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DOJ Files Statements of Interest in "No Poach" Cases: Policy Shift or Trap for the Unwary?

Edward B. Schwartz, Michelle A. Mantine, and Jennifer M. Thompson

The Department of Justice has shined a spotlight on the potential antitrust risks associated with employers' use of "no-poach" agreements in which companies agree not to hire or solicit each other's employees. The authors of this article discuss the Justice Department's statements of interest in "no poach" cases.

Since 2010, with its cases filed against a number of leading technology companies, the Department of Justice (DOJ) has shined a spotlight on the potential antitrust risks associated with employers' use of "no-poach" agreements in which companies agree not to hire or solicit each other's employees. Indeed, the DOJ and the Federal Trade Commission (FTC) issued joint guidelines in 2016 making clear that they would aggressively enforce the antitrust laws against such agreements between and among competitors as per se unlawful, including through criminal enforcement. Yet, the DOJ recently filed statements of interest in several antitrust cases brought against franchisors, taking the position that the no-poach agreements at issue in those cases were not per se unlawful and should be analyzed under the more forgiving rule of reason test. As discussed below, companies should not read the DOJ's filings as reflecting a change in its enforcement policy when it comes to no-poach agreements. But the

Edward B. Schwartz (*eschwartz@reedsmith.com*) is a partner at Reed Smith LLP and co-leader of the firm's Antitrust & Competition Team in the Global Regulatory Enforcement Group, defending clients in antitrust class actions and other antitrust and commercial litigation, and in criminal, merger, and other civil antitrust investigations. Michelle A. Mantine (*mmantine@reedsmith.com*) is a partner at the firm and co-leader of its Antitrust & Competition Team focusing on complex commercial litigation, investigations, and regulatory matters. Jennifer M. Thompson (*jmthompson@reedsmith.com*) is an associate in the firm's Global Commercial Disputes Group, focusing her practice in all areas of commercial litigation, including class actions, injunctions, and state and federal appeals.

DOJ's involvement in private, civil actions concerning the use of no-poach agreements bears watching and could ultimately provide helpful guidance to franchisors, manufacturers who distribute through independent dealers, and other companies that may wish to use no-poach provisions in their vertical contracts.

BACKGROUND

The DOJ's recent enforcement campaign against no-poach agreements began when it brought a series of cases against a number of high-profile, technology companies, because of agreements between the companies not to cold call each other's employees, and in some cases, agreements not to hire each other's employees. These cases ultimately resulted in consent judgments. Then, in October 2016, the DOJ and the FTC issued their first "Antitrust Guidance for Human Resource Professionals" in which they, among other things, warned employers that "naked" no-poach agreements (that is, agreements that are not reasonably necessary for a separate legitimate business transaction or collaboration) were considered per se illegal under federal antitrust laws and that, going forward, the DOJ might seek criminal penalties against companies that enter into such agreements.

Since then, the DOJ brought a civil antitrust lawsuit challenging a no-poach agreement as per se unlawful, which resulted in entry of a consent judgment; however, to date, the DOJ has not filed criminal charges challenging any no-poach agreement, in that action or otherwise.

Several states have followed the DOJ's lead and launched their own investigations and, in some cases, challenges to the lawfulness of no-poach agreements, particularly in the franchisor-franchisee context. The Washington State Attorney General has been particularly active in this arena, and in October 2018, it filed a lawsuit against restaurant chain Jersey Mike's, which had refused to remove a no-poach clause from its franchise agreements. The court recently denied a motion to dismiss filed by Jersey Mike's, allowing the case to proceed.

In addition, private plaintiffs have commenced a flurry of civil class action antitrust litigation against franchisors related to the use of no-poach provisions, and to date, these actions have survived dismissal at the early stages of the proceedings.[1] In those cases, the courts have focused on identifying the appropriate standard (per se, rule of reason, or quick look) to be applied in determining whether the allegations were sufficient to survive a motion to dismiss.

DOJ'S STATEMENTS OF INTEREST

The DOJ recently filed statements of interest in several of these civil antitrust cases in the Eastern District of Washington. The DOJ

asserted that franchisor-franchisee no-poach agreements should be subject to a rule of reason analysis, and not the more stringent per se standard.[2]

The DOJ noted that "horizontal" agreements between competing fast-food companies not to hire each other's employees could constitute a per se violation of the Sherman Act. However, the DOJ argued, the franchisor-franchisee relationship is vertical, and is therefore properly assessed under the rule of reason. However, it bears noting that where a franchisor owns and operates its own stores, it may be viewed as having both a vertical and horizontal relationship with its franchisees and, depending upon the relevant facts, the DOJ's analysis might not apply. The DOJ's statements of interest demonstrate its intent to closely scrutinize the relationship between entities to determine which standard applies (per se or rule of reason), which will likely result in a highly fact-intensive inquiry if the case proceeds beyond the motion to dismiss phase, as all such cases have to date.

In its statements of interest, the DOJ also rejected the plaintiffs' arguments that the agreements between the franchisors and franchisees constituted a "hub-and-spoke conspiracy." The DOJ noted that to successfully state a claim based on this doctrine, the plaintiffs would need to plead that there was a horizontal agreement among "spokes"—here, franchisees—not to hire from each other, and that the franchisor "hub" agreed to participate in that horizontal agreement. The plaintiffs would also need to demonstrate the existence of a "rim" to the wheel in order to form an agreement among the horizontal competitors. The DOJ argued that the plaintiffs in the three cases had not pled the existence of a rim, but that even if they did, the franchise relationship is a legitimate business collaboration and thus no-poach agreements qualify as ancillary restraints that would qualify for rule of reason analysis.

The DOJ also rejected the plaintiffs' position that a "quick-look" analysis—a subset of the rule of reason—should apply, noting that such analysis should be employed only when the conduct's anticompetitive effects can easily be ascertained and it is "implausible" that the procompetitive benefits would outweigh harm to competition. Here, the DOJ argued that because franchise no-poach agreements may indeed provide procompetitive benefits and promote interbrand competition, they do not qualify for quick-look analysis.[3]

THE WASHINGTON STATE ATTORNEY GENERAL WEIGHS IN

Notably, the Washington State Attorney General sought leave to file an amicus brief in response to the DOJ's statements of interest in these cases, which the court granted. In its briefing, the Washington Attorney General argues in part—at least as to the antitrust claims

under state law, including Washington's Consumer Protection Act, RCW 19.86.920—that franchise-based no-poach deals should be considered per se unlawful as a form of market allocation.[4] In support, the Washington Attorney General notes that at least one state court judge (in the decision in *Jersey Mike's*, discussed above) has already rejected arguments that a franchisor's use of no-poach provisions in its franchise agreements should be analyzed under the rule of reason, preserving the State's per se and quick-look claims under the Washington Consumer Protection Act.

Following this back-and-forth briefing between the DOJ and the Washington Attorney General, the parties ultimately settled their respective antitrust lawsuits consolidated in the Eastern District of Washington on March 18, 2019. The settlement of these lawsuits leaves a key question up in the air—will courts accept the DOJ's position that no-poach agreements among franchisors and franchisees generally call for a substantive antitrust analysis under the rule of reason, or will the Washington Attorney General's position prevail?

CONCLUSIONS AND KEY TAKEAWAYS

The DOJ chose to file statements of interest in private, civil cases concerning antitrust challenges to no-poach agreements. It presumably did so both to potentially influence the outcome of those cases and to state publicly that while it can and will aggressively enforce the antitrust laws against "naked" restraints on hiring between competitors, it recognizes that some no-poach agreements might, on balance, be procompetitive and may survive antitrust scrutiny under the more lenient rule of reason standard.

However, the law is evolving in this area and, as reflected in the amicus brief filed by the State of Washington in response to the DOJ's statements of interest, no-poach agreements that may pass muster with the DOJ might still be subject to investigation and an enforcement proceeding by a state attorney general. And, in the current enforcement environment, in which many state attorneys general are actively seeking to fill what they view as an enforcement void in federal law enforcement, including antitrust enforcement, this risk should not be treated lightly. Also, at a minimum, the DOJ's filings in no way mitigate the antitrust enforcement risk that companies face from agreeing with their direct competitors to any restraints in their hiring practices.

In sum, in evaluating their current no-poach provisions, or when considering such agreements in the future, companies should keep the following in mind:

- The DOJ has made clear that it intends to continue to aggressively bring enforcement actions to prohibit naked no-poach agreements between companies that compete in the labor market—that is, agreements that are not part of a legitimate business transaction—as per se unlawful.

- The DOJ's statements of interest recognize that there are circumstances in which an employer has a legitimate, procompetitive reason to enter into a no-poach agreement. This may be the case where a supplier or franchisor wishes to restrict the ability of its franchisees or distributors to compete with one another for employees: that is, the relationship between the parties is vertical.

- Although not addressed by the DOJ in its filings, a no-poach agreement may also be considered procompetitive where such an agreement is part of a legitimate business transaction between horizontal competitors: such as the sale of assets or of a business where the value of the assets or business purchased hinges in part on the existing employees remaining in place for some period of time.

- In either case—a purely vertical agreement or one that is ancillary to a legitimate business transaction—the terms of the no-poach agreement will be assessed for their reasonableness, taking into account a variety of relevant facts.

- Regardless of the DOJ's position, state enforcers, such as the Washington State Attorney General, may argue for the application of the more stringent per se standard under respective state laws.

In light of these considerations and the heightened level of antitrust scrutiny that no-poach agreements receive today, companies should consult with experienced antitrust counsel when evaluating their legitimate procompetitive bases for including such provisions in their business agreements, both now and in the future.

NOTES

1. *See, e.g., Arrington v. Burger King Worldwide, Inc., et al.*, No. 1:18-cv-24128 (S.D. Fla.); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786 (S.D. Ill. 2018). In March 2019, Jimmy John's filed a second motion to dismiss in response to an amended complaint, and its briefing included numerous references to the DOJ's statements of interest filed in the three consolidated cases in the Eastern District of Washington.

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

3. The DOJ went so far as to argue that the court should reject the decisions of two other federal district courts that have recently allowed antitrust claims challenging no-poach agreements to survive motions to dismiss and have seemed to indicate that a quick-look analysis may be appropriate in analyzing these franchisor-franchisee no-poach agreements. *See, e.g., Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786 (S.D. Ill. 2018).

4. *See, e.g., Stigar*, No. 2:18-cv-00244, Doc. No. 36.