**Podcast Transcript**

# The Emerging New Era for Noncompetes and Trade Secrets: Nationalizing Competitiveness and Noncompete Law: Criminal Antitrust and Federal Efforts to Curtail No-Poach and Noncompete Agreements

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Rubenking: The restriction and legislation of noncompete agreements is gaining traction around the country. In July, President Biden signed an executive order that discussed the regulation of noncompete agreements, which in the past has only been the province of the states. To stay ahead of the game, both employers and executives need to know what changes to expect and how to best prepare for the future. To help bring all this into focus, we've created a six-part series called The Emerging New Era of Noncompetes and Trade Secrets. I'm Randall Rubenking and you are listening to BakerHosts.

Our fifth episode, Nationalizing Competitiveness and Noncompete Law: Criminal Antitrust and Federal Efforts to Curtail No-Poach and Noncompete Agreements, explores the executive order issued by President Biden in July, aimed at regulating noncompetes and the fallout that has followed it.

Our guests today are partners Joyce Ackerbaum Cox, Ann O'Brien, and John Siegal, members of BakerHostetler's Noncompete and Trade Secrets team. Let's listen in.

Cox: Good afternoon. My name is Joyce Ackerbaum Cox. Welcome to part five of our six-part series that we have called Nationalizing Competitiveness and Noncompete Law, Criminal Antitrust and Federal Efforts to Curtail No-Poach and Noncompete Agreements. It is a mouthful, and we have some very interesting information for you here today together with John Siegal, who sits in our New York office.

He and I co-chair the Baker Hostetler Noncompete and Trade Secrets group, and we are very lucky to have with us our esteemed partner, Ann O'Brien, who is going to lead our segment today. Ann is actually an antitrust lawyer in our Washington, D.C. office, and among many other things, she is the leader of the Cartel and Government Antitrust Investigations Task Force here. And before joining Baker, she was with the Department of Justice's Antitrust Division, notably as the assistant chief of two sections and as the acting director of Criminal Enforcement.

So, she has got unique insights into this area, an area that she and I collaborate with a lot of our clients. It puts the fear of God into a lot of people. So without further ado, I'm going to start this program and bring Ann into the conversation, and as an opener, Ann, I'd ask you to just tell us about the recent focus on labor and the Federal Antitrust and Competition Bill.

O'Brien: Thanks Joyce, and we are really busy. I'm really busy, you all are really busy, we're really busy at Baker dealing with no-poach and noncompete issues at the federal level, dealing with criminal cases as well as civil cases, and so there is a bit of disclaimer needed here, that all that experience, whether the DOJ and in private practice as this issue has kind of evolved and come to the forefront. I also need to give a disclaimer really, that the views are really my own and not of course any of our clients or Baker, or back to my DOJ days. I guess a double disclaimer that I'm not divulging anything from, that is not public from my experience there. But how did we get to where we are?

Why are we even having this webinar today? You know, there is a real recent focus, but there is really a history that I think both John and I will talk about, that how we got to where we are today started really during the Obama administration, which as we all know, now President Biden was the Vice President. I will say I experienced firsthand when I was at DOJ that he had a keen focus on labor, and that was a priority in the Obama administration which the Vice President's office really spearheaded. And now President Biden, then Vice President, was really a critic of no-poach agreements. And then in 2016, there was the first kind of public pronouncements by a joint guidance from the DOJ and FTC that was antirust guidance for HR professionals, and it was really geared at HR professionals, just sensitizing them to those issues, and it laid out what the competition issues are relating to hiring in the HR front, and it went through some examples.

And while it was intended for that audience, the part that really jumped out to people and how I kind of spent a lot of time on this odyssey since then, is that the DOJ said that going forward, the DOJ intends to proceed criminally against naked wage fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product places or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. So, what they did then, the DOJ, was announce it would criminally prosecute any naked, and what does naked mean? If you need to say naked, is it per se?

That is a big substantive legal question in the antitrust world, but wage fixing and no-poaching agreements that continued, and this is important, after 2016. So, this pronouncement, this announcement goes out. They took the public position, the Antitrust Division, that if there was alleged agreements to not poach each other's customers, and those existed but continued after 2016, they would be subject to criminal prosecutions. So, there is a really procedural retroactivity, their applications, and so then the Obama administration ends. The antitrust division leadership comes in, the political leadership and the Trump administration, and they really doubled down on the guidance.

There was a question what will happen, but they doubled down, and the political head, the Assistant Attorney General at the time, he was promising that criminal cases were imminent. And then everyone waited four years. And then I left the government and I came into private practice, and Joyce and many others have brought me in to kind of really say, these are coming. These cases are coming. They're going to do this criminally, and that was hard for a lot of people to swallow, to say this is stuff that has been litigated in the employment context. I know, narrowly tailored. It is just nonsolicit. It is not noncompete. Well, those cases came in the criminal context. In 2020 we had a series of cases, three cases, in rapid succession in 2020.

Still, the first ones were brought under the Trump administration, but they continued three of the first four cases in the medical field, healthcare services involving outsourced nursing contracts involving therapists, and there was a wage fixing case first in Texas. And then there were three no-poach cases, and a recent case brought that expands beyond the healthcare field into the aerospace industry, and so what is really remarkable here is, with all the political division that we've seen as a country, for some reason this issue has stayed on the forefront and really become a fixation, I would say.

Not a focus, you can call it, but a fixation to bring these cases and seek them out and bring federal criminal cases against individuals and companies for alleged agreements not to poach each other's employees, whether written or unwritten. They're going after unwritten, but I'm not sure the DOJ Antitrust Division would say that they wouldn't proceed if there were a written agreement in place. And so that has continued now through three administrations as policy, and two having brought cases, so we don't know where this necessarily will go. Those cases, the three no-poach cases, criminal cases, first three ever brought, now we have a fourth.

Motions to dismiss are pending in those cases, and they are argued by former solicitor generals and fantastic partners like ours that are arguing these cases, and we don't know what these judges are going to do. And even if the judges deny the motions to dismiss, these are going to be very interesting trials with never before litigated issues that are very difficult in this new area. So, we don't know exactly where we're going, and that could take a long time to play out. But we do know we're here now and these cases aren't going away quickly, and we have to anticipate more.

Cox: So, it is very interesting that this guidance came out in 2016, and then of course there wasn't much buzz about it at the time that it came out. And then obviously 2020 and thereafter, we've seen a lot of activity in the area. Are these cases that you're seeing being brought like other criminal antitrust cases? And do you have any sense of how they will play out in addition to what you just stated about the motions to dismiss? So, let's get past that, beyond that, and then what happens?

O'Brien: Yeah, it is very interesting, and there is a lot to be determined, and I think how judges react to this at the district court level, how juries react in the criminal context, at the beyond a reasonable doubt standard, and then ultimately if convictions, how appellate courts view this, is going to be very interesting. And the rub is exactly what you asked about, the DOJ will say what we're observing in these, and it is in public motions to dismiss, and two of them there has been oral arguments.

You see the DOJ saying, nothing to look at here that is not different. This is market allocation, so no-poach agreements or market allocation and wage fixing is price fixing. And in the first case, the *Jindal* case, there was recently an opinion where a judge bought on to the price fixing is the same as wage fixing. I don't think that is as big a leap personally, as no-poach agreements are market allocation. The Sherman Act has been around since 1890. There's never been other cases. These are the first criminal application of the Sherman Act in this context. That is a long darn time. There is no relevant on all force case law.

The DOJ is drawing on civil case law, and the defense side of the motion to dismiss are, these are very different, and market definition is typically an issue in antitrust cases, but not in criminal cases. In a rule of reason type case which many of the defendants are arguing should apply, but they're saying the market is labor. That is what DOJ's mantra is, the market is labor. And the defense side is saying, people aren't widgets. You can't, this is very nuanced and different in every industry. So, I think it is going to be very interesting how judges, and we've heard some different pushback from the different judges that had oral argument, how judges will rule on that, and then how juries will take that.

And I think it is ultimately, we're going to see how they all come out, but in the meantime the antitrust division is, I call it, quadrupling down on it. Now they're bringing these cases aggressively and they're expanding it. So we're in this flux situation where we don't have clarity in the law, but we need to continue as lawyers to advise our clients and as businesspeople, to continue on doing the work we do with this cloud of uncertainty in these cases.

Cox: Well, I think that a lot of the uncertainty makes people uneasy, particularly because, and I don't know if you can speak to this, but who specifically is being indicted? Who is justice pointing the fingers at in terms of these criminal cases? They're not all, it is not always the CEO, right? I mean, there's people at varying levels.

O'Brien: That is right, and you also, we talk about compliance training and bringing in HR officials, anyone with hiring authority in the hiring chain. They're all fair game. We've been told, without divulging specifics, but we've been told by DOJ those are subjects too. So, it certainly could be CEOs, presidents, if they have alleged agreements, but if can go much deeper in the company, including to HR. We have not seen public examples of HR personnel cases being brought specifically, but we are told by DOJ in these matters that they are subjects so we cannot rule that out.

Cox: Particularly because they are oftentimes involved in the negotiations with respect to hiring or and/or not hiring and/or dealing with placement companies and those sorts of things, so that is something certainly that we're going to watch. I'm going to shift to John now if I could, and John, I want to talk a little bit about the FTC and what we see coming out of the FTC and the Biden administration specifically with respect to this kind of intersection of competition and noncompete in labor markets. Can you speak to that?

Siegal: Well, I can speak to what has happened on that _______ predicting business, and I can't see behind the curtain, but there has basically been two steps taken thus far. The first was the Biden executive order, that in this particular area directed the Federal Trade Commission to take steps to curtail the use of unfair noncompetes. The only follow-up publicly from that, at this point that we're aware of, is a joint FTC and the Department of Justice workshop that happened at the beginning of last month, December, on making competition work, promoting competition in labor markets where there was a fairly general level discussion about the impact of noncompetes in competition and labor markets, and particularly on the research and data gathering that would have to go into, to justify regulation or other action in that area.

So, there's really three issues as I see them, right? One, what does it mean to curtail noncompetes? That can range from everything to prohibiting them, to limiting them, to offering guidance on how they should be used, no tipping of the hat as to where the FTC is going in terms of the reach of what it may do. Secondly, what are unfair noncompetes? Many of us argue all the time that there are applications and uses of noncompetes that aren't unfair that fall within the customary rule of reason analysis, and so what the FTC will deem to be unfair is obviously the big issue. And then thirdly, then sort of underlying all of this, is what is the impact of noncompetes and other restrictive agreements on labor markets?

I think the underlying theory of regulation or action here is probably most succinctly stated by Tim Wu, who is the President's advisor, the Columbia Law professor now working in the White House who wrote in his book, *The Curse of Business*, today concentrated economic power is used to avoid raising wages, to insist on intense conditions of employment, to abuse noncompete agreements. The more power a firm or industry enjoys, the easier it is to prevent employees from getting too much in returns.

Well, based on that, I think it is reasonable, it is logical to expect that noncompetes would be more prevalent in highly concentrated industries. But it is not clear that that kind of sectoral concentration or analysis and its impact on the use of noncompetes in the marketplace is the type of research that is going to be the basis finding potential FTC action or rulemaking, nor perhaps is there a sufficient research record or empirical record to act on those issues.

Cox: So, a lot of uncertainty in this area as well? What are some of the issues or concerns that can be raised or are being raised with respect to a potential FTC action?

Siegal: Yeah, and look, I'm not in the predicting business. Maybe I'm being a little bit more of an advocate than an analyst here, but clearly any action by the FTC in this area that has customarily been governed by state law is going to be subject to challenge in terms of the FTC's authority to act. There is an incredibly dynamic environment that we touched on, we began to touch on last month in the webinar, of state law changes in recent areas.

I mean, if ever there is an example of the states being laboratories of democracy, as Justice Brandeis put it, to try out different approaches, different regulatory and legislative approaches, it is here where states are going in all kinds of different directions, not only in terms of what restrictions or prohibitions they're putting on noncompetes, but states are going in diametrically opposite directions in terms of whether they consider nonsolicitation agreements to be within or outside the gambit of these pieces of legislation. Causation, it is hard to identify.

Do noncompetes cause lower wages or a lack of competition for employees? That is a big empirical question, and it is hard to research. One point some have been making is, there is a lot of research and correlations between noncompetes and wages in certain circumstances. But as the HR and employment professions on this call certainly know better than anyone, various types of restrictive covenants are most often bundled together, and so research that looks at the impact of noncompetes, it is very hard to sort out what is the impact of noncompetes versus notice provisions versus nonsolicitation agreements, et cetera. And the lack of correlation to me is indicated in some ways by, I've read for the last several years the filings in federal courts under the DTSA across the country every day.

Very few of the companies involved in those cases are companies that would be on anyone's watch list for potential market power, antitrust type of claims or arguments. A lot of the companies that people look at as being potentially subject to antitrust issues, particularly in the tech industry, they're basically California and they don't have noncompetes. So, on the sectoral analysis and how it plays out here, it is really interesting, as well as what positions or types of employees is the FTC really looking at and what is the impact on wages and on competition?

These are the kinds of issues we'd expect to surface that many of us will be raising if and when the FTC starts an action process, and I realize I'm raising more questions than I'm giving answers, but as I say, we're not in the predicting business. We're just following developments, and thus far the FTC has not really tipped its hand.

O'Brien: Just to chime in on that point before we move to the next question, Joyce, is that that is why it is so interesting what the DOJ is doing, because they're trying to short circuit these issues that John is raising, because in a per se antitrust case, that means the harm is presumed. And the DOJ doesn't have to show that, and they don't have to show market power, so they're trying to short circuit it by bringing these per se criminal cases, per se civil would be the same, and just short circuit that whole thing, And defendants in those cases are raising those concerns and whether judges will listen or juries will listen is a different issue, but a per se case in essence cuts off these ancillary and market power issues that you would have to address in a civil rule of reason case.

Cox: Yeah, what is clear is that there is going to be a lot of changes, certainly if there is anything done by the FTC at a federal level, certainly as the DOJ continues with its pursuit, and as states continue to pass various laws. And as practitioners, we're going to have to really look at giving advice to our clients that help them really protect their assets and their trade secrets, because that is generally, and I've litigated as have you guys, from an employment lawyer's perspective on all sides of this, and generally people, when companies are going after somebody who has left, they're concerned that they're going to take the information that is confidential, that they've spent a lot of time investing in and building, and they're going to use that at a competitor to their disadvantage, or, I should say and, that includes the assets of people that they've invested in and developed, and whatnot.

So, we're going to have to be looking at a lot more creative ways to do that, and I guess that is a good tee-off question for you, Ann. What are some takeaways that the folks on this webinar can go away with that speaks to the current level of the Department of Justice's focus on labor here, and certainly the criminalization of agreements that a lot of which have been in place for a long time? I know one of the top ones we want to talk about is, is reviewing agreements very carefully that are in place, because I know, and a lot, and again, depending on the state, I often see clauses that say you shall not solicit, hire, et cetera, and that word, hire, become a real problem in addition to some of these other things. So Ann, can you speak to, given some concrete takeaways here?

O'Brien: Yeah, we'll try to give concrete takeaways, and Joyce, I do many calls with you where we're called upon, whether the client comes from an antitrust angle or a labor and employment angle, they're struggling with these intersection of the two areas. And I saw we had a question from the audience about really, the $64,000 question or $64 million question, what is the difference between civil and criminal? I will say, one thing we can say, and Joyce counsels clients, as does John, but I've been on many calls with Joyce where when you're talking about, we haven't seen DOJ go after the individual agreement between employer and employee, that traditional noncompete or nonsolicit when a high-value person that might hold trade secrets moves.

What we're seeing is criminal focus, and the tech cases, while not criminal from years back, did focus on this as well, discussions between horizontal competitors. And so I think the *Aya* case that all of us, the three of us I know, have followed, but someone asked what is an example. The *Aya* case that made its way up to the Ninth Circuit is a good elucidation of some of those, where is the line? And that was stuff that the court deemed to find fall on the okay side of the line, but where the big stakes problems are, are agreements with competitors, and it is a very important point. Who are your competitors? And Joyce and I have been on many calls with clients saying, you can't think of this in a traditional way, like a vendor, a supplier.

You are not in the same market so you're not competitors because of the DOJ's view that competitors are competing for labor, so an outsource or vendor agreement, we're seeing this in the recent cases brought, but it is just a reality that is troubling to many of us. You can't leave that as face value as a safe haven, right? This is just a supply agreement or vendor agreement, so I think we really should focus on if you could compete for labor, what should you do and not do in negotiations, written agreements, and even more importantly, CEO to CEO meetings, HR to HR meetings, businesspeople to businesspeople meetings, and trying to negotiate those.

So, the key to antitrust, the good side of antitrust is to make sure and self-servingly state this as much as you can to competitors and do training on it, that you make hiring and wage decisions unilaterally. It is your company's decision unilaterally based on your specific needs and wants, to hire the people that are right for your company, very, very heightened being careful when talking to competitors. And businesspeople want to talk to other businesspeople and that is understandable, but really, if the issues are going to come up regarding hiring or wages or even the formulas for those, that is an issue. And lawyers, really, it is self-serving to say that as lawyers, but lawyers should be involved in those.

What can, what really gets you in hot water, do not exchange competitively sensitive information, including even at a general level, what you might consider an information exchange and the DOJ might not, plans for future hiring, needs for hiring. Will you need more or less people? What, in a contract negotiation, what is your bottom line you can pay because of wages? Just talking about those with competitors, while previously maybe you think this isn't in the context of contract negotiations and it is a safe haven with a supplier, it might not be.

So, be very wary and let your executives know in one-on-one meetings at any level, business side HR, that turn to future pricing or hiring, and if those discussions take place, terminate them. Let the lawyers know. And finally, I think revisiting those contracts. I often hear, well, these have been in place for decades, as if that is a good thing. And Joyce and I together have counselled clients well, that is exactly why you need to revisit them now and see if the procompetitive reasons or the ancillary reasons, like really are still reasons, and if they are, okay.

Maybe the risk is low, but revisit them now and think about them in light of where we are, and we would hope that all enforcement agencies and litigators would view that as a positive, that you're trying to revisit these things and not just leave them on the books collecting dust for a long period of time without someone exploring the actual need, because that exploration of the need can help you articulate the procompetitive reasons that you need this restraint on labor ancillary to whatever you're really trying to do. And if no one in your company can tell you the reason why, then you question whether it should be in there.

Siegal: You know Ann, hearing you say that I'm reminded of what Joyce and I and others have gone through all the time with clients in noncompetes where they have formed noncompete agreements that have a description of what is the competitive environment or the competitive market, or what would constitute competition that can't be violated, and they are generic, broad, often longstanding, not tailored to the current specifics of the market. And I think the advice you're giving in the antitrust context is that much more important also, just in your noncompetes and your restrictive covenants, like make sure they really reflect the current competitive landscape at this point.

O'Brien: I would add that make sure people understand them, because we often see that people, the rank and file folks in HR or business side that are implementing those are under a misimpression. They're not lawyers, that is understandable, but train, train, train. And make sure those that are negotiating or that are dealing with employees, because we often see this in the criminal context that there is misinformation that becomes lore in an organization and then is attributed as nefarious by the Department of Justice when they're looking at potential gentleman's agreements, they'll call them, or non-written agreements, when really employees might be referring to written agreements that do contain what we would otherwise think that completely legal provision.

Siegal: One other note not really on our agenda today, but to flag from a litigator's point of view when you're settling a noncompete or other restrictive covenant case, over the years many of us have had settlement agreements with, bilateral agreements not to hire, or unilateral no-poach agreements, you have got to very careful about those now.

Cox: Yeah, and I think just going to your last point, which John, yeah, your point is very well taken, but Ann, to your last point, there is also an issue with these agreements that have been sitting around and renewed year to year. And not only do people not know why those things are in there in the first place, or people have an inability to articulate it, but they don't enforce them, right? So, there is something to be said about having a potentially problematic clause in an agreement that has been out there for a long period of time, and the company, it is just not in their corporate culture, they're just, and not in their past. They just haven't and would never really pursue litigation. Do you want to talk about that for a minute before we wrap up?

O'Brien: I just think that when I hear that we never really enforce them, it is one, a reason to revisit why you have them, and two, really not helpful in a potentially criminal investigation where you're, by saying that, potentially foreclosing the argument that you're relying on those noncompetes and not a gentleman's agreement. It sounds, it looks nefarious to the DOJ whether it is or not, so that is very problematic. And you're right, we do see that quite a bit.

Cox: So, I think the one takeaway was to the extent you've got these agreements, particularly with potential competitors and/or others, we need to be taking a look at those agreements and seeing how they need to be revised, among some other things with respect to training and other things. So John, I'll turn it over to you to wrap up.

Siegal: So, we appreciate your joining. Thank you, Ann, for a great, really learned presentation, and if you have questions, feel free to reach out to Joyce or me directly by email afterwards, and thanks.

Rubenking: Thank you, Joyce, Ann, and John. If you have any questions for them, their contact information is in the show notes. Please join us next time for the final episode in the series, Future Shock: How to Protect Trade Secrets when Noncompetes Become Truly Disfavored. Partners Joyce Ackerbaum Cox and John Siegal will discuss how companies and employees have to change their approaches to noncompetes and trade secrets enforcement to adapt to the changing legal landscape. As always, thanks for listening to BakerHosts.

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