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Editors

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world..

Alongside the daily content sourced by our global team of reporters, GCR also offers deep analysis of longer-term trends provided by leading practitioners from around the world. Within that broad stable, we are delighted to include this publication, *US Courts Annual Review*, which takes a very deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by court or circuit around the US, allowing our valued contributors to analyse both important local decisions and draw together national trends that point to a direction of travel in antitrust litigation. Both oft-discussed developments and infrequently noted decisions are thus surfaced, allowing readers to comprehensively understand how judges from around the country are interpreting antitrust law, and its evolution. New for our second edition of the publication are some high-level analysis chapters, looking at key trends across the country such as class certification, no poach and reverse payment cases.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the US, whose knowledge and experience has been essential in drawing together these developments. That team has been led and indeed compiled by Eric P Enson and Julia E McEvoy of Jones Day, whose insight, commitment and know-how have been fundamental to fostering the analysis produced here. We thank all the contributors, and the editors in particular, for their time and effort in compiling this report. Thanks also go to Paula W Render, formerly of Jones Day, as co-editor of the inaugural edition.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Part 1

Topics and Trends

The 'No-Poach' Approach: Antitrust Enforcement of Employment Agreements

Dee Bansal, Jacqueline Grise, Beatriz Mejia and Julia Brinton*
Cooley

Introduction

Antitrust enforcement of conduct in labor markets has continued to ramp up substantially during the past decade, with particularly intense scrutiny on agreements between employers of different companies not to recruit or solicit employees of another, often called 'no-poach' agreements.

Although these agreements have been subject to review for many years, the US antitrust agencies – the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) (together, the Antitrust Agencies) – first issued formal guidance indicating that the DOJ would criminally prosecute no-poach agreements and other forms of collusion in the labor market in 2016. Until that point, enforcement had been mostly focused on the healthcare and technology markets and only in the civil context, analyzed under the rule of reason.

In their 2016 guidance, however, the Antitrust Agencies made clear that naked wage-fixing and no-poach agreements are per se illegal, not justifiable for any reason, and promised future criminal enforcement action. This led to reinvigorated agency investigations and settlements, new waves of private litigation, including class actions, and, just in the past six months, criminal enforcement.

Following the Antitrust Agencies' dramatic shift in approach, there remains a fair amount of uncertainty regarding how no-poach agreements will be analyzed by state regulators, the federal antitrust authorities, and the courts, depending on the context in which they arise. For example, although the DOJ has advised that not all no-poach agreements are 'naked' and provided some guidance on which agreements are subject to per se treatment, state regulators and courts have often disagreed with the DOJ's approach.

Below, we summarize the legal landscape and current developments to illuminate these issues. Specifically, we summarize the applicable laws, standards of review, and theories of harm, and provide a brief history of the enforcement of no-poach agreements by both the Antitrust Agencies and the courts.

We conclude with a discussion of the recent enforcement trends, including recent DOJ criminal indictments for no-poach agreements and the Biden administration's aggressive stance with respect to such agreements, which strongly suggests antitrust scrutiny of no-poach agreements will continue to increase in the near future.

Antitrust issues associated with no-poach agreements

Overview of agreements subject to enforcement in the employment context

This chapter is focused on no-poach agreements, but we start by providing an overview of the types of agreements that are subject to antitrust scrutiny in the employment context generally.

Agreements subject to antitrust scrutiny may be between employers of different companies or between an employer and its employees, and often relate to an employee's salary or his or her mobility (or both).

Generally agreements between employers raise more antitrust risk and include (1) wage-fixing agreements, which are a form of price-fixing, and include agreements to fix salaries, set salaries at a certain level, within a certain range, or according to certain guidelines, or increase, maintain or lower salaries by an agreed percentage, (2) no-poach or non-solicit agreements, which are agreements not to recruit another company's employees, and (3) no-switching or no-hire agreements, which are agreements not to hire another company's employees.

An agreement between an employer and its employees that may raise antitrust risk is a non-compete agreement, which limits the ability of an employee to join or start a competing firm after a job separation.

Another category of agreements between employers that may raise antitrust risk is information-sharing agreements, which include agreements to exchange competitively sensitive information with competitors (e.g., salary, bonus, or benefits information).

The Antitrust Agencies and the courts have focused on these agreements, asserting that competition in the labor market provides actual and potential employees with higher wages, better benefits, and more varied types of employment – all of which ultimately benefit consumers because 'a more competitive workforce may create more

or better goods and services.’¹ Thus, the Antitrust Agencies argue that competition for employees is akin to competition for products and services, and should be protected and promoted.

Importantly, however, in analyzing agreements under the antitrust laws, the term ‘competitor’ includes any firm that competes to hire the same employees, regardless of whether the firm makes similar products or provides similar services.² This broad definition of ‘competitor’ distinguishes the competitive analysis from the analysis applied in other antitrust contexts, which focuses more on current, future, or potential competition for goods sold and services offered. As a result, firms may be subject to antitrust liability for entering into certain agreements with firms in different industries, if the agreement concerns the same types of employees (e.g., software engineers).

Antitrust laws applied to agreements in the employment context

The relevant antitrust laws that apply to no-poach and other employment agreements are section 1 of the Sherman Antitrust Act, which prohibits contracts that unreasonably restrain trade,³ and section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices.⁴

Under the Sherman Act, there are two fundamental standards of review: (1) the *per se* standard, which applies to certain acts or agreements that are deemed so harmful to competition with no significant countervailing pro-competitive benefit that illegality is presumed without further analysis; and (2) the ‘rule of reason,’ which applies to all other conduct and agreements, and pursuant to which the factfinder weighs the pro-competitive benefits of the restraint against its potential harm to competition to determine the overall competitive effect. There is a third standard of review,

1 Dep’t of Justice [DOJ] and Fed. Trade Comm’n [FTC], ‘Antitrust Guidance for Human Resource Professionals’ (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>; see also *In re Papa John’s Emp. & Franchisee Emp. Antitrust Litig.*, No. 3:18-CV-00825, 2019 WL 5386484, *9 (W.D. Ky. Oct. 21, 2019) (‘Plaintiffs also sufficiently plead antitrust injury. Plaintiffs contend that the No-Hire provision is an agreement not to compete for labor and that the agreement had the purpose and effect of depressing wages and diminishing employment opportunities.’).

2 *Id.* at 2 (‘From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.’).

3 15 U.S.C. § 1. ‘Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.’

4 15 U.S.C. § 45(a)(1). ‘Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.’

called the 'quick look,' which is a truncated rule of reason analysis and may be applied when 'the great likelihood of anticompetitive effects can easily be ascertained.'⁵ It is not clear when courts will apply the full rule of reason analysis versus the 'quick look' analysis, and the Supreme Court has indicated, 'there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anti-competitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.'⁶

The Supreme Court has stated that the rule of reason is 'presumptively' applied and there is a 'reluctance' to adopt the per se standard.⁷ Agreements between competitors (i.e., horizontal agreements) to fix prices and allocate markets or customers are treated as per se illegal, whereas vertical agreements (i.e., between two firms at different levels in the chain of distribution) are generally subject to the rule of reason. Indeed, courts generally recognize that horizontal restraints have a much greater potential than vertical restraints to produce anticompetitive harm, and so are much more lenient in analyzing vertical restraints.⁸ Moreover, ancillary restraints (i.e., those that are 'reasonably necessary' to a separate, legitimate, pro-competitive integration) are also subject to the rule of reason.⁹

Whether the per se or rule of reason standard applies has significant implications for the outcome of an enforcement action or litigation. If an agreement is found to be a 'naked' no-poach agreement, meaning there is no purpose for the agreement other than to restrict competition, the per se standard applies. As such, neither the court nor the Antitrust Agencies will consider any proposed justifications for the agreement; it is illegal on its face. If, however, the rule of reason standard applies, such as if a non-solicitation provision is found to be ancillary to a larger agreement, then the factfinder will consider the business justifications for the restraint. As we discuss below, there is no uniform approach among the Antitrust Agencies, state Attorneys General, and the courts on which standard applies to no-poach agreements.

5 *California Dental Ass'n v. FTC*, 526 U.S. 756, 770, 779 (1999).

6 *Id.* at 780-81.

7 *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

8 *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007) (noting that '[o]ur recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements').

9 *NCAA v. Bd. of Regents*, 468 U.S. 85, 100-03 (1984).

For example, there are some contexts in which the use of no-poach or non-solicitation agreements are generally found to raise less risk, if, for instance, the parties to the agreement are in a vertical relationship (e.g., a manufacturer and a retailer), as opposed to horizontal competitors (i.e., are in the same level of the supply chain such that they could or do compete against each other). In this circumstance, as well as if the agreement is found to be ancillary, the rule of reason standard of review is more likely to apply, meaning the court will consider the proposed justifications for the no-poach provision.

It is also permissible for companies to make independent decisions about restrictions or limitations on the company's own hiring practices, as long as any decisions are indeed made unilaterally. The use of no-poach provisions may also be permissible in the context of mergers or acquisitions, joint ventures,¹⁰ investments, or divestitures,¹¹ as long as such clauses are reasonable, narrowly tailored, and tied to legitimate business justifications, such as protecting trade secrets or the investment in employee training and education. Similarly, no-poach provisions may be acceptable in contracts with consultants, auditors, vendors, and recruiting agencies, and to resolve legal disputes, if narrowly and carefully crafted.

The penalties for violating the antitrust laws are severe and apply at both the company and the individual level. For per se criminal violations, companies face a maximum fine of up to \$100 million, or twice the gross gain or gross loss suffered, and an individual may be fined up to \$1 million or face a 10-year prison sentence.¹² For civil matters, the DOJ or plaintiffs may seek treble damages against companies.¹³ This is in addition to reputational damage, the potential for required changes to business practices and oversight monitoring as a result of a government consent decree, and significant time and effort to defend against an investigation or lawsuit.

10 In their joint 2016 guidance, the DOJ and FTC explicitly noted: 'Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.' 'Antitrust Guidance for Human Resource Professionals', at 3 (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

11 See, e.g., *U.S. v. Adobe Sys., Inc.*, No. 1:10-cv-01629, 2011 WL 10883994 (D.D.C. Mar. 18, 2011).

12 18 U.S.C. § 3571(d).

13 15 U.S.C. § 15(a) ('any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained').

Evolving approach of agencies and courts to no-poach agreements

Antitrust scrutiny of no-poach and other types of agreements in the employment context is not new; there has been civil enforcement and litigation going back nearly a decade and promoting competition in labor markets has been a focus for a number of years. However, until recently, enforcement was restricted to civil enforcement actions only and primarily against companies in the healthcare and technology industries. That changed in 2016 with the Antitrust Agencies' new guidance, yet recent investigations and litigation reflect that there still remains a significant amount of uncertainty about which standard to apply in evaluating no-poach agreements.

Early no-poach actions

In 2010, the DOJ opened an investigation into some of the largest technology companies over alleged agreements not to 'cold call' or recruit one another's employees, and on 24 September 2010, the DOJ filed a civil complaint and a proposed consent order.¹⁴ A settlement followed several months later, on 17 March 2011, prohibiting the companies:

*from attempting to enter into, entering into, maintaining or enforcing any agreement with any other person to in any way refrain from, requesting that any person in any way refrain from, or pressuring any person in any way to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person.*¹⁵

Following the DOJ's settlement with the defendants, a class action was filed in 2011 on behalf of 64,000 of the defendants' employees.¹⁶ The class action ultimately settled for \$435 million.¹⁷ This action offered little clarity regarding the proper standard of review for no-poach agreements as it settled without an opinion from the courts.¹⁸

14 DOJ, Press Release, 'Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements, Settlement Preserves Competition for High Tech Employees' (Sep. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.

15 *Adobe Systems*, 2011 WL 10883994, at *2.

16 'Apple, Google Must Face Group Antitrust Suit, Judge Rules', Bloomberg (Oct. 25, 2013), <https://www.bloomberg.com/news/articles/2013-10-25/apple-google-must-face-group-antitrust-hiring-lawsuit>.

17 Antitrust Class Actions, Case Study: High Tech Employees 'No Poach' Antitrust Litigation, https://appliedantitrust.com/05_class_actions/unit5_case_study_high_tech_employees.pdf.

18 See also *U.S. v. Knorr-Bremse AG*, No. 18-cv-747, 2018 WL 4386565 (D.D.C. Jul. 11, 2018).

2016: Introduction to the potential for criminal prosecution

The Antitrust Agencies first took the position that the DOJ would criminally prosecute no-poach agreements and other forms of collusion in the labor market in 2016, when the DOJ and FTC jointly issued 'Antitrust Guidance for Human Resource Professionals'¹⁹ regarding the application of the federal antitrust laws to hiring practices and certain employment agreements.²⁰ The Antitrust Agencies pointedly warned the business community: 'Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.'²¹

The guidance also noted that if the agreement is not separate from or is reasonably necessary to a larger legitimate collaboration between the employers, it would not be considered per se illegal. However, it did not provide detailed guidance on how to evaluate whether the agreement was 'reasonably necessary' and on what may constitute a legitimate collaboration.

2018–2019: Disputing the appropriate standard

From 2018 to 2019, although civil prosecutions continued, DOJ and FTC officials issued a number of statements indicating that criminal enforcement actions in no-poach cases were imminent. The DOJ continued to foreshadow criminal charges. Makan Delrahim, then assistant attorney general of the DOJ's Antitrust Division, stated in September 2019: 'I want to reaffirm that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division.'²²

In the meantime, in 2018, the DOJ brought its first public civil enforcement action since the 2016 guidelines in *Knorr-Bremse AG*, asserting that two of the leading railway equipment suppliers, who were direct competitors, agreed not to poach one another's employees.²³ The no-poach agreements, the DOJ alleged, were per se

19 DOJ and FTC, 'Antitrust Guidance for Human Resource Professionals' (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

20 Cooley LLP, Press Release, 'DOJ Criminally Prosecutes First No-Poach Agreement on Heels of First Criminal Wage-Fixing Indictment' (Jan. 12, 2021), <https://www.cooley.com/news/insight/2021/2021-01-12-doj-criminally-prosecutes-first-no-poach-agreement>.

21 *Id.*

22 *Id.*

23 Wolters Kluwer, 'Justice Department settlement in "no-poach" case against rail equipment suppliers approved' (Jul. 13, 2018), <https://rus.wolterskluwer.com/news/antitrust-law-daily/justice-department-settlement-in-no-poach-case-against-rail-equipment-suppliers-approved/55953/>.

unlawful horizontal agreements under section 1 of the Sherman Act.²⁴ However, the consent agreement did not require the companies to pay any penalties and the DOJ agreed to forego criminal penalties, partially because the no-poach agreement was terminated before the 2016 Guidelines were released.²⁵

Multiple state Attorneys General contemporaneously engaged in investigations and settlements concerning no-poach agreements, particularly in the franchise context. For example, in July 2018, a coalition of Attorneys General from 10 states and the District of Columbia opened an investigation into the use of no-poach agreements by many national fast-food franchises.²⁶ As a result of this investigation, several major fast-food chains that operate thousands of locations across the United States and employ tens of thousands of workers, including Dunkin Donuts, Arby's, Five Guys, and Little Caesars, agreed to stop using no-poach agreements.

Follow-on private litigation in the franchise industry highlighted a difference of opinion between the federal and state agencies on the appropriate standard of review. For example, in March 2019, the DOJ filed statements of interest in private class action lawsuits against Carl's Jr, Auntie Anne's, and Arby's, clarifying that no-poach agreements between a franchisor and franchisee typically merit the rule of reason analysis and that the abbreviated quick-look analysis should not apply because of the vertical relationship between the parties and the potential that franchise-based no-poach agreements are ancillary to legitimate business interests.²⁷

In response, the Washington Attorney General filed its own statement of interest, asserting 'to the extent a franchise agreement restricts solicitation and hiring among franchisees and a corporate-owned store – which is indisputably a horizontal competitor of a franchisee for labor – the agreement must properly be analyzed as a per se restraint.'²⁸ Washington's Assistant Attorney General Rahul called the DOJ's approach 'somewhat misguided,' reiterating that no-poach agreements should be

24 *Id.*

25 *Id.*

26 Office of the Attorney General of the District of Columbia, Press Release, 'AG Racine Announces Four Fast Food Chains To End Use Of No-Poach Agreements' (Mar. 13, 2019), <https://oag.dc.gov/release/ag-racine-announces-four-fast-food-chains-end-use>.

27 DOJ, No-Poach Approach: Antitrust Division Update Spring 2019, <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach>.

28 Amicus Curiae Brief, at 6–7, *Stigar v. Dough Dough, Inc.*, No. 18-CV-244, (E.D. Wash. Mar. 11, 2019), ECF No. 36, <https://storage.courtlistener.com/recap/gov.uscourts.waed.82231/gov.uscourts.waed.82231.36.0.pdf>.

treated no differently from other per se antitrust violations.²⁹ The defendants settled their consolidated case in March 2019, with no decision from the judge on the merits regarding the applicable legal standard.³⁰

The DOJ next filed a statement of interest in *Seaman v Duke University* in March 2019,³¹ in which the plaintiffs alleged that the medical schools of Duke University and the University of North Carolina (UNC) at Chapel Hill agreed to a guideline that prohibited lateral moves of faculty between Duke and UNC.³² The DOJ emphasized that naked no-poach agreements were subject to per se analysis, and noted that, to date, 'Duke has not identified any specific collaboration between it and UNC[] to which the no-poach agreement would have been ancillary.'³³ On 4 January 2018, the UNC defendants settled, and on 20 May 2019, Duke agreed to settle for \$54.5 million. As part of the settlement, the DOJ filed an unopposed motion to intervene in the Duke litigation and obtained the right to enforce an injunction against the maintenance or

29 American Bar Association, 'No-Poach: Assessing Risk in Uncertain Seas' (Apr. 28, 2020), <https://ourcuriousamalgam.com/our-curious-amalgam-podcast-release-no-poach-assessing-risk-in-uncertain-seas/>.

30 Bloomberg Law, 'Fast Food Franchisees Settle Employee No-Poach Suits' (Mar. 19, 2019), <https://news.bloomberglaw.com/daily-labor-report/fast-food-franchisees-settle-employee-no-poach-suits-2?context=search&index=9>.

31 With the recent passage of whistle-blower protection laws for criminal antitrust violations, individual employee whistle-blowers are likely to become a growing source of cases for the Antitrust Division and class action plaintiffs' lawyers.

32 Statement of Intent, *Seaman v. Duke Univ.*, No. 1:15-cv-462 (MD.N.C. Mar. 7, 2019), ECF No. 325, <https://www.justice.gov/atr/case-document/file/1141756/download>.

33 Statement of Intent, at 29, No. 1:15-cv-462 (MD.N.C. Mar. 7, 2019), ECF No. 325.

recurrence of the conduct at issue, thereby securing an unprecedented role as enforcer in a private litigation.³⁴ On 24 September 2019, the district court judge approved the settlement.³⁵

The same uncertainty as to the appropriate standard has been reflected in private litigation. For example in *In re Papa John's*, a district court denied a motion to dismiss, holding that the plaintiffs had plausibly pleaded that 'the provision restrains horizontal competitors for labor', which was unlawful under the per se rule, quick look analysis, and rule of reason analysis.³⁶ Comparably, a district court held that the plaintiffs plausibly pleaded that no-poach agreements between the defendant and its franchisees unlawfully restrained trade in *Robinson v Jackson Hewitt, Inc*, and that the franchisors and franchisees were separate economic entities pursuing their own economic interests.³⁷ However, in contrast to *In re Papa John's*, the district court did not determine the standard of review applicable to the case as they believed such a determination to be 'premature' and asserted that 'more factual information [was] required.'³⁸

34 Motion to Intervene, No. 1:15-cv-462 (MD.N.C. Mar. 20, 2019), ECF No. 352, <https://www.justice.gov/atr/case-document/file/1164996/download>. Regarding the unprecedented role of the DOJ in the settlement, former Assistant Attorney General Delrahim noted that: '[p]ermitting the United States to become part of this settlement agreement in this private antitrust case, and thereby to obtain all of the relief and protections it likely would have sought after a lengthy investigation, demonstrates the benefits that can be obtained efficiently for the American worker when public and private enforcement work in tandem.' DOJ, Press Release, 'Justice Department Seeks to Intervene in Private Class Action to Enforce Prohibition on Unlawful "No-Poach" Agreements' (May 20, 2019), <https://www.justice.gov/opa/pr/justice-department-seeks-intervene-private-class-action-enforce-prohibition-unlawful-no-poach>. This outcome highlights that the agencies and courts will continue to work together to enforce against these agreements. Further, the settlement released claims by medical faculty, but did not release claims by non-medical faculty. A second-class action suit was filed against the universities in 2020, with the class comprised of non-medical faculty. The parties have reached a preliminary settlement agreement.

35 DOJ, Press Release, 'Justice Department Comments on Settlement in Private "No-Poach" Class Action That Allows Government to Enforce Injunction Against Duke University, Court's Final Judgment Allows Antitrust Division to Enforce Injunction Barring University from Maintaining or Entering into Unlawful Agreements not to Compete for Employees' (Nov. 8, 2019), <https://www.justice.gov/opa/pr/justice-department-comments-settlement-private-no-poach-class-action-allows-government>.

36 *In re Papa John's*, 2019 WL 5386484.

37 *Robinson v. Jackson Hewitt, Inc.*, No. 19-9066, 2019 WL 5617512, (D.J.N. Oct. 31, 2019).

38 *Id.* at *7.

However, there are some outliers, one of which is *Arrington v Burger King Worldwide Inc.*, in which the district court held that franchisors and franchisees were the same economic actor pursuing the same economic interests and so agreements between them could not violate section 1 of the Sherman Act.³⁹ This decision stemmed from the decision in *Copperweld v Independence Tube*, which held that a company parent and its subsidiary cannot, by law, collude under section 1 of the Sherman Act because they are the same economic actor.⁴⁰ On *Arrington's* appeal to the 11th Circuit, the DOJ entered an amicus brief noting that, as related to hiring, franchisors are capable of conspiring with their franchisees under antitrust law because, in the hiring context, they are independent economic actors.⁴¹

Another notable case was filed in September 2019 against LG and Samsung for allegedly entering into a no-poach agreement, which was discovered when a recruiter told a former LG sales manager that the two companies 'have an agreement that they won't steal each other's employees.' The complaint was dismissed at the pleading stage,⁴² and the Ninth Circuit upheld the lower court's finding, holding that the plaintiffs had not provided sufficient evidence of an agreement in its complaint.⁴³

Latest trends

In April 2020, in the wake of the covid-19 pandemic and resulting economic downturn, the Antitrust Agencies asserted that they were closely monitoring employer coordination that may be used to disadvantage workers, specifically noting that the antitrust laws would not be less vigorously enforced during the economic crisis. The Antitrust Agencies made clear they are on the alert and are carefully observing the hiring, recruiting, retention or placement of workers to identify collusive and anti-competitive conduct, including wage-fixing, no-poach agreements, the exchange of competitively sensitive information and non-compete agreements, and there would be an increased focus on preserving competition for employees in essential industries, such as first responders, and those working in grocery stores, pharmacies, and warehouses.⁴⁴

39 *Arrington v. Burger King Worldwide Inc.*, 448 F. Supp. 3d 1322 (S.D. Fl. Mar. 2020).

40 467 U.S. 752 (1984).

41 Brief of Amicus Curiae, No. 20-CV-13561 (11th Cir. Dec. 7, 2020).

42 *Frost v. LG Elec.*, No. 16-cv-05206, 2018 WL 6256790, *2 (N.D. Cal. Jul. 9, 2018).

43 *Frost v. LG Elec., Inc.*, 801 F. App'x 496 (9th Cir. 2020).

44 DOJ and FTC, 'Joint Antitrust Statement Regarding Covid-19 and Competition in Labor Markets' (Apr. 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf.

2020–2021: First criminal indictments

In December 2020, the DOJ made true on its promise to criminally prosecute no-poach agreements, announcing a federal grand jury indictment against a former owner of a therapist staffing company for conspiring with competing companies to agree to lower wages for physical therapists (PTs) and physical therapist assistants (PTAs).⁴⁵ The DOJ's allegations include communications between the defendant, Neeraj Jindal, and as-yet unnamed co-conspirators, about exchanging non-public wage information for PTs, and agreeing to and implementing wage decreases.⁴⁶ The majority of the communications occurred by text messaging, with the defendant allegedly communicating with at least four other competing staffing companies – 'I am reaching out to my counterparts about lowering PTA pay rates to \$45' – and asked each owner, 'What are your thoughts if we all collectively do it together?' The defendant then allegedly texted one owner, 'FYI we made rate changes effective next payroll Monday decreasing PTs and PTAs.'⁴⁷

As a result of the charges, Mr Jindal faces up to 10 years in prison and a \$1 million fine, in addition to an obstruction charge relating to the FTC's separate investigation of the wage-fixing conduct, which carries a statutory maximum penalty of five years' imprisonment and a \$250,000 fine.⁴⁸ Assistant Attorney General Delrahim noted in announcing the charges: 'The charges announced today are an important step in rooting out and deterring employer collusion that cheats American workers – especially healthcare workers – of free market opportunities and compensation.'⁴⁹

Shortly after announcing its first criminal charges relating to wage-fixing, in January 2021, the DOJ announced its first criminal charges relating to no-poach agreements.

45 Indictment, *U.S. v. Jindal*, No. 4:20-cr-358 (E.D. Tex. Dec. 9, 2020), ECF No. 1, <https://www.justice.gov/opa/press-release/file/1344191/download>.

46 *Id.* at ¶ 12.

47 *Id.*

48 DOJ, Press Release, 'Former Owner of Health Care Staffing Company Indicted for Wage Fixing, Antitrust Division Remains Committed to Prosecuting Collusion in Labor Markets' (Dec. 10, 2020), <https://www.justice.gov/usao-edtx/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>.

49 *Id.*

According to the indictment, Surgical Care Affiliates (SCA), a unit of UnitedHealth Group and the owner and operator of outpatient medical care facilities across the United States, allegedly entered into two separate conspiracies with other healthcare companies to suppress competition between them for the services of senior-level employees.⁵⁰

As evidence of the alleged agreements, the DOJ's indictment cites emails between SCA and the unnamed co-conspirators, including one in which a co-conspirator's chief executive officer (CEO) emailed its employees: 'I had a conversation w[ith] [SCA's CEO] re people and we reached agreement that we would not approach each other's proactively.'⁵¹ Another email from a co-conspirator to SCA's CEO states: 'Just wanted to let you know that [recruiting company] is reaching out to a couple of our execs. I'm sure they are not aware of our understanding.' The indictment further contains allegations of the impact of the agreement, with a human resources employee at one company emailing a recruiter, stating that although a candidate looked great, she 'can't poach her' because the candidate worked for SCA.⁵²

As a result of the charges, SCA faces a statutory maximum penalty under the Sherman Act of up to \$100 million in fines. No individuals have been charged to date. In announcing the charges, Mr Delrahim said: 'The charges demonstrate the Antitrust Division's continued commitment to criminally prosecute collusion in America's labor markets.'⁵³

In response, SCA filed a motion to dismiss the indictment on 26 March 2021, arguing in part that the indictment fails to plead a per se violation and that, because there is no federal precedent that no-poach or non-solicitation are inherently illegal, '[f]undamental principles of due process and fair notice bar this prosecution.'⁵⁴ The DOJ filed its response on 30 April, arguing that the alleged conspiracies are per se illegal under the Sherman Act, which, as construed by courts, also provides notice as required by due process.⁵⁵

50 Indictment, *U.S. v. Surgical Care Affiliates, LLC*, No. 3:21-cr-00011 (N.D. Tex. Jan. 5, 2021), ECF No. 1, <https://www.justice.gov/opa/press-release/file/1351266/download>.

51 *Id.* at ¶ 11(a).

52 *Id.* at ¶ 11(f).

53 DOJ, Press Release, 'Health Care Company Indicted for Labor Market Collusion' (Jan. 7, 2021), <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>.

54 Motion to Dismiss, *United States v. Surgical Care Affiliates LLC*, No. 3:2021-cr-00011 (N.D. Tex. Mar. 26, 2021), ECF No. 38.

55 Opposition to defendants' Motion to Dismiss (above), ECF No. 44.

The wave of criminal indictments continued in March 2021 when the DOJ announced it had secured a criminal indictment against a healthcare staffing company and a former manager of the company in Las Vegas, Nevada.⁵⁶ Both the company and the former manager, Ryan Hee, were charged with engaging in a conspiracy to fix the wages of nurses.⁵⁷ It was alleged that Mr Hee entered into agreements with a competing company (which also provided contract nursing services to the school district) not to recruit or hire nurses staffed by their respective companies and to refrain from raising the wages of those nurses.⁵⁸ The DOJ cited evidence of alleged communications between Mr Hee and his co-conspirator, including an email in which Mr Hee said: 'Per our conversation, we will not recruit any of your active [school district] nurses.'⁵⁹

Executive and state enforcement

The push for increased enforcement is not exclusive to the Antitrust Agencies.⁶⁰ President Biden, who was key to President Obama's policies to curb non-compete and no-poach agreements, has made various statements signaling an aggressive approach.

In 2019, President Biden tweeted that '[i]t's simple: companies should have to compete for workers just like they compete for customers. We should get rid of non-compete clauses and no-poaching agreements that do nothing but suppress

56 DOJ, Press Release, 'Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses: Alleged allocation and wage-fixing scheme targeted nurses staffed at the Clark County School District who were serving medically fragile students' (Mar. 30, 2021), <https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses>.

57 Indictment, *U.S. v. Hee*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Mar. 26, 2021), ECF No. 1, <https://www.justice.gov/opa/press-release/file/1381556/download>.

58 *Id.* at ¶ 12.

59 *Id.* at ¶ 14(a).

60 The United States is not alone in its engagement with anticompetitive employment agreements. Brazil's Administrative Council for Economic Defense recently mounted a formal probe into three dozen companies based on allegations of wage-fixing in the healthcare market; Abbot, Acelity, Baxter, 'Others targeted in Brazilian probe into wage fixing of healthcare labor agreements' (Mar. 16, 2021) (MLex).

wages.’⁶¹ He additionally promised in 2020 to ‘work with Congress’ to ‘eliminate all non-compete agreements, except for the very few that are absolutely necessary . . . and outright ban all no-poaching agreements.’⁶²

Indeed, President Biden has made clear since before the 2020 election that anti-competitive employment agreements were squarely in his administration’s crosshairs. Many anticipate a federal no-poach ban or very restrictive guidelines regarding the legality of non-compete and no-poach agreements. Preserving competition in the labor markets appears to be a bipartisan issue, with both Democrats and Republicans having introduced bills designed to restrict or ban certain types of employment agreements.⁶³

Employment-related agreements can and have been regulated at the state level as well, both by the courts and legislature. For example, the End Employer Collusion Act, currently in the New York Senate Rules Committee, would void ‘agreements between certain employers restricting . . . current or future employment’, defining ‘restrictive employment agreement[s]’ as ‘any agreement that (i) is included in a franchise agreement and (ii) prohibits or restricts one or more franchisees from soliciting or hiring the employees or former employees of the franchisor or another franchisee.’⁶⁴ Further, Washington’s Non-Compete Act, passed in 2019, directly addresses no-poach agreements regarding franchises. The legislation states that ‘[n]o franchisor may restrict, restrain, or prohibit in any way a franchisee from soliciting or hiring any

61 Joe Biden (@JoeBiden), Twitter (Dec. 23, 2019, 7:05pm), <https://twitter.com/joebiden/status/1209263668736745473?lang=en>.

62 ‘Another Bill in Congress Seeks to Limit Non-Competes – Will This One Go Anywhere?’ (Mar. 1, 2021), *The National Law Review*, <https://www.natlawreview.com/article/another-bill-congress-seeks-to-limit-non-competes-will-one-go-anywhere#:~:text=In%20December%202020%2C%20then%20President,narrowly%20defined%20category%20of%20trade>.

63 Senator Marco Rubio (R-FL) introduced the Freedom to Compete Act, which would amend the Fair Labor Standards Act to restrict non-compete agreements between employers and low-wage workers. S.124 – Freedom to Compete Act (Jan. 15, 2019), <https://www.congress.gov/bill/116th-congress/senate-bill/124/text>. Democratic Senator Chris Murphy (D-CT) and Senator Todd Young (R-IN) then introduced the Workforce Mobility Act, which states, ‘no person shall enter into, enforce, or threaten to enforce a noncompete agreement,’ and contains exceptions, such as one for the sale of ‘goodwill or ownership interest’ in a business. S.2614 – Workforce Mobility Act of 2019 (Oct. 16, 2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2614/text>.

64 Senate Bill S3937–C (Feb. 21, 2019), <https://legislation.nysenate.gov/pdf/bills/2019/S3937C>.

employee of a franchisee of the same franchisor,' and that '[n]o franchisor may restrict, restrain, or prohibit in any way a franchisee from soliciting or hiring any employee of the franchisor.'⁶⁵

Conclusion

Evolution in the treatment of no-poach agreements, including the wave of recent criminal enforcement actions, along with statements by President Biden and top-ranking officials in the agencies, demonstrate that the Antitrust Agencies are fully focused on anticompetitive conduct in labor markets. We expect this trend to continue and look to those future enforcement actions and court decisions to provide additional guidance along the way.

* *The authors gratefully acknowledge the contributions of colleague Grace Hunter in preparing this chapter.*

65 Revised Code of Washington, Title 49, Chapter 49.62, § 49.62.060, Franchisor restrictions, <https://app.leg.wa.gov/RCW/default.aspx?cite=49.62&full=true>.



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