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No Poach, Per Se: The Application of the Antitrust Laws to Employment Agreements

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NO POACH, *PER SE*: THE APPLICATION OF THE ANTITRUST LAWS TO EMPLOYMENT AGREEMENTS

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OCTOBER 2, 2019

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Antitrust Law Background

ANTITRUST LAW BACKGROUND
WHAT ARE THE GOVERNING ANTITRUST LAWS?

- Section 1 of the Sherman Act prohibits contracts or combinations (which courts interpret to mean any type of written or oral agreement) that restrain trade.
- Section 5 of the FTC Act generally prohibits unfair or deceptive acts (which can include unlawful exchanges of information).
  - There are numerous other provisions that generally do not apply to employment agreements, such as Sherman Act Section 2 (prohibits monopolistic conduct); Section 7 of the Clayton Act (prohibits acquisitions that may lessen competition); Section 8 of the Clayton Act (prohibits interlocking directors); etc.
- The states each have their own antitrust laws, which often track the federal laws but can vary, as can state enforcement priorities.

ANTITRUST LAW BACKGROUND
WHO CAN SUE FOR AN ANTITRUST VIOLATION?

The Government

- The **Department of Justice Antitrust Division ("DOJ")** can criminally prosecute individuals and companies for violations of the Sherman Act.
  - The DOJ can seek individual fines up to $1 million and ten years in federal prison, or corporate fines up to $100 million for each offense.
  - The DOJ can also pursue civil enforcement actions.

ANTITRUST LAW BACKGROUND
WHO CAN SUE FOR AN ANTITRUST VIOLATION?

The Government

- The **Federal Trade Commission ("FTC")** also polices anticompetitive conduct and can take civil actions against potential violators.
- The FTC has not been as active as the DOJ in the employment context, but could be particularly interested in unlawful exchanges of employment data between competitors.

ANTITRUST LAW BACKGROUND
WHO CAN SUE FOR AN ANTITRUST VIOLATION?

The Government

- **State attorneys general** can bring claims under the federal antitrust laws on behalf of the citizens of their state, as well as enforce their states' antitrust laws.

ANTITRUST LAW BACKGROUND
WHO CAN SUE FOR AN ANTITRUST VIOLATION?

Private Plaintiffs

- In the employment context, the claimant is often a current or former employee who brings a lawsuit for civil damages and/or injunctive relief requiring the company to cease the allegedly anticompetitive employment practice(s).
- Private plaintiffs can rely on federal and/or state antitrust laws.
- These cases are frequently brought as class actions on behalf of all similarly situated employees.

ANTITRUST LAW BACKGROUND
HOW ARE AGREEMENTS EVALUATED UNDER THE ANTITRUST LAWS?

- The legality of agreements effecting employees depends upon a number of factors, including:
  - The type of agreement;
  - Who the agreement is between (i.e. is it a horizontal or vertical agreement); and
  - Whether the agreement is ancillary to any other agreements.

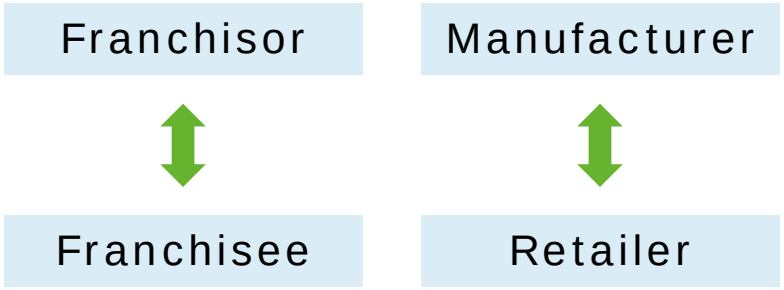
ANTITRUST LAW BACKGROUND
EMPLOYMENT AGREEMENTS POTENTIALLY UNLAWFUL UNDER SECTION 1 OF THE SHERMAN ACT

- "No-poach" agreements
  - Agreements in which companies agree that they will not solicit or hire workers away from the other companies.
  - These agreements limit employees' opportunities for higher-wages and better employment options.
- Wage fixing agreements
  - Companies collectively decide on the maximum amount they will pay certain types of employees.
  - These agreements restrain competition between companies for employees, stopping employees from earning higher wages.
- Non-compete agreements
  - Agreements prohibiting employees from working for a competing company.

ANTITRUST LAW BACKGROUND
WHAT IS THE DIFFERENCE BETWEEN HORIZONTAL AND VERTICAL ARRANGEMENTS?

- Horizontal arrangements are agreements amongst competitors. For example, McDonalds, Burger King, and Wendy's are competitors, so an agreement among them would be a horizontal arrangement.
  - Courts are currently examining the question of whether franchisees are horizontal competitors.

- Vertical arrangements are agreements amongst entities at different levels of the supply chain, such as a franchisor and franchisee, or between a manufacturer and retailer.



ANTITRUST LAW BACKGROUND
HOW IS A POTENTIAL ANTITRUST VIOLATION EVALUATED?

Using a *Per Se* Approach

- Agreements that are considered so anticompetitive that they are deemed unlawful on their face. There is no need to analyze the parties' intent, the anticompetitive effects, the defendants' market power, or potential benefits of the agreement.
- Conduct that has been deemed a *per se* violation of the antitrust law includes:
  - Horizontal price fixing or bid-rigging. In the employment context, this includes wage fixing.
  - Horizontal market or customer division. In the employment context this includes "no-poach" agreements.
  - Horizontal group boycotts (also known as "concerted refusals to deal"), which involve companies collectively deciding not to work with a third party, whether it be a competitor or someone up or down the vertical chain.

ANTITRUST LAW BACKGROUND
HOW IS A POTENTIAL ANTITRUST VIOLATION EVALUATED?

Using the Rule of Reason Approach (sometimes called the "full rule of reason")

- This analysis is used when the alleged conduct is not a *per se* violation, often because the conduct has the potential to have both procompetitive and anticompetitive effects.
- In a rule of reason analysis, a burden-shifting framework is used.
  - The plaintiff bears the initial burden of coming forward with evidence to show actual or potential anticompetitive effects.
  - If the plaintiff meets its burden, the defendant can rebut by showing procompetitive effects.
  - If the defendant is able to prove procompetitive effects, the plaintiff is then required to show that the anticompetitive effects outweigh the procompetitive benefits.
  - If the plaintiff can demonstrate that the anticompetitive conduct potentially outweighs the procompetitive justifications, the court will assess the merits of both sides and reach a determination.
- Since this framework is time-intensive and costly, the DOJ and private plaintiffs are less likely to pursue a lawsuit if a rule of reason analysis is the appropriate method of evaluating conduct.

ANTITRUST LAW BACKGROUND
HOW IS A POTENTIAL ANTITRUST VIOLATION EVALUATED?

Using a "Quick Look" Rule of Reason Approach

- This approach is used when an observer, with even a rudimentary understanding of economics, could conclude that the arrangement in question would have anticompetitive effects, or where the likelihood of anticompetitive effects can easily be ascertained.
  - As the Third Circuit has explained, a "quick look" approach "'presum[es] competitive harm without detailed market analysis' because 'the anticompetitive effects on markets and consumers are obvious.'"
  - A "quick look" is an abbreviated version of the fuller rule of reason analysis in which courts do not require the comprehensive market analysis undertaken in a rule of reason review.
- Courts use this analysis sparsely due to uncertainty around when it should be used. Courts prefer to use apply the *per se* rule or a full rule of reason analysis.

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How The Department Of Justice Antitrust Division Views Employment Agreements

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS EARLY NO-POACH CASES

In re High-Tech Employee Antitrust Litigation, 856 F. Supp. 2d 1103 (N.D. Cal. 2012)

- Five software engineers sued Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar, claiming the executives of these companies had created multiple "Do Not Cold Call" agreements bilaterally amongst each other.

- These agreements consisted of each company placing the names of the other companies' employees on a list and instructing recruiters not to cold call them, meaning they would not contact the employees if they had not reached out to the company seeking employment.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
EARLY NO-POACH CASES

The court denied the defendants' joint motion to dismiss because it found that the software engineers had adequately pled an antitrust injury.

Reasoning

- Previously, the Ninth Circuit has held that when an employee is the direct and intended object of an employer's anticompetitive conduct, that employee has standing in antitrust matters.
- The court found that the engineers had successfully asserted that their salaries and mobility were suppressed by not receiving the cold calls and the agreements were entered into to suppress competition to employ skilled laborers.

Subsequent history:

- Once the defendants' joint motion to dismiss was denied, the companies agreed to settle the class action for a total of $435 million.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS EARLY NO-POACH CASES

In re Animation Workers Antitrust Litigation, 14-cv-04062-LHK

Very similar set of facts to *In re High-Tech Employee Antitrust Litigation.*

- Following an investigation by the DOJ, several artists and engineers claimed that Disney, Pixar, DreamWorks, Blue Sky Studios, Two Pic MC LLC, Lucasfilm, and Sony had conspired to suppress employee compensation by collectively sharing employee compensation information and agreeing not to actively solicit each other's employees.

- As opposed to engaging in prolonged litigation, the companies settled the class action for a total of $169 million.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS BOTTOM LINE

In recent years, the DOJ has underscored the importance of the ability of working professionals to have a free market to seek better employment opportunities.

- In October 2016, in conjunction with the publication of the DOJ and FTC's joint Antitrust Guidelines for Human Resource Professionals, the DOJ announced its intent to criminally investigate naked no-poach and wage-fixing agreements.
  - "Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects."
  - "Going forward, the DOJ intends to proceed criminally against naked wagefixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct."

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS BOTTOM LINE

- In April 2018, following an investigation, the DOJ announced a civil settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation arising from those companies' alleged agreements that prohibited the solicitation, recruiting, and hiring of other companies' employees.

- In its Spring 2018 Division Update, the DOJ stated on its website that it "intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations…that harm employees and the economy."

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS BOTTOM LINE

State Attorneys General have also begun pursuing no-poach agreements.

- In 2019, numerous state attorneys general have obtained settlements with several fast food chains, including Arby's, Dunkin' Donuts, Five Guys, and Little Caesars, over no-poach provisions in their franchise agreements.

- As of September 2019, 75 companies have dropped their no-poach provisions.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS BOTTOM LINE

Recently, the DOJ has sought to clarify its view of the application of the antitrust laws to employment agreements in several statements of interest filed in ongoing no-poach class actions, as well as through public statements.

- When looking at no-poach agreements between horizontal competitors, the DOJ has argues this conduct should be viewed as a *per se* Sherman Act Section 1 violation, unless the agreement is ancillary to a separate, legitimate business purpose, which is then looked at under a rule of reason analysis.
- However, when no-poach agreements are tied to franchise agreements (vertical arrangements), the DOJ argues that these agreements should be viewed under a rule of reason analysis in almost all cases.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS BOTTOM LINE

- DOJ officials have acknowledged that the Antitrust Guidelines for Human Resource Professionals lack detail as to the proper way in thinking about these cases. In a recent speech, Deputy Assistant General Michael Murray provided some guidance on the proper questions to ask.

"Are the entities capable of concerted action?"

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS BOTTOM LINE

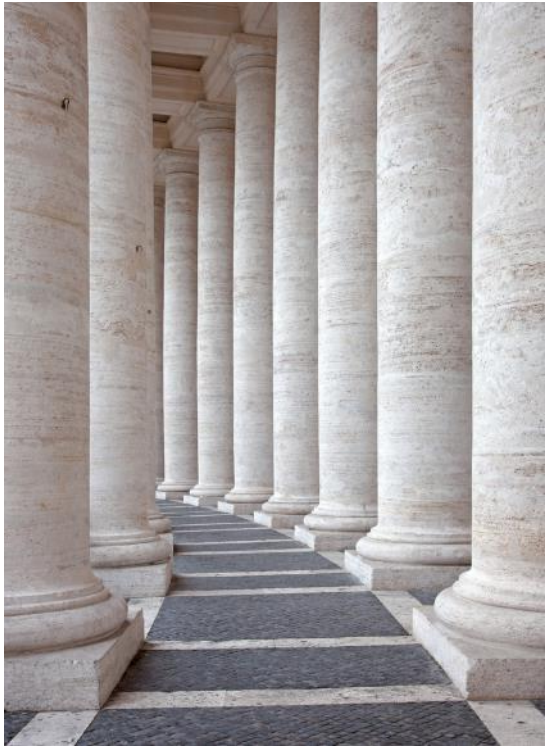
- Are the entities capable of concerted action?
- If yes, what is the relationship between the entities? The question of whether to use a *per se* or rule of reason analysis is dependent on the relationship between the entities of the agreement.
  - "[I]f [the parties] are not competitors in the labor market but instead are, for example, vertically related in their industry, then any agreement among them is subject to the rule of reason."
  - "If, however, the entities are not vertically related but rather horizontally related as competitors in the labor market, then they have entered into a classic market allocation. As we all know and as [*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*] reaffirmed, agreements among competitors to divide markets are per se unlawful…"
- If there is a horizontal agreement, is it part of a separate, legitimate transaction and is the no-poach agreement reasonably necessary to "make the main transaction more effective in accomplishing its purpose?"
  - If yes, it should be analyzed under a rule of reason. If no, it will be a *per se* violation.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS BOTTOM LINE

In summary, according to the DOJ, there are two ways for a no-poach agreement to escape *per se* treatment and be subject to the rule of reason burden shifting analysis: (1) verticality, and (2) ancillarity.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS BOTTOM LINE

- State attorneys general continue to pursue settlements with franchises, and several private class action cases have overcome motions to dismiss.
  - It is unclear whether courts will agree with the DOJ's position.
  - Until that time, it is advisable to exercise caution when including or otherwise agreeing to a no-poach provision.



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HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST

- While not relying exclusively on these cases, the DOJ has repeatedly cited the following cases in their Statements of Interest:
  - *Eichorn v. AT&T Corp*—a 2001 decision out of the Third Circuit.
    - There, the Third Circuit found that the district court properly applied the rule of reason to analyze a "no-hire agreement." The "no-hire agreement" was a covenant not to compete, but constituted a legitimate ancillary restraint to a transfer of business ownership.
  - *Deslandes v. McDonald's USA*—a 2018 decision from the Northern District of Illinois.
    - McDonald's franchise agreement included a no-poach provision. The district court held that no-poach agreements that are ancillary to separate, legitimate business transaction – such as a franchise agreement – can have procompetitive effects and therefore should be judged under the rule of reason, or a "quick look" rule of reason, when viewing the horizontal arrangement between the franchisees.
  - *AYA Healthcare Services, Inc. v. AMN Healthcare, Inc.*—a 2018 case from California's Southern District.
    - The court held that no-poach agreements that were overly broad and lasted in perpetuity after the dissolution of a joint venture were deemed *per se* unlawful.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – RAILWAY INDUSTRY

***In re: Railway Industry Employee No-Poach Antitrust Litigation*, Civil No. 2:18-MC-00798-JFC (W.D. Penn.)**

- Facts: Following the DOJ's settlement with railroad companies, former employees filed a private class action alleging that Knorr-Bremse AG, Wabtec, and Faiveley Transport S.A. had entered into agreements to "refrain from soliciting or hiring each other's employees without the consent of the current employer," or "no-poach" agreements.
- The plaintiffs, former employees of the defendants, alleged the defendants previously "competed vigorously with each other in lateral hiring for employees."
- The defendants argued that no-poach cases should be viewed under the rule of reason as opposed to a *per se* analysis. Since the plaintiffs failed to adequately plead the required elements under a rule of reason analysis (i.e. relevant market, market shares, competitive effects, etc.), the defendants sought dismissal of the class action.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – RAILWAY INDUSTRY (CONT'D)

Statement of Interest from the DOJ: "This Court should reject defendants' argument that, as a matter of law, all no-poach agreements must be analyzed under the rule of reason."

- Agreements to divide or allocate markets have been previously deemed unlawful *per se*.
- Therefore, the DOJ took the view that horizontal no-poach agreements among competing employers are *per se* unlawful unless they are ancillary to a separate, legitimate business transaction.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – RAILWAY INDUSTRY (CONT'D)

- In its statement of interest, the DOJ explained: "Just as an agreement among competitors to allocate customers eliminates competition for those customers, an agreement among them to allocate employees eliminates competition for those employees."
- Employees cannot seek higher wages or better employment terms if they are not allowed to compete to find a better job.
- No-poach agreements have almost identical anticompetitive effects to wage-fixing agreements since employers avoid competing over wages and terms of employment.
- For example, in *United States v. eBay, Inc.,* the court found a *per se* violation when eBay and Intuit agreed not to solicit or hire each other's employees, and this agreement was not ancillary to a separate, legitimate business transaction.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – RAILWAY INDUSTRY (CONT'D)

- The DOJ clarified, however, that if no-poach agreements are part of a separate, legitimate business transaction, they should be judged under a rule of reason and not a *per se* analysis.
  - For an agreement that eliminates competition to be ancillary, it must "be subordinate and collateral to a separate, legitimate transaction," and "reasonably necessary to 'make the main transaction more effective in accomplishing its purpose.'"
- Note, however, that even if a no-poach agreement is part of a separate, legitimate business transaction, the companies entering into the agreement still need to show that it is reasonably necessary.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – RAILWAY INDUSTRY (CONT'D)

Main Takeaways:

- Explicit no-poach agreements in horizontal markets will be deemed *per se* violations of Sherman Act Section 1 according to the DOJ.
- A no-poach agreement that is ancillary to a legitimate business purpose will be analyzed using the rule of reason provided it is not overbroad. Some examples that the DOJ found to be not overbroad are:
  - A no-poach agreement that is ancillary to a business acquisition provided it is for a limited time.
  - A franchise agreement that prohibits poaching of employees from the parent company, its subsidiaries, or any franchises, by a franchisee.
- The district court ultimately denied the defendants' motion to dismiss the class action and indicated that, in line with the DOJ's position, the *per se* rule would likely apply to the agreements at issue.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS

RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – DUKE UNIVERSITY

***Seaman v. Duke University*, Civil No. 1:15-cv-00462 (M.D.N.C. May 20, 2019)**

- Facts: The plaintiff, Dr. Danielle Seaman, was a professor at Duke School of Medicine and sought employment at the University of North Carolina (UNC) School of Medicine (UNCSM).
- The UNC School of Medicine deemed that Dr. Seaman "would be a great fit," but UNC Dean's stated, "lateral moves of faculty between Duke and UNC are not permitted" based on a guideline between the deans of Duke and UNC, which prohibited lateral moves unless the move was a promotion.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – DUKE UNIVERSITY (CONT'D)

In the statement of interest, the DOJ again argued that this agreement constituted a *per se* violation

- The DOJ set forth the same analysis as it did in *In re: Railway Industry Employee No-Poach Antitrust Litigation*, arguing that some agreements are subject to a rule of reason, but agreements that are predominately anticompetitive will be viewed under a *per se* analysis.
- Duke attempted to assert that no court had ruled that no-poach agreements were viewed using a *per se* analysis.
- Duke additionally tried to argue that the *per se* rule would not apply to not-for-profit academic institutions.
- Lastly, Duke tried to assert the no-poach agreement was an ancillary agreement because the schools collaborate and work together frequently.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS

RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – DUKE UNIVERSITY (CONT'D)

Main Takeaways:

- Roughly one month after *In re: Railway Industry Employee No-Poach Antitrust Litigation*, the DOJ doubled down on their assertion that no-poach agreements were subject to *per se* analysis, unless the no-poach agreement is ancillary to a larger business agreement between the parties or part of a vertical agreement, where a rule of reason analysis should be used.
- The DOJ also asserted that although Duke and UNC are not-for-profit institutions, they are still subject to Sherman Act Section 1.
- Following the DOJ's submission of its Statement of Interest in March 2019, Duke settled the class case in May 2019 for $54.5 million.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – STIGAR, RICHMOND, AND HARRIS

***Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244-SAB (E.D. Wash)**
***Richmond v. Bergey Pullman Inc.*, No. 2:18-cv-00246-SAB (E.D. Wash)**
***Harris v. CJ Star, LLC*, No. 2:18-cv-00247-SAB (E.D. Wash)**

- Facts: Former employees of Auntie Anne's, Arby's and Carl's Jr. filed suit against their respective former employers, alleging a Sherman Act Section 1 violation.
- Specifically, the plaintiffs alleged that the franchise agreements between the franchisor and franchisee contained a provision that the franchisees "will not employ[] or seek to employ an employee of [the franchisor] or another franchisee." Therefore, for example, an Arby's franchisee could not employ or seek to employ an employee from the franchisor (Arby's corporate offices) or another franchisee (a different Arby's restaurant).
- The plaintiffs argued that the challenged no-poach agreements are the products of hub-and-spoke conspiracies among and between each franchisor and its franchisees, which should garner *per se* analysis. A hub-and-spoke conspiracy has three elements: (1) a hub (i.e. a dominant purchaser), (2) spokes (i.e. competing manufacturers/distributors that enter into vertical agreements with the hub), and (3) the rim of the wheel, which consists of horizontal agreements among the spokes.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – STIGAR, RICHMOND, AND HARRIS (CONT'D)

Statement of Interest from the DOJ: "[W]ithin a franchise system…a full rule of reason analysis is likely necessary."

- The DOJ submitted one Statement of Interest for all three fast food franchise cases.
- According to the DOJ, for there to be concerted action, there must be (1) an agreement, and (2) two or more entities capable of engaging in concerted action.
- From the DOJ's perspective, an agreement between competing fast-food franchises (horizontal) usually falls in the *per se* category, unless it is part of a legitimate, separate business transaction. However, no-poach agreements between the franchisor and each of its franchisees (vertical) fall in the rule of reason analysis in most cases.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
RECENT LAWSUITS/DEPARTMENT OF JUSTICE STATEMENTS OF INTEREST – STIGAR, RICHMOND, AND HARRIS (CONT'D)

Main Takeaways:

- The DOJ is taking the position that no-poach provisions within franchise agreements should be assessed under a rule of reason and not a *per se* analysis in most cases.
- A hub-and-spoke conspiracy such as that argued by the plaintiffs in these matters can be unlawful. However, the plaintiff needs to show all of the elements of a true hub-and-spoke conspiracy. Without the "rim" (horizontal agreements), a franchisor-franchisee agreement will be analyzed utilizing a rule of reason analysis.
- Following the DOJ's Statement of Interest, the plaintiffs reached individual settlements with the fast food defendants.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS COURTS QUESTIONING THE DOJ'S POSITION

Despite the Statement of Interests and the DOJ's public comments, two courts have recently called into question the DOJ's interpretation and believe no-poach provisions should be analyzed using a rule of reason analysis as opposed to a *per se* analysis. Those cases are *Blaton v. Domino's Pizza* and *Butler v. Jimmy John's Franchise, LLC*.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS COURTS QUESTIONING THE DOJ'S POSITION

- *Blaton v. Domino's Pizza*, Case No. 18-13207 (E.D. Mich.)
  - The plaintiff – a former Domino's employee – filed suit alleging Domino's violated the Sherman Act by utilizing no-hire agreements, where franchisees agreed "not to solicit or hire current employees of other Domino's franchisees and affiliated entities."
  - Domino's argued that the court should grant the motion to dismiss unless the plaintiff could show the agreement was unreasonable under a rule of reason analysis.
  - The court "decline[d] to announce a rule of analysis at this juncture," determining that, "[m]ore factual development is necessary." Instead, the court denied the motion to dismiss because the plaintiff plausibly pled the agreement was unreasonable under both a *per se* and quick-look analysis.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS COURTS QUESTIONING THE DOJ'S POSITION

- *Butler v. Jimmy John's Franchise, LLC,* Case No. 3:18-cv-00133-NJR-RJD (S.D. Ill.).
  - Under Jimmy John's franchise agreement, a franchisee must not "solicit or initiate recruitment of any person then employed, or who was employed within the preceding twelve (12) months, by [Jimmy John's], any of [Jimmy John's] affiliates, or another Jimmy John's Restaurant franchisee."
  - Jimmy John's filed a motion to dismiss, claiming that *per se* analysis shouldn't be used. The court denied the motion to dismiss.
  - The court noted: "The DOJ's Antitrust Division is certainly a titan in this arena and carries a considerable burden in interpreting open questions in antitrust jurisprudence – that is without question. But DOJ is not the ultimate authority on the subject, especially in situations like this one: after the DOJ submitted its Statement of Interest, the American Antitrust Institute – another titan in the antitrust arena – penned a letter in staunch opposition to the DOJ."
  - In August 2019, the judge refused to certify an interlocutory appeal filed by Jimmy John's, saying it is too early for the company to argue that rule of reason should be utilized by the court.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS
POTENTIAL CONGRESSIONAL INTERVENTION

- On June 5, 2019, Congressman David Cicilline, chairman of the House Judiciary Committee's antitrust subdivision, announced a plan to reintroduce legislation aimed at prohibiting no-poach and non-compete agreements in employment contracts.
- The initial legislation, The End Employer Collusion Act, was introduced in 2018. It never made it out of the Senate.
  - The bill would make it unlawful to enter or enforce a restrictive employment agreement.
  - The bill would allow for a private right of action, and enabled the FTC to pursue violations under Section 5 of the FTC Act.

HOW THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION VIEWS EMPLOYMENT AGREEMENTS STATE ATTORNEYS GENERAL INTERVENTION

- On September 9, 2019, Washington Attorney General Bob Ferguson reached agreements with eight corporate chains, whereby the chains agreed to drop their no-poach provisions.
- With these agreements, AG Ferguson has eliminated no-poach clauses from 75 corporate chains, representing nearly 140,000 locations.
- Fourteen State Attorneys General (California, DC, Iowa, Illinois, Maryland, Massachusetts, Minnesota, North Carolina, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont) have formed a coalition to pursue cases against corporations for no-poach provisions.

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Main Points of Emphasis

MAIN POINTS OF EMPHASIS
BE CAUTIOUS WHEN ENTERING INTO EMPLOYMENT AGREEMENTS

Companies should be cautious when entering into agreements regarding the hiring or payment of employees.

- If an employment agreement is not ancillary to a separate, legitimate business transaction, or otherwise reasonably necessary to achieve a legitimate collaboration, employers risk being investigated and/or sued for violating Sherman Act Section 1.

- Even if the agreement is vertical or ancillary, it may be subject to government or private plaintiff challenge under rule of reason.
  - Courts often refrain from deciding which standard applies at the motion to dismiss stage, instead requiring fact discovery to inform the decision.

MAIN POINTS OF EMPHASIS
BE AWARE OF THE POTENTIAL FOR LAWSUITS OUTSIDE OF THE DOJ

While the DOJ might be reluctant to pursue no-poach agreements involving franchises based on its position that these agreements should be analyzed under the rule of reason, state attorneys general and private plaintiffs have challenged vertical no-poach agreements.

- In 2019, numerous state attorneys general have pursued and obtained settlements with several corporate chains, eliminating no-poach provisions from 75 corporate chains and nearly 140,000 locations.

- There are additional class cases being pursued against companies such as Domino's Pizza and Jimmy Johns.

MAIN POINTS OF EMPHASIS
IT IS UNKNOWN HOW COURTS WILL VIEW NO-POACH AGREEMENTS

Many of these cases continue to play out, and it is still unknown how the federal courts will interpret the DOJ's guidance.

- In a recent order denying a motion to dismiss in one of the franchise no-poach cases – *Blaton v. Domino's Pizza* out of the Eastern District of Michigan – the court declined to announce which analysis standard it would apply, explaining that it was too early in the proceeding and "more factual development is necessary."

- More pointedly, in another franchise no-poach case – *Butler v. Jimmy John's Franchise, LLC*, the Southern District of Illinois denied the defendant's motion to dismiss. The district court stated that the DOJ "is certainly a titan in this arena" but "not the ultimate authority on the subject."

MAIN POINTS OF EMPHASIS
WORK WITH ANTITRUST COUNSEL

If a company currently has vertical or horizontal employment agreements already in place, it would be wise to work with antitrust counsel to closely scrutinize these arrangements.

- Along those lines, if an employer is considering any of the following, the employer should consult with antitrust counsel:

Absent a vertical agreement, restrictions between franchisees not to poach each other's employees.	Restrictions between members of the same trade association not to poach each other's employees.	Informal agreements between companies not to hire employees at increased wages.	Employment agreements that have non-compete clauses lasting several years and/or broad geographic scope.

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Test Your Knowledge

TEST YOUR KNOWLEDGE

Fancy Car Company and Luxury Automotive – both car manufacturers – agree that they will not hire each other's design engineers.

- Is this a vertical agreement or a horizontal agreement?
- How would the DOJ likely view this agreement?
- Is this agreement analyzed under a *per se* or rule of reason analysis?

TEST YOUR KNOWLEDGE

Fancy Car Company and Luxury Automotive – both car manufacturers – agree that they will not hire each other's design engineers.

- Is this a vertical agreement or a horizontal agreement?

  Answer: Horizontal agreement

- How would the DOJ likely view this agreement?

  Answer: Sherman Act Section 1 violation

- Is this agreement analyzed under a *per se* or rule of reason analysis?

  Answer: *Per se* analysis

TEST YOUR KNOWLEDGE

Top Tacos USA (franchisor) has an agreement with all of its stores (franchisees) that they cannot attempt to hire any management personnel who work at the corporate office or another franchise. As part of the agreement, all new franchisees must contact every store within a twenty-mile radius and agree not to hire any of their management personnel.

- How would the DOJ likely view this agreement?
- What kind of agreement is this?
- Is this agreement analyzed under a *per se* or rule of reason analysis?

TEST YOUR KNOWLEDGE

Top Tacos USA (franchisor) has an agreement with all of its stores (franchisees) that they cannot attempt to hire any management personnel who work at the corporate office or another franchise. As part of the agreement, all new franchisees must contact every store within a twenty-mile radius and agree not to hire any of their management personnel.

- How would the DOJ likely view this agreement?

  Answer: Illegal under Sherman Act Section 1

- What kind of agreement is this?

  Answer: Hub-and-spoke agreement

- Is this agreement analyzed under a *per se* or rule of reason analysis?

  Answer: *Per se* analysis

TEST YOUR KNOWLEDGE

Now assume the agreement only said, “Top Tacos USA franchisees will not attempt to hire any management personnel from the corporate office or another franchise.” Is this agreement totally free from scrutiny?

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Now assume the agreement only said, “Top Tacos USA franchisees will not attempt to hire any management personnel from the corporate office or another franchise.” Is this agreement totally free from scrutiny?

Answer: While the DOJ would likely view this agreement using the rule of reason, Top Tacos USA would still have to prove that the agreement is procompetitive. While the DOJ may decide not to pursue this case if rule of reason is used, it has not stopped private plaintiffs from filing lawsuits. Recently, state AGs sought and obtained settlements with Arby’s, Dunkin’ Donuts, Five Guys, and Little Caesars under which the companies agreed to drop similar provisions from their franchise agreements.

RESOURCE LINKS

- Antitrust Guidelines for HR Professionals
- Eichorn v. AT&T Corp
- Deslandes v. McDonald's USA, LLC
- AYA Healthcare Servs. v. AMN Healthcare, Inc.
- Statement of Interest Railway Litigation
- Statement of Interest Duke
- Statement of Interest Stigar
- Press Release AG Ferguson
- Congressman Cicilline Letter to DOJ

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