Employee No-Poach Agreements
Practical Advice on Advising Clients in an Uncertain Legal Environment

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Antitrust Background

Section 1 of the Sherman Act makes unlawful “[e]very contract, combination … or conspiracy, in restraint of trade.” Courts, however, interpret the statute to prohibit only unreasonable restraints that harm competition. To violate § 1, there must be (1) an agreement, (2) between two or more persons, (3) that unreasonably restrains trade, and (4) affects interstate or foreign commerce. The agreement need not be explicit, formal, or written, but can be implicit, tacit, or verbal. Finally, an unreasonable restraint of trade is one that is likely to result in higher prices, lower output, or less innovation.

There are two primary analytical frameworks that courts use to analyze whether an agreement (or conduct) violates § 1: (1) the per se rule and (2) the rule of reason. The per se rule condemns as unlawful the most serious antitrust offenses upon proof that an agreement has been reached; no analysis of the actual effect of the agreement is required. The rationale behind the per se rule is that “there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.” The per se rule applies to “naked restraints of trade”—usually “horizontal restraints” (i.e., agreements among actual or potential competitors)—such as price fixing, bid rigging, and market allocations (allocating customers or territories). Per se violations of § 1 carry the risk of criminal prosecution and civil penalties, including treble damages.

Rule of reason analysis generally applies to all other agreements, including horizontal agreements that do not relate to price and to “vertical restraints” (e.g., agreements among suppliers and customers or distributors). Under the rule of reason, a factfinder weighs all of the evidence of the agreement’s procompetitive benefits against the anticompetitive harm; where the harm outweighs the benefits, the agreement is unlawful. The rule of reason permits “ancillary” restraints of trade where the restraint is reasonably related and reasonably necessary to an otherwise procompetitive agreement, the restraint is narrowly tailored, and the overall effect of the agreement is procompetitive. Agreements subject to the rule of reason are not prosecuted criminally, but still subject defendants to civil damages, which may be trebled.
Antitrust and Employment

• “No-Poaching” agreements are agreements between two or more employers not to solicit each other’s employees.
  o Broad Scope – covers (i) employees located in the US being hired to work in the US or outside the US or (ii) any employee located outside the US being hired to work in the US.

• “No-Hire” agreement prohibits the hiring of the worker even if he or she was not solicited.

DOJ/FTC Joint Guidance

• Antitrust Guidance for Human Resource Professionals (October 2016)
  o “Naked” agreements among employers not to recruit employees or not to compete on employee compensation would be considered *per se* violations of the antitrust laws and may be prosecuted criminally.
  o What is a “naked” agreement? An agreement that stands alone. It is not ancillary to a greater, legitimate collaboration.

• Summary → “No-Poach” agreements do not violate the antitrust laws if they are reasonable in scope and duration and are reasonably necessary to further the interests of the legitimate collaboration.
  o What is a “reasonable” agreement? Per DOJ, must:
    1. Be in writing
    2. Be ancillary to a legitimate business agreement
    3. Be narrowly tailored to only those employees directly involved in the agreement
    4. Contain a specific termination date or event.

Key Enforcement Actions

2010 – Silicon Valley Settlements

DOJ settled with Google, Apple, Pixar, eBay, Intel, and Adobe, enjoining each from entering into employee no solicitation agreements. DOJ alleged that each company had entered into at least one agreement with another company that prevented one or both from directly soliciting highly skilled employees of the other company. DOJ concluded these agreements restrained competition for affected employees without any procompetitive justification, and were therefore *per se* violations of antitrust law.

2018 – Knorr-Bremse / Wabtec

Upon settling a no-poach case with Knorr-Bremse and Westinghouse Air Brake Technologies (“Wabtec”) for injunctive relief, DOJ again warned that no-poach agreements could be
prosecuted criminally. In this instance, because the conduct at issue had ended prior to issuance of the DOJ/FTC guidance, DOJ decided to pursue this case as a civil matter. Interestingly, the agreements at issue only came to light because of DOJ’s antitrust review of an acquisition by Wabtec.

2018 – State AGs and Franchises

Numerous state Attorneys General, led by Washington AG Bob Ferguson, began obtaining agreements with franchisors to eliminate provisions that prevented franchise holders from hiring each other’s employees. The first targets were restaurants, with AG Ferguson setting forth his goal to “unrig a system that suppresses wages in the fast food industry.” Since, the initiative has spread to other industries including tax preparation, auto repair, travel services, and many others. Class action lawsuits have followed many settlements.

The Washington AG sued Jersey Mike’s after it refused to enter into a settlement. The case is pending.

2019 – DOJ and Washington AG Disagree on Standard in the Franchise Context

In three class actions against fast food restaurants, DOJ and the Washington AG filed dueling amicus briefs. DOJ argued that the restraints were vertical or alternatively, horizontal and ancillary to an otherwise procompetitive agreement, and therefore rule of reason treatment should apply. The WA AG argued that no-poach agreements are only employed by a minority of franchisors, and therefore are not “reasonably necessary” to franchise agreements. The cases settled before the court ruled.

2019 – Duke Class Action

DOJ filed an amicus in a class action against Duke University that alleged a faculty no poach agreement between the Duke and University of North Carolina medical schools. DOJ argued that the agreements were not ancillary and were therefore subject to per se condemnation. Following DOJ intervention, Duke settled with the class for $54.5 million and with DOJ for injunctive relief.
EMPLOYEE NO-POACH AGREEMENTS
Practical Advice on Counseling Clients in an Uncertain Legal Environment

September 12, 2019

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01 ANTITRUST FUNDAMENTALS
SHERMAN ACT § 1

“Every contract, combination, ... or conspiracy in restraint of trade ... is declared to be illegal”

Elements:
1. Agreement
2. Two or more persons
3. Unreasonably restrains trade
4. Affects U.S. (interstate or foreign) commerce
"[T]here are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

*Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958)
RULE OF REASON

• “Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977)*

• Each restraint must be:
  – Ancillary (reasonably related) to an otherwise procompetitive agreement
  – Reasonably necessary to achieve the procompetitive purposes of the agreement
  – As narrowly tailored as reasonably possible
HORIZONTAL VS. VERTICAL

Vertical Arrangements

Supplier
Manufacturer
Distributor
Retailer
Consumer

Horizontal Arrangements

Supplier
Manufacturer
Distributor
Retailer
Consumer

Monopoly Power
Monopsony Power
**PER SE** vs. **RULE OF REASON**

- **Per se rule** applies to “naked”:
  - Horizontal agreements on price
  - Horizontal territorial or customer allocation
  - Bid rigging

- **Rule of Reason** generally applies to everything else:
  - Horizontal non-price agreements
  - Horizontal agreements ancillary to procompetitive agreements
  - All vertical restraints

- **Quick look**
  - Conduct appears so likely to have anticompetitive effects that full Rule of Reason analysis is not required
ANTITRUST & EMPLOYMENT
ANTITRUST & EMPLOYMENT

• Primary Areas where Antitrust and Employment Law Overlap
  – Sharing of Wage Information
  – Restrictions on Hiring

• Labor = a Good/Service

• Wages = Prices
DOJ/FTC ANTITRUST GUIDANCE FOR HR PROFESSIONALS

• “Just as competition among sellers ... gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment.”

• On who is a competitor for antitrust purposes: “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.”
ANTITRUST & EMPLOYMENT

Wage Information

01. Managed by a third party (trade ass’n, outside consultant, etc)

02. Information is more than three months old

03. Information is aggregated/anonymized

04. At least five participants

05. No participant’s data contributed more than 25% of “weight” of any metric
AGREEMENTS ON RECRUITING

DOJ/FTC Position:

• “Naked wage-fixing or no-poaching agreements among employers...are per se illegal under the antitrust laws”
• But, agreements on hiring that are “ancillary” and “reasonably necessary to a legitimate collaboration” are assessed under the rule of reason
WHAT IS REASONABLE?

1. Be in writing,
2. Be ancillary to a legitimate business agreement,
3. Be narrowly tailored to only those employees directly involved in the agreement, and
4. Contain a specific termination date or event.

from DOJ Proposed Order in Knorr-Bremse
SILICON VALLEY CASES

• 2010: Google, Apple, Pixar, eBay, Intel, Adobe Companies each had agreements with other firms to avoid solicitation of hardware engineers and web developers
• USDOJ concluded these agreements were per se violations of Antitrust Law and enjoined conduct
• 2014: California AG reached a $3.8 million dollar settlement with eBay over allegations the company violated state and federal antitrust laws by entering into a no-poach agreement with Intuit
KNORR/WABTEC

• 2018 – USDOJ alleged that Knorr and Westinghouse Air Brake Technologies Corporation (WABTEC) agreed not to compete for U.S. rail industry workers
• Resulted in a Consent Decree enjoining conduct
• DOJ again warned about criminal liability
• Conduct revealed in a merger investigation
• Ongoing class action litigation (Knorr-Bremse settled in August 2019)
STATE AG ENFORCEMENT

• 2018 – Present: State AGs, led by Washington, file dozens of settlement agreements with franchisors banning no-poach agreements

• Started with restaurants; goal was to “unrig a system that suppresses wages in the fast food industry.”

• Moved to other industries (H&R Block, AAMCO, Sport Cuts, etc.)

• WA AG currently in litigation with Jersey Mike’s
DOJ VS. STATE AG ENFORCEMENT

• In three class actions that challenge no-poach clauses in franchise agreements of fast food chains, USDOJ and the Washington AG each filed amicus briefs and took different positions.
  • DOJ argued those agreements are vertical (or horizontal and ancillary) and should usually be evaluated under a full Rule of Reason analysis
  • WA AG argued for per se standard under the right facts
• Both could be right
  • State antitrust laws are not always identical to the federal laws
  • State AGs are charged with enforcing other laws that may be relevant (e.g. consumer protection, fair labor)
DUKE UNIVERSITY SETTLEMENT

• Class action alleged faculty no-poach between Duke and UNC medical schools
• DOJ filed amicus in March 2019 arguing for per se standard
• Duke settled in May 2019 for $54.5M and injunctive relief
SCENARIOS & GUIDANCE
NON-SOLICITS IN CLIENT/VENDOR AGREEMENTS

- Company X has a services agreement with Client Y
- The agreement includes an employee non-solicitation clause that extends for 1 year following the expiration of the agreement
- Is this legal? Key questions:
  - Is it ancillary to an otherwise procompetitive agreement?
  - Is it as narrowly tailored as reasonably possible?
  - What are the procompetitive justifications?
CUSTOMER IMPOSED NO-POACH BETWEEN VENDORS

- Customer X’s standard service agreement includes a provision prohibiting provider from soliciting other employees of other providers performing the same services
  - Is it ancillary to an otherwise procompetitive agreement?
  - Is it as narrowly tailored as reasonably possible?
  - What are the procompetitive justifications?
HANDS OFF MY CFO!

• Company A hires Company B’s CFO
• Company B’s CEO sees Company A’s CEO at a social function and gives her a hard time about hiring the employee
• Company A’s CEO is chagrined and tells her counterpart that it won’t happen again
• What just happened?
  – Agreement?
  – Per se illegal?
FRANCHISE THIS!

• Franchisor Implausible Burger has a standard franchise agreement that prohibits its franchisees from hiring employees from another Implausible Burger franchisee
• All the franchised location are owned by different franchisees
• Is this a problem?
  – Vertical or horizontal?
  – Per se illegal or Rule of Reason?
• What if promotions or raises are exempted?
• What if all outlets are company-owned and “agreement” is just an internal policy?
TRADE ASSOCIATION DISCUSSIONS

At a trade association meeting, the president of the association proposes the following and the members agree:

1. To hold salary increases to 4% next year
2. That bonuses shall only make up 20% of total compensation
3. To jointly purchase health insurance for employees
4. To enact maternity and paternity leave “best practices”
5. To all observe the same holidays
QUESTIONS?