers to sign noncompete agreements.
- The Jimmy John's news led state attorneys general in Illinois and New York to each pursue and ultimately settle with Jimmy John's and to then pursue similar abusive uses of noncompete agreements.

Noncompete Overview

Current Status

- Recent years have seen dramatic swings in federal treatment of noncompetes, largely in response to changes in presidential administrations.
- The Biden FTC enacted a nationwide ban in April 2024, only for the Trump administration to reverse course and withdraw the ban.
- The FTC, however, has simultaneously increased targeted enforcement.
- As the federal approach to noncompetes continues to evolve, it's important to remember that states remain the primary regulators in this area, and state laws and enforcement still vary significantly across the country.

The Biden FTC's Noncompete Ban

Noncompete Ban

FTC Adopts Nationwide Noncompete Ban

- On April 23, 2024, the FTC under the Biden administration adopted its nationwide noncompete ban, in a 3-2 party-line vote under then-Chair Lina Khan.
- The rule would have prohibited virtually all new noncompete agreements and rendered most existing ones unenforceable starting September 4, 2024.
- Senior-level executives, however, would still be subject to the noncompete clause they may have signed, but the company can't create a new noncompete or modify the current one.

Noncompete Ban

Commissioner Ferguson's and Holyoak's Dissent of the Ban

- Both Ferguson and Holyoak authored individual dissents of the ban, joining one another's as well.
- Ferguson mainly dissented on procedural grounds:
    - The FTC lacked authority under the FTC Act to issue such a wide-sweeping rule.
    - Even if the FTC were empowered to issue the rule, such a delegation of authority would be unconstitutional and violate the separation of powers.
    - The rule "violates the basic requirements of the Administrative Procedure Act," including that the agency engage in "reasoned decision-making."
- Holyoak similarly argued that the ban is unlawful because Congress has not authorized the FTC to issue it, the Constitution forbids it, and it violates the basic requirements of the Administrative Procedure Act.

Challenges to the Ban

Legal Challenges to the Ban

- Legal challenges to the ban were filed almost immediately, and the rule was soon tangled in various federal litigation.
- On August 20, 2024, a ruling by a Texas U.S. district judge enjoined the ban nationwide, finding that the FTC exceeded its statutory authority and acted in an "arbitrary and capricious" manner.

The FTC's Appeal

- On October 18, 2024, the Biden FTC appealed the district court's decision to the Fifth Circuit.

Trump’s FTC Changes Course

FTC's Withdrawal of Ban

FTC Drops Its Appeal

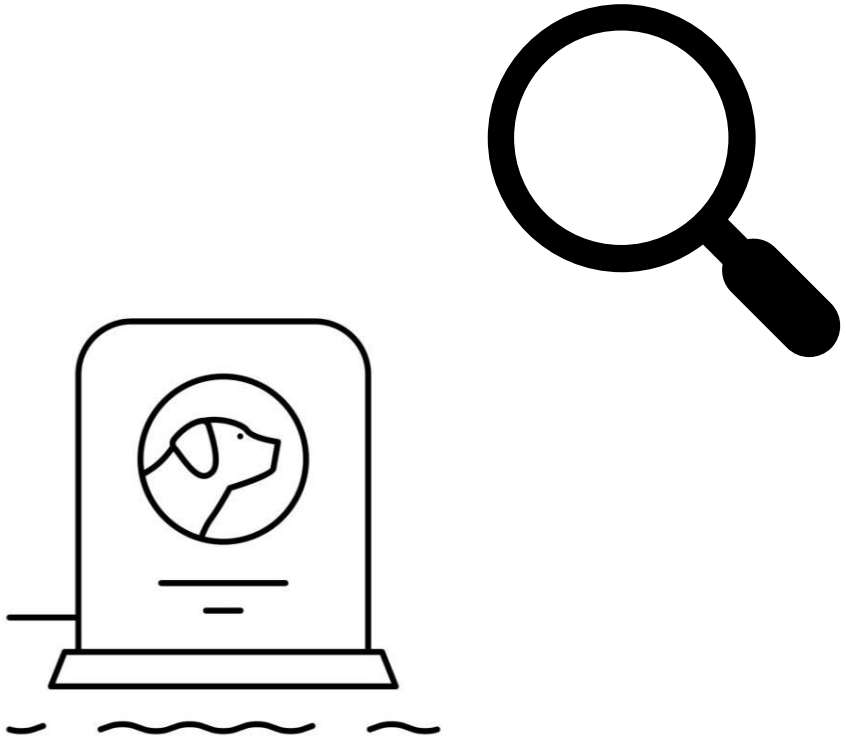
- As many legal experts anticipated, with Trump winning the election and Ferguson becoming FTC chairman, the FTC, on September 5, 2025, formally withdrew its appeal, thereby abandoning its challenge to the district court's ruling invalidating its noncompete ban.
- The FTC also acceded to vacatur of the rule, meaning the agency acknowledged, formally and legally, that the district court's decision to invalidate the rule stands.

FTC's Withdrawal of Ban

Ferguson and Holyoak's Accompanying Statement

- Chairman Ferguson issued a statement accompanying the FTC's decision to drop its challenge to the injunction:
  - Ferguson said the ban's "illegality was patently obvious" and "would never survive judicial review," adding that it constituted a waste of the agency's funding.
  - The FTC will stay vigilant "enforcing the antitrust laws aggressively against noncompete agreements," including by "patrolling our markets for specific anticompetitive conduct that hurts American consumers and workers, and taking bad actors to court."

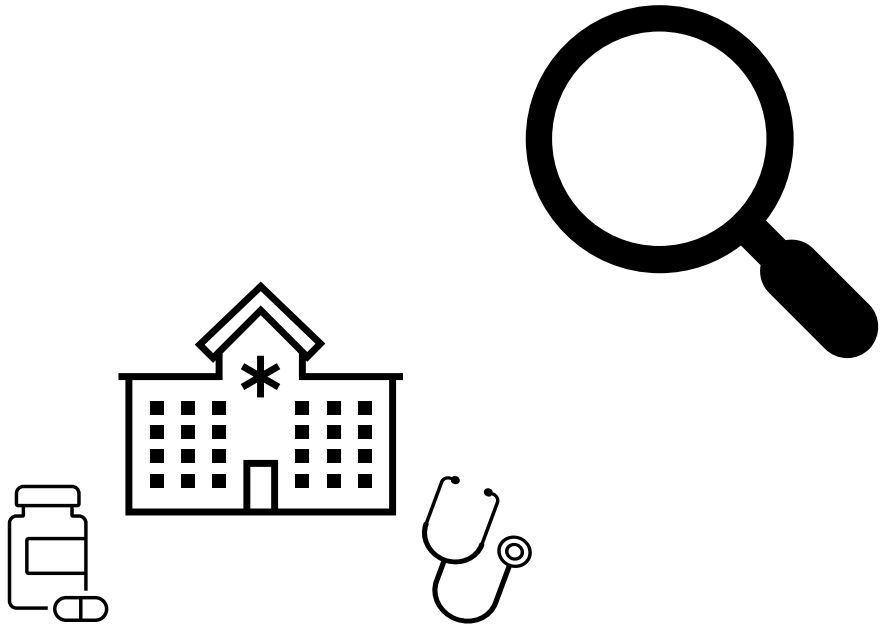
Increased Targeted Enforcement



Increased Targeted Enforcement: Pet Cremation Business

- As Chairman Ferguson promised, the FTC has already started targeted enforcement of noncompetes.
- Last month, the FTC ordered Gateway Services, the nation's largest pet cremation business, to stop enforcing noncompete agreements against its employees.
- Chairman Ferguson issued an accompanying statement:
    - He stated that Gateway's nationwide noncompetes' "vast geographic scope" was "overbroad" and that they also "apply indiscriminately to highly compensated executives and hourly workers in relatively low-skill positions alike."
    - He highlighted "the Trump-Vance FTC's commitment to enforcing the law vigorously against those who demand their employees enter into noncompete agreements so pernicious and so onerous as to make them anticompetitive."
    - He addressed "the fact-specific approach and considerations that govern the Commission's evaluation of noncompete agreements."

Increased Targeted Enforcement



Increased Targeted Enforcement: Healthcare

- On September 10, 2025, Ferguson sent letters to several large healthcare employers urging them to conduct a comprehensive review of their employment agreements—including any noncompetes or other restrictive agreements—to ensure they are appropriately tailored and comply with the law.
- Kelse Moen, deputy director of the Bureau of Competition and co-chair of the agency's Joint Labor Task Force, commented:
    - "Enforcement against unreasonable noncompete agreements remains a top priority for the Federal Trade Commission."
    - "We strongly encourage all employers—not just those receiving letters today—to review their contracts closely, to ensure that any restrictions on employee mobility are in full compliance with the law."

Request for Information ("RFI")

Public Inquiry Launched Regarding Anticompetitive Noncompetes

- On September 4, 2025, the FTC issued an RFI on employee noncompete agreements, launching a public inquiry to better understand the scope, prevalence, and effects of these agreements, as well as to gather information to inform possible future enforcement actions.
- Kelse Moen, deputy director of the Bureau of Competition and co-chair of the agency's Joint Labor Task Force, commented:
    - "We are asking the public to help shine a light on unfair and anticompetitive agreements."
    - "Unreasonable noncompete agreements have proliferated for too long in the dark. With the assistance of the employees and workers most burdened by them, the Trump-Vance FTC intends to uproot the worst offenders and restore fairness to the American labor market. We look forward to closely reviewing every response."

Making Sense of the Ferguson FTC's Actions

Apparent Contradiction

- How should businesses reconcile the FTC's formal withdrawal of its nationwide noncompete ban with its simultaneous ramping up of targeted enforcement and related RFI?
- What are the FTC's true intentions concerning noncompetes and protecting laborers' rights more broadly?

Making Sense of the Ferguson FTC's Actions

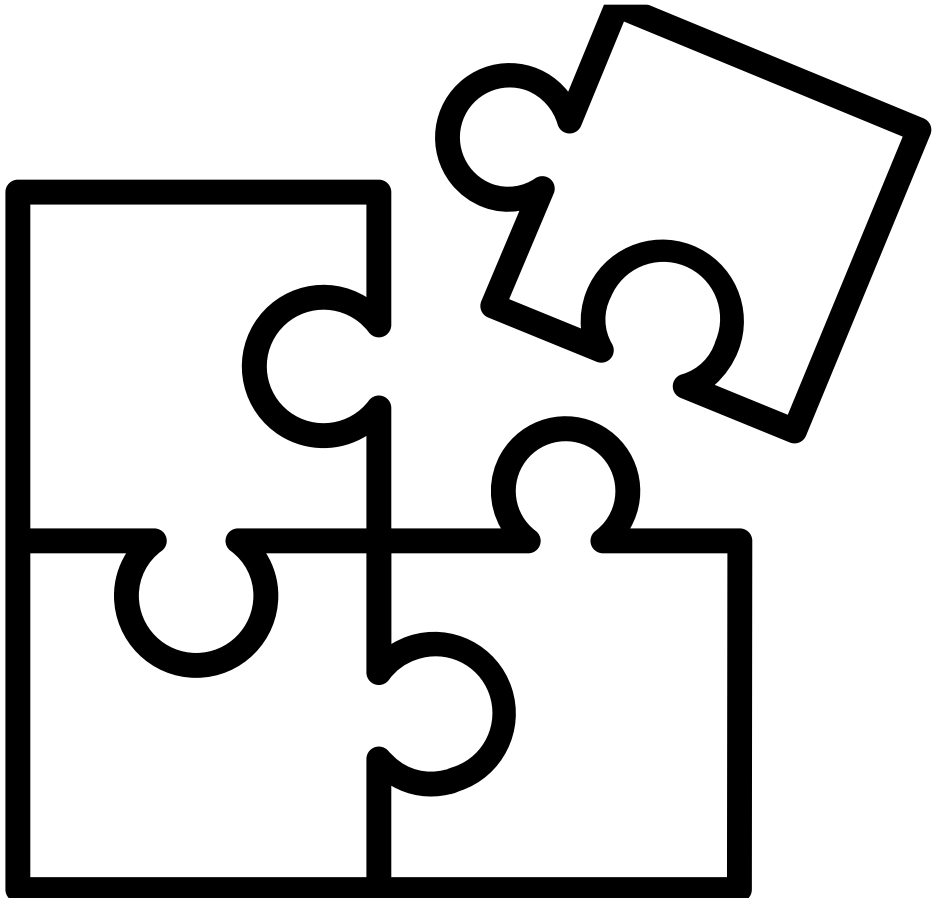
Continued Interest in Noncompetes

While the FTC did withdraw its nationwide noncompete ban, the agency has since consistently demonstrated that it remains committed to challenging overbroad noncompete agreements.

Pivot from Rulemaking to Targeted Enforcement

This reflects merely a tactical shift: Trump's FTC believes it lacks authority to make substantive regulations about labor practices, but it is eager to apply targeted enforcement efforts in certain markets and industries.

Making Sense of the Ferguson FTC's Actions



Likely Focus on Most Egregious Uses of Noncompetes

- The FTC is expected to focus on "quick wins" by targeting the most aggressive and indefensible noncompete practices while avoiding more complex cases, guided by the RFI responses.
- Enforcement will likely prioritize employers who impose broad noncompetes on large numbers of low-wage workers, especially with sweeping geographic or time restrictions.
- The FTC may also act against egregious practices, such as noncompetes before mass layoffs or clear violations of state law.

U.S. Labor Law

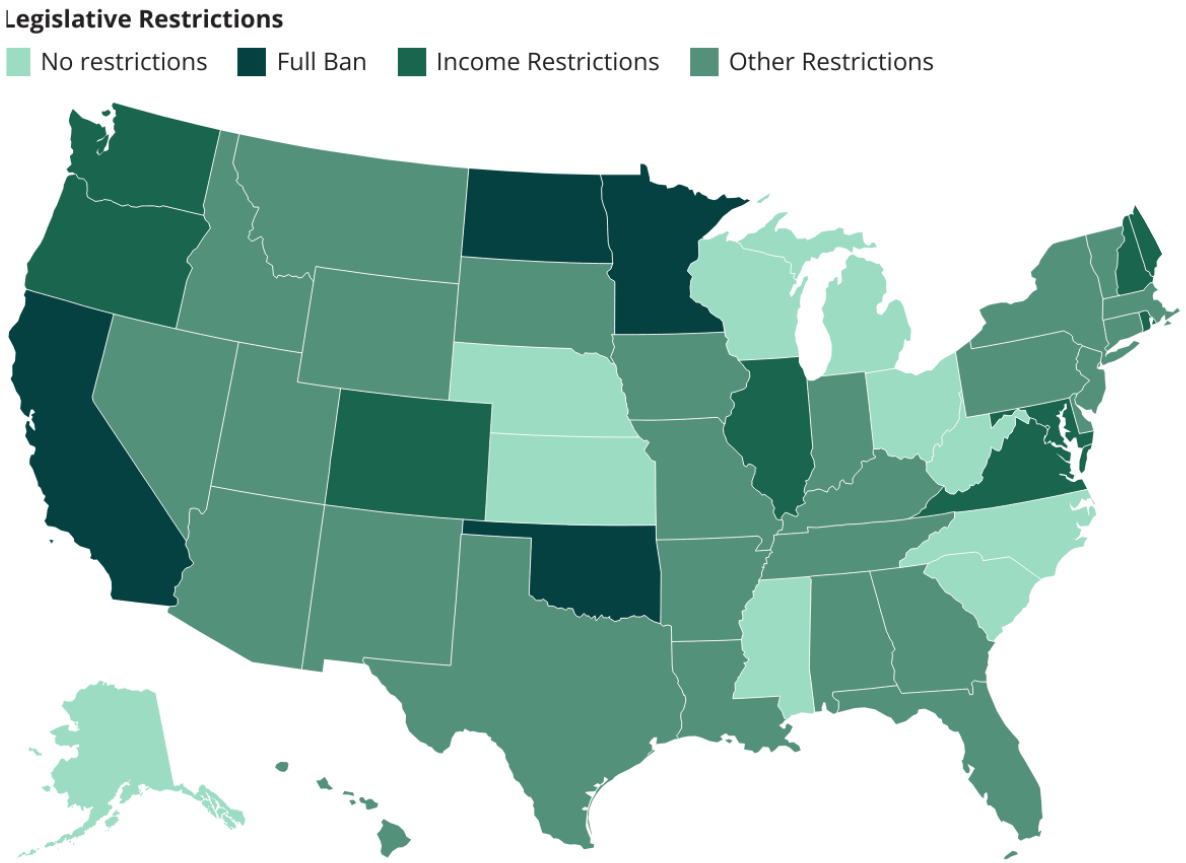
The NLRB Flip Flops

Like the FTC, the National Labor Relations Board (NLRB) Changed Its Position on Noncompetes Under the New Administration

- On May 30, 2023, the then general counsel of the NLRB issued guidance that, except in limited circumstances, noncompete agreements violate federal labor law because they interfere with employees' exercise of rights under the National Labor Relations Act (NLRA).
- Under the Trump Administration, on February 14, 2025, this guidance was rescinded, and the NLRB is unlikely to broadly challenge noncompetes under the current administration.

State Law

State Law



Map: Economic Innovation Group

State Law on Noncompetes

- Noncompetes are primarily governed at the state level.
- Currently, four states ban the use of noncompetes entirely, and 34 states plus DC restrict their use. See the map for more details.
    - "Full Ban": Do not allow any noncompetes in an employment context but may have exceptions for the dissolution of a partnership or the goodwill sale of a business.
    - "Income Restrictions": Use an income threshold to determine which employees may be subject to noncompetes and may or may not have additional restrictions.
    - "Other Restrictions": Includes any industry-specific bans, statutory limits to the scope of agreements, or any other limits on noncompetes short of a full ban that are not based on income.
    - "No Restrictions": Have no laws on the books defining when a noncompete is valid, except for undefined requirements that they are "reasonable" or in writing.

State Law

States' Approaches to Noncompetes

The situation in the states is also fluid, as seen in several recent changes enacted by state legislatures...

Approach to Noncompetes	Recent State Examples
Medical Professional Restrictions	**Arkansas, Colorado, Indiana, Louisiana, Maryland, Montana, Oregon, Pennsylvania, Texas, and Utah** – each recently passed new restrictions or prohibitions on the use of noncompete agreements for medical professionals. Effective dates include **Jan. 1, 2025 (LA, PA)**; **May 7, 2025 (UT)**; **June 9, 2025 (OR)**; **July 1, 2025 (MD, IN)**; **Aug. 5, 2025 (AR)**; **Aug. 6, 2025 (CO)**; **Sept. 1, 2025 (TX)**; and **Jan. 1, 2026 (MT)**.
Prohibitions on Use for Lower-Wage Employees	**Virginia** – previously limited its ban to certain low-wage employees; **effective July 1, 2025**, Virginia expanded the ban to **all employees subject to overtime requirements**.
Complete/Nearly Complete Ban	**Wyoming** – enacted a law making **new noncompetes unenforceable as of July 1, 2025,** unless used to protect **trade secrets** or applied to **executives and management personnel** or their professional staff.
Outlier – Enhancement of Noncompetes	**Florida** – enacted the **CHOICE Act**, effective **July 3, 2025**, strengthening noncompete agreements, including **restricted periods up to four years** for some employees.

State Law

Examples of State Enforcement Actions

Washington: In 2022, the Washington AG launched an investigation into Tradesmen International LLC, a staffing services provider, for engaging in unfair and deceptive noncompete practices, which included preventing workers it assigned to worksites from pursuing permanent employment with those employers, thereby limiting job mobility. The investigation resulted in Tradesmen International entering a consent decree requiring it to eliminate such noncompete agreements and pay $287,100 in restitution.

Illinois: In 2024, Illinois AG took action against Valvoline, an auto service and oil change company, for allegedly requiring hourly employees to sign noncompete agreements preventing them from working in the oil change business within 100 miles of a Valvoline store within a year of leaving the company. Valvoline entered into a settlement, under which it agreed not to require workers to sign noncompete agreements. If Valvoline violates these terms, a $500,000 penalty can be sought.

Practical Implications: U.S.

Practical Implications

What Should Employers Do Now?

- With the FTC's shift from broad rulemaking to targeted enforcement, the enforceability of noncompetes under federal law now turns on the specific agreement terms, the justification for their use at different employee levels, and compliance with varying state laws.
- Even if compliant with federal law, the variance in state law—including several jurisdictions that ban noncompetes outright—makes standardized nationwide agreements effectively impossible.
- As a result, employers should:
    - **Consult legal counsel** to review all existing noncompetes for compliance with federal and state law.
    - **Limit noncompete clauses** to positions where they're truly necessary and in jurisdictions where permitted.
    - **Avoid using noncompetes for low-wage employees** even in jurisdictions where permitted, unless there's a strong, well-documented business justification.

EU and UK Perspective

EU: The Limits of Competition Law Re Employment Contract Noncompetes

This is why labor contract noncompetes are not in scope of EU competition rules …

EU Competition Law

Agreement between undertakings?

No

Yes

Noncompete directly related and necessary for an agreement (Ancillary Restraint)?

- Certain (limited) noncompetes

No

Restriction of competition?

- No poach
- Wage fixing

Yes

Outweighing pro-competitive effects?

\+ Labor-related competitively sensitive information (CSI)

EU: Is the (Labor) Agreement in Scope of Competition Law?

Subject of EU competition rules: "undertakings"

Employees/workers

- No "autonomous economic activity" in the sense of offering services on a market
- Part of their employers' undertakings (or "economic units")
- Noncompete clauses in employment contracts regulated under EU member state labor laws

Distinction blurs in the context of:

CBAs

&

"Acqui-hires"

"Undertaking"

Any entity engaged in economic activity, irrespective of its legal status or the way it is financed

- Economic activity: offering goods or services on a market in return for remuneration and (actually or potentially) competing with others
- Liberal professions if there is no employment relationship—e.g., self-employed accountants, pharmacists, doctors, musicians
- Limits scope of possible EU competition enforcement to labor-related agreements between companies— e.g., noncompetes between companies (including in connection with JVs), no-poach and wage-fixing agreements

Broad EU competition law principles apply to labor-related issues.

EU and UK: Specific Issues in Collective Bargaining Agreements

CBAs provide for a rare overlap between employment contracts and EU competition law

- ECJ: Immunity from competition law for CBAs between associations of workers (unions) and employers
  - Conditions: agreement (1) entered into in framework of collective bargaining between employers and employees and (2) contributes directly to improving employment and working conditions
  - Collective agreements concluded by self-employed workers in situation comparable to that of employees are outside prohibition of cartels

1999 "Albany exception"

- *EU Guidelines on Collective Bargaining Agreements*
  - Rapid expansion of digital platforms and the "gig economy" blurring distinction between "worker" and "self-employed"
  - Certain self-employed persons in a comparable situation to employees and therefore benefit from the exemption for CBAs, namely solo self-employed persons who:
    - Are economically dependent in that they provide their services predominantly to one counterparty
    - Work "side-by-side" with workers and perform similar tasks for the same counterparty
    - Work through digital labor platforms they depend on (esp. for reaching customers)

2022 expansion of the Albany exception

Expanding CBA exception to certain self-employed persons blurs EU competition law distinction between worker and undertaking.

EU and UK: Does the (Labor) Agreement Between Employers Qualify as an "Ancillary Restraint"?

Labor noncompetes between companies allowed subject to certain (strict) conditions

- Ancillary restraint: directly related and necessary to implementation of a main operation
  - Necessary: (1) objectively necessary for implementation; (2) proportionate to it (duration, substantive scope, and geographic scope do not exceed what is necessary)
  - Applies to noncompete clauses necessary to ensure viability of a transaction (and are of proportionate duration and scope)

NB. various jurisdictions (notably Germany) apply stricter criteria

- In mergers/JVs, for example, non-solicitation clauses if necessary for the transaction (e.g., if certain employees' know-how is important to guarantee the full value of the assets transferred)
  - Rule of thumb: clauses can restrict the seller from hiring employees of a target for up to three years
    - KingFisher/Wegert: SPA non-solicitation clauses for key managers of the target
    - ICI/Williams: obligation not to solicit certain Williams employees within two years of closing

- In principle, the same rule applies for non-merger agreements/transactions (e.g., non-concentrative JVs)

EU and UK: Does the (Labor) Agreement Between Employers Restrict Competition?

Labor noncompete/no-poach agreements usually considered restrictions of competition "by object"

Food Delivery Services (2025)

Facts	• Delivery Hero minority investment (15%) in Glovo, gradually increased until acquisition of sole control in 2022 • **Labor collusion:** reciprocal (1) SHA no-hire clauses re "key employees" and (2) general non-solicitation clauses—without specified duration or territory • **Non-labor collusion:** (1) Delivery Hero board member shared Glovo's documents and CSI; (2) Delivery Hero used shareholding to influence Glovo's business strategy (incl. aligning geographical footprint); and (3) excessive staff ties
Decision	• No-hire obligations not objectively necessary or proportionate: (1) unlimited duration and territory; (2) de facto reciprocal—i.e., beyond what was required to protect investors' interests in Glovo; and (3) did not apply to all investors • Fined €329 million for exchange of CSI, market allocation, and employee no-poach agreements

Wider collusive arrangement but *"[e]ach of the no-poach, information exchange and market sharing infringements constituted a single and continuous infringement on its own."*

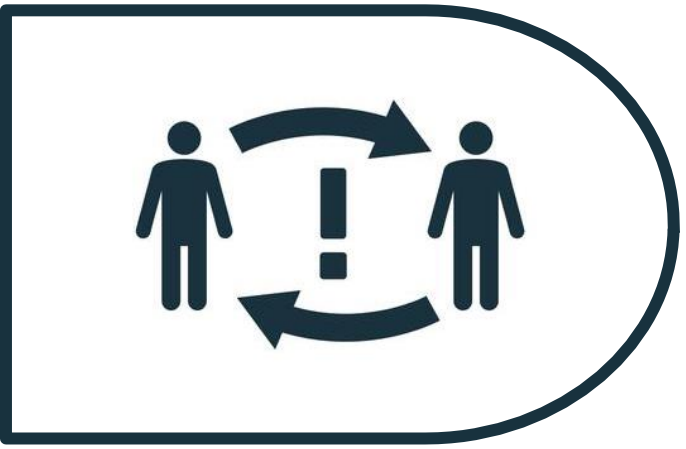
IT Services (2025)

- Four French engineering, tech consulting, and IT services companies fined €29.5 million for HR collusion
  - Gentlemen's agreements to refrain from (1) soliciting and hiring each other's employees; (2) poaching (direct solicitation) and hiring (spontaneous application) business managers
  - Talent hiring "*an essential competitive parameter in the labor markets in which the companies are active*"
  - Certain non-solicitation clauses that were targeted and limited in duration were dropped from the investigation

Standalone no-poach infringement!

CMA Guidance: *Employers advice on how to avoid anti-competitive behaviour* (2023)

EU and UK: Labor-Related Information Exchange Between Employers



Assessed on the same principles as other (potentially anticompetitive) conduct

- Wages and benefits typically considered direct operating costs of an undertaking (i.e., CSI)—for example, airline pilot wages, schoolteacher salaries
- M&A due diligence: target value preservation and day-one readiness vs. limits on sharing CSI (incl. re workforce and labor arrangements)
- Delivery Hero/Glovo and the French IT services companies all exchanged CSI to facilitate coordination
- Exchanging labor-related CSI can, by itself, be anticompetitive—e.g., Dutch Mobile Operators (2009):
    - Dutch mobile operators discussed reducing standard dealer remunerations at a single meeting
    - Shared nonpublic information re certain commissions paid to dealers
    - ECJ: the mere likelihood of the practice negatively impacting competition sufficient to conclude that competition laws had been breached

EU and UK: Specific Issues Regarding Acqui-Hires

Merger enforcement gap concerns have drawn attention to acquisitions of highly-skilled employees like AI developers

- **Microsoft/Inflection (2024):** hire of Inflection's co-founders and most of its staff but no tangible or intangible assets besides a non-exclusive IP license
- German FCO: Hiring highly-skilled employees can transfer the competitive potential of a company (notably in AI development)—de facto takeover of Inflection, subject to German merger control (but insufficient revenues to trigger thresholds)
- CMA: "*acquired the collective know-how of Inflection's pre-transaction activities – which in and of itself may be sufficient to constitute an enterprise*" (CMA cleared in phase 1)
- EC: transfer of Inflection's market position for generative AI FMs and chatbots, leading to a "*structural change in the market*"

EU: "concentrations between undertakings"

- EUMR not limited to specific acquisition structures but potential issues with revenue attribution
- Less likely to trigger for individual (or smaller groups of) employees but conceivable for transfers of (nearly) all employees

UK : "enterprises ceasing to be distinct"

- CMA: "… *the transfer of assets or employees alone may be sufficient to constitute an enterprise*", e.g., if "*a group of employees and their know-how, enables a particular business activity to be continued.*"
- Eurotunnel: combination and continuation of business activities

- Potential factors: sector relevance of talent; proportion of employee base transferred; other assets transferred; collective know-how transfer vs. direct hiring of individuals; mutual alignment to merger (e.g., Inflection waived its right to challenge hirings).
- But still raises various questions—e.g., can employees be (reportable) "assets," and if so, who is "selling"? tensions with fundamental rights protections on free movement and freedom of occupation; can a transfer be "on a lasting basis" if employees can terminate their contracts at will?

Practical Implications: EU and UK

Employment contracts and collective bargaining

Divergence from U.S. antitrust law: noncompetes in employment contracts generally not in scope of EU and UK competition law

Differences at EU and EU member state levels: "pure" employment contract issues dealt with at national level

Noncompetes between employers

Context is everything: Ancillary restraints in certain contexts, hardcore cartels in others

Watch cross-sector rivalry for talent: a company in a different industry can still be a "competitor" for talent

Individuals who are "the business"

People who cannot be hired? Does the logic of acqui-hire cases mean that certain employers cannot hire certain talent?

Questions?

Perkins Coie

