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Anti-Poaching Issues In Franchising

Brian Forgas
Hilton Worldwide
McLean, Virginia

and

Rahul Rao
Washington State Office of the Attorney General
Seattle, Washington

and

Sandy Wall
DLA Piper LLP
Chicago, Illinois

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I. INTRODUCTION

Labor and employment issues have been at the heart of some of the most important legal controversies in the franchise sector for the last several years. They have also been a source of significant risk for franchisors and franchisees alike. Following closely on the heels of the joint-employer saga, beginning in 2017 a surge of attention became focused on “anti-poaching” provisions in franchise agreements. Anti-poaching provisions are known by several different names, including non-solicitation agreements, non-interference provisions, no-hire clauses, and restrictive employment agreements, to name a few. Based on the nature of the obligations they impose, they tend to be categorized together generally as “anti-poaching provisions.” However, they are not all the same.

This paper first examines the nature and types of anti-poaching provisions and their history. It then surveys the application of antitrust laws and enforcement of anti-poaching provisions and examines the recent federal, state, and private actions that have propelled the issue. This paper considers the different stakeholders, their different perspectives, and outlines the risks that each face in the current environment with a view towards where the legal trends may be heading next.

II. WHAT ARE ANTI-POACHING PROVISIONS?

A. Definition

Generally speaking, an anti-poaching provision is an agreement in which one party agrees not to solicit or hire the employees and/or former employees of the other party without the other party’s consent. This restriction may also encompass the employees and/or former employees of other employers (or groups of employers) who are not parties to the agreement. In March 2018, a bill was introduced in the United States Senate entitled the “End Employer Collusion Act,” which defines a restrictive employment agreement as “any agreement that (a) is between two or more employers, including through a franchise agreement or a contractor-subcontractor

1 See e.g., Allison R. Grow and Adrienne L. Saltz, Effectiveness of the Legislative Response to Joint Employer Liability 37 Franchise L.J. 349 (Winter 2018), observing that “The franchise industry occupies a unique space in the larger employment and workplace debates occurring across the country. . . . Franchise lawyers and business people have been grappling with [questions regarding the proper limits of franchisor control over franchisees’ businesses] for years, long before “joint employer liability” became the term du jour.”

2 See e.g., Joyce Mazero, Karen Boring Satterlee, Eric H. Karp, Leonard H. MacPhee, Jess A. Dance and William W. Sentell, “Drawing Lines in Franchisor Support – Is It Necessary and Where Are the Lines to Draw in Today’s Joint-Employment Environment?” 38 Franchise Law Journal 327 (Winter 2019), providing a chronological overview and analysis of the shifting and inconsistent legal standards governing joint-employer liability in the franchise context. See also, Josh M. Piper and Erik Ruda, Employee “No Poaching” Clauses in Franchise Agreements: An Assessment in Light of Recent Developments, 38 Franchise Law Journal 185 (Fall 2018), noting that “Anyone who has followed the joint employer issue (as it has affected franchising) will recognize the similar path that the no-poaching controversy has followed.”

3 See infra note 35 and accompanying discussion.

4 See Piper et al., supra note 2, at 185.

5 See, e.g., infra note 10 and accompanying examples of anti-poaching provisions. See also Piper et al., supra note 2, at 185.

6 See infra note 203 and accompanying discussion regarding the implications of whether such employers may be third-party beneficiaries of the anti-poaching provision.
agreement; and (b) prohibits or restricts one employer from soliciting or hiring another employer’s employees or former employees. This proposed federal definition has not yet been adopted.  

In the franchise context, an anti-poaching provision is typically a clause within a standard franchise agreement that seeks to prevent franchisees from hiring workers away from the franchisor and/or other franchisees in the same system without consent. It accomplishes this by placing restrictions on the franchisees – the employers – not the employees. This is a critical factor that differentiates an anti-poaching provision from non-competition covenants.

B. Types

There are many different types of anti-poaching provisions used in franchise agreements. Because these provisions are tailored to suit the businesses they serve, there can be significant variations in the specific types of conduct they proscribe, the employees and/or former employees they cover, their geographic limits, their time limits, the employers that are bound, and how the provisions are enforced. The key elements found in anti-poaching provisions are discussed below. To best understand them it is helpful to begin with some examples.

1. Examples

In 2017, Alan Krueger and Orley Ashenfelter of Princeton University conducted a survey and published a working paper that analyzed the prevalence and effects of anti-poaching provisions in the franchise sector (the “Princeton Study”). This study provided the following examples from standard form franchise agreements in the United States:

McDonald’s: During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald’s, any of its subsidiaries, or by any person who is at the time operating a McDonald’s restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph 14 shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.

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7 S. 2480, 115th Cong. § 2(a)(2). In April 2018, an identical companion bill was introduced in the U.S. House of Representatives. H.R. 5632, 115th Cong.

8 Id. At the time of this writing both of these bills were under committee review in each chamber respectively. https://www.congress.gov/bill/115th-congress/senate-bill/2480/all-actions and https://www.congress.gov/bill/115th-congress/house-bill/5632/all-actions.

9 Non-competition covenants in employment agreements are regulated by state law and while specific definitions may vary between jurisdictions, they all principally encompass direct agreements between employers and their employees or former employees. See generally Brian M. Malsberger, Covenants Not to Compete A State-by-State Survey, Tenth Edition, ABA Section of Labor and Employment Law and Bloomberg BNA (2016 Supplement). A straightforward example of this direct relationship can be found in the Florida statute that regulates non-competition covenants, which provides inter alia that “A court shall not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought.” Fla. Stat. Ann. §542.335(1)(a).


11 Id. at 5-6.
**Jiffy Lube:** Franchisee covenants that during the term of this Agreement, Franchisee will not employ or seek to employ any person who is or within the preceding six months has been an employee of Franchisor or of any System franchisee of Franchisor, either directly or indirectly, for itself or through, on behalf of, or in conjunction with any person.

**H&R Block:** During the term of this Agreement, neither Franchisee nor any of Franchisee’s Associates will, without H&R Block’s prior written consent: ... Solicit for employment any person who is employed by H&R Block or by any other franchisee of H&R Block …

**Anytime Fitness, LLC:** You will not retain or hire any person employed at another Anytime Fitness center located within ten (10) miles of your Anytime Fitness Center (or who was employed at such an Anytime Fitness center with ninety (90) days of you retaining or hiring that person), to become an employee of, or provide services to your Anytime Fitness Center (or to any other business in which you have an ownership interest of ten percent (10%) or more) without the consent of the owner of that other Anytime Fitness center.

Additional examples of anti-poaching provisions are cited in the case reviews in Section VI below.

2. **The Conduct Prohibited**

   As illustrated in the examples above, the principal restrictions found in anti-poaching agreements tend to concentrate on three activities: (1) soliciting; (2) inducing; and (3) employing.\(^\text{12}\) Understanding each is necessary to properly assess the scope of a restriction.

   At the most basic level, “soliciting” means merely to ask, to request.\(^\text{13}\) The impetus for a restraint on soliciting employees is to prevent one party from interfering with the employment relationship of others, regardless of whether those efforts are successful, because the interference itself could potentially cause harm.\(^\text{14}\) Such harm could include, for example, disturbing the employees during their workday, raising questions about loyalty, causing concerns about confidentiality, arousing suspicion among colleagues, driving rumors, inciting disagreements, and upsetting the day-to-day operation of the business. Any number of difficult personnel situations might develop that could negatively impact the harmony of the employer and employees working together. Maintaining a positive work environment is an important issue for employers for many reasons, including attracting and retaining talent and avoiding potential liability.\(^\text{15}\)

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\(^\text{12}\) In this context the term “recruiting” is synonymous with “employing” as it means to secure the services of, to engage, to hire. Compare *Webster’s Ninth New Collegiate Dictionary* 408, 985 (1983) with *Black’s Law Dictionary* 632 (Abridged 6th ed. 1991); see also *Merriam-Webster Dictionary* (2019), [https://www.merriam-webster.com/dictionary].


\(^\text{14}\) This concern has been reflected expressly in the text of some anti-poaching provisions. For example, the anti-poaching provision in McDonald’s standard franchise agreement in the United States as of 2017 was titled: *Interference With Employment Relations of Others.* *infra* note 35 and accompanying text (citations omitted).

\(^\text{15}\) People are the most important assets an organization can have. See, e.g., Employee Summary Feedback Report of the 2011 Federal Employee Viewpoint Survey, U.S. Equal Employment Opportunity Commission, [https://www.eeoc.gov/eeoc/plan/employeeviewpoint survey2011.cfm](https://www.eeoc.gov/eeoc/plan/employeeviewpoint survey2011.cfm), (stating that, “Part of delivering a world-class work environment...”)}
consequently would want to protect that investment and the daily operation of their business. However, for a party seeking to enforce a no-solicitation restriction it may be difficult to prove that a solicitation has occurred. As a practical matter, without firm evidence it can be challenging to determine who first approached whom when a dialog has taken place about leaving one employer to join another. In many instances the discussion could quickly dissolve into a “he-said she-said” situation with each participant blaming the other. As a result, the actual value of a restriction on solicitation may fall more into the realm of deterrent than enforcement.

The act of “inducing” is different than soliciting. It is the corollary of solicitation. To induce means to bring about, affect, cause, or influence an act or course of conduct. For an inducement to occur under an anti-poaching provision, the restricted party must have caused the employee to act – to leave their employment. But it does not mean that the restricted party needed to be successful in its ultimate goal. For example, if an anti-poaching agreement existed between Employer A and Employer B, and Employer B solicited an employee of Employer A to leave her position and go to work for Employer B, and in response the employee decided to quit and get away from both Employer A and B by leaving the industry altogether, Employer B could be found to have induced the employee into leaving Employer A even though the result isn’t what Employer B intended. The act of inducing also does not require that the inducer offer a benefit or advantage to the person being induced. Evidence of a benefit, therefore, is not necessarily needed to prove inducement. However, it is helpful to a party seeking to enforce an anti-poaching provision to prove that a violation occurred when that party can show evidence that the violator actually offered or provided a benefit to the employee, such as a cash bonus, for leaving. This puts the party seeking to enforce the restriction in stronger position, but does not eliminate entirely the problem of proof, when all this activity has been hidden from the employer from the outset. Indeed, in many cases an employer does not know that a former employee has been poached until after the fact, when they later learn that the person has gone to work for the restricted employer. This leads to the third and most important element of an anti-poaching provision, “employing.”


16 Id.


18 Id. *See also, e.g., F.S. Sperry Co., Inc. v. Schopmann, et al.*, 304 F. Supp.3d 694 (2018) (discussing the elements of claims for inducement of breach of contract and intentional interference with business relationships under Tennessee law); *Reeves v. Hanlon et al.*, 17 Cal. Rptr. 3d 289 (Cal. Sup. Ct. 2004)(discussing the elements of a claim for intentional interference with at-will employment relations under California law. Each of these claims involve elements pertaining to inducement, and none require evidence of a benefit). In *Reeves*, the court held that to establish a claim of interference with an at-will employment relationship, the plaintiff must prove that the defendant engaged in an independently wrongful act (and that merely extending a job offer, alone, is not an independently wrongful act). 17 Cal. Rptr. at 298. Presumably, the violation of an anti-poaching provision could constitute an independent wrongful act for purposes of this tort in California. How anti-poaching provisions interact with tort claims, like this one, is beyond the scope of this paper and could be an area for further review in the future.
To “employ” means to hire or engage one for service.\(^\text{19}\) This goes to the heart of an anti-poaching provision and completes the protection that is sought. By restricting the act of employing separately from, and in addition to, solicitation and inducement, an anti-poaching provision prohibits the ultimate harm that the employer is seeking to prevent. The mere fact that employment has occurred constitutes the violation, regardless of how it came about, even in the absence of any provable solicitation or inducement. This type of restriction effectively imposes an affirmative duty on the employer to confirm that it is not hiring an employee in violation of the restriction.\(^\text{20}\) In the normal course that is accomplished by simply reviewing the resume or job application of each applicant, which lists the applicant’s recent employment history.\(^\text{21}\) If the applicant conceals the identity of their current or former employer, then the restricted franchisee has not violated the restriction intentionally but upon learning the true facts may be required to terminate the employee in order to avoid what would be, at that point, a known continuing violation. By terminating the deceptive employee promptly, the franchisee cures any potential violation, demonstrates good faith, preserves its relationships with the franchisor and fellow franchisees, and removes a dishonest employee from its staff. This outcome could benefit both employers and the franchise system as a whole because it could help deter other employees from engaging in similar deceptive conduct.

A question that is common across all of these activities is who is prohibited from engaging in them. Some anti-poaching provisions may restrict the franchisee, its owners, officers, directors, employees, agents and their immediate family members from the prohibited conduct. Some may reach even more broadly to cover any person acting at the behest or for the benefit of the franchisee (by using clauses such as “directly or indirectly”). Agency questions aside, the basic reason for this is to prevent a franchisee from using a proxy to avoid the restriction. Otherwise the restriction itself would be illusory.

3. The Time Period

Anti-poaching provisions necessarily involve temporal elements, whether they are stated expressly or not. For example, consider an anti-poaching provision that provides: “Party A shall not employ or seek to employ any person who is employed by Party B.” Under this clause, on its face the restriction exists only during the period of employment by Party B. Therefore, Party A ostensibly could avoid the restriction easily by structuring an arrangement whereby an employee of Party B resigns from Party B’s employment and then waits a brief period of time before being hired by Party A. To prevent this scenario, many anti-poaching provisions are written to prohibit the employment of both current and former employees – for specific period of time after their employment has ended. The rationale for this is that an employee would be unlikely to wait for an extended period of time between jobs. By establishing a longer period between these two events, there is a greater assurance that there has been no surreptitious poaching. However, the concern with these post-employment restrictions is that while they may be effective at preventing “cheating” by a restricted employer, they also cover innocent situations in which an employee


20 Krueger et al., supra note 10.

21 Id. at 8. In their study, the authors examined the online job applications of 133 of the 156 franchise systems in their sample and found that nearly all of them collected past work experience, and 40% of them specifically asked whether the applicant has worked at the franchise brand in question. However, the authors noted that within their sample, franchise systems with anti-poaching provisions in their franchise agreements were only slightly more likely to pose that question than franchise systems without anti-poaching provisions in their franchise agreements. Id.
leaves one employer for reasons unrelated to the restricted employer, and then later applies for a job with the restricted employer without knowing there is an anti-poaching provision in place. In that case both the worker and the restricted employer have lost an opportunity that could have been beneficial to each of them, with no harm done to the first employer. This type of impact is one of the concerns with anti-poaching provisions generally.\footnote{See Section II.D.1.b., discussing the allegations of specific harm to individuals and broader impacts to the market asserted by opponents of anti-poaching provisions.}

4. The Employees Covered

Anti-poaching provisions may cover all employees and/or former employees, or only a specific subset of employees and/or former employees.\footnote{Compare the McDonald’s anti-poaching provision in \textit{Deslandes v. McDonald’s USA, LLC} (which covered all employees), infra note 39, with Pizza Hut’s anti-poaching provision in \textit{Ion v. Pizza Hut, LLC} (which covered only employees in a managerial positions), infra note 43.} If a subset is used, it can be defined by job position, geographic territory, or other factors. The question of which employees should be covered traditionally has been a business decision driven by the needs of the business. It has not been tempered by the types of legal guardrails that are attendant to employee non-competition covenants, because anti-poaching provisions have not been regulated in the same manner.\footnote{To be enforceable under state laws, employee non-compete agreements typically must be narrowly tailored to protect the employer’s legitimate business interests and reasonably limited in their time, geography, and scope, whereas these same types of requirements historically have not applied to anti-poaching agreements between employers. See supra note 9. And while some states have banned employee non-compete agreements entirely, or banned them in certain circumstances, no state has statutorily banned anti-poaching agreements between employers. \textit{Id.}} Without such regulation, some companies have elected not to use any anti-poaching provision, some have chosen to use only very limited provisions, and others have chosen to utilize very broad provisions with sweeping restrictions.

The Princeton Study analyzed the prevalence and effects of anti-poaching provisions in the franchise sector.\footnote{Krueger et al., supra note 10.} Their survey encompassed all franchisors for which a 2016 franchise disclosure document (FDD) was available and in which the franchisor had more than 500 franchised units operating in the U.S. In this sample of 156 franchise systems, the authors found that: (1) 42% did not have anti-poaching provisions in their standard franchise agreement; (2) 58% did have anti-poaching provisions in their standard franchise agreement; (3) most anti-poaching clauses applied to all workers, while only a minority were limited to managerial workers; (4) most anti-poaching clauses had a greater geographic scope than 10 miles; and (5) some provisions expressly allowed franchisees to poach workers with the other employer’s written consent, while other provisions contained a blanket prohibition.\footnote{\textit{Id.} at 5-6.}

The factors that bear on a franchisor’s decision on which employees should be subject to an anti-poaching provision may include the risk of harm to the business, the nature of the industry, the judgment of the business leaders, and the needs and demands of the franchisees. For example, the hotel and restaurant industries both fall under the general category of “hospitality” and are both heavily franchised, but they have taken largely opposite approaches to anti-poaching provisions. In the hotel industry anti-poaching provisions are rare as that is not the normal market
practice in that industry.\textsuperscript{27} Whereas, in the restaurant industry anti-poaching provisions are the norm.\textsuperscript{28} The authors of the Princeton Study observed the industry-based patterns in their research and noted, “These are . . . diverse sets of industries employing workers with relatively high or low skills, so it is unlikely that there is a simple or single explanation or characteristic that fully accounts for the occurrence of anti-poaching restrictions in franchise contracts. Nevertheless, the fact that one can reject that the occurrence of anti-poaching agreements across industries is a result of random chance suggests that industry characteristics might help predict where no-poaching agreements occur.”\textsuperscript{29} They then analyzed different industry characteristics and found that industries with higher employee turnover rates were more likely to utilize an anti-poaching provision than those with lower turnover rates. But they did not assert any causal relationship in this correlation.\textsuperscript{30}

5. The Employers Covered (Mutual Restrictions)

The factors that bear upon a franchisor’s decision whether to make its anti-poaching provision mutual to cover the franchisor as well as the franchisees are similar to those that determine which employees should be covered. That is to say the decision depends on the actual risk of harm to the business, the nature of the industry, the judgment of the business leaders, and the needs and demands of the franchisees. The Princeton Study did not assess the prevalence of mutual anti-poaching provisions. Therefore, of the 58% of franchise systems that utilize anti-poaching provisions cited in that study, it is unclear how many of those provisions provided reciprocal protections.\textsuperscript{31}

The threshold issue when considering whether an anti-poaching provision should be mutual is whether the franchisor has company-owned or affiliate-owned outlets that would compete with franchised outlets for the same workers. In that case the franchisor may naturally want the protection of an anti-poaching provision to protect the franchisor’s own outlets (or those of its affiliates). In equal measure, the franchisees would seek the same protections through mutuality. Indeed, in many systems a lack of mutuality would be unacceptable to the franchisees who would negotiate for greater protections. Mutuality may not be provided within the anti-poaching provision itself, but through other mechanisms in the system. For example, the McDonald’s anti-poaching provision cited above is not mutual on its face. However, McDonald’s company-owned restaurants are subject to the same anti-poaching restraint as its franchisee-

\textsuperscript{27} Id. at 7 (concluding that anti-poaching provisions are common in Quick Service Restaurants, Full-Service Restaurants, Tax Preparers, and Maintenance Services companies, and are uncommon in Hotels and Real Estate Agencies (as those categories were defined therein)).

\textsuperscript{28} Id.

\textsuperscript{29} Id. at 7-8.

\textsuperscript{30} Id. at 20 (stating that with respect to their logit estimates, “Our measures are imperfect proxies for the relevant theoretical constructs, and, in any event, the direction of causality is unclear. Consequently, this analysis is best viewed as an exploratory exercise to learn about the correlates of no-poaching agreements.”) (emphasis added).

\textsuperscript{31} Id.
owned restaurants. As a result, reciprocal protections exist in that system, which was noted by the court in the case of Deslandes v. McDonald's, discussed below.

The question of mutuality does not necessarily stop at the outlet level. Indeed, employees who work in corporate offices that oversee multiple outlets within the franchise system can also be attractive for poaching because of the knowledge they have gained through their broader experience. For example, an experienced finance director of the franchisor might be an attractive candidate to a large multi-unit franchisee that is seeking a new finance officer to support its growing organization. Likewise, a seasoned operations director from a franchisee organization might be a terrific candidate for a franchisor seeking to replace its own operations director who is retiring. Interestingly, though, most anti-poaching provisions are not directed toward protecting mid-management or senior-level corporate employees, but rather remain focused on store-level managers and hourly crew members. One could contemplate that the reason is that risks related to the loss of corporate employees traditionally have been managed with non-competition covenants within employment agreements (i.e., with employees with whom they have a direct relationship, utilizing contractual covenants that are governed by employment law). However, the breadth of some anti-poaching provisions in franchise agreements that cover “all” employees ostensibly do just that. This could add an extra layer of protection for an aggrieved employer, which would have a remedy against both the employee (via the non-competition covenant) and the poacher (via the anti-poaching clause). This raises the question of whether an anti-poaching provision could be used to circumvent local laws that would render a particular non-competition covenant unenforceable. This question goes beyond the scope of this paper.

6. Consent

Some anti-poaching provisions expressly allow franchisees to poach workers with the other party’s consent, while others contain a blanket prohibition. However, as a practical matter, it is likely that requesting consent would nearly always be an option, and the grant of consent likely would be the determinative factor even if the franchise agreement does not expressly provide for it. This is due to business reasons not legal ones – in the normal case a franchisor simply would not have any reason to spend time and money pursuing a violation when there is no actual dispute between the franchisees (unless there are other aggravating factors involved). Moreover, in the legal realm, a franchisor may find it difficult to enforce the provision when the harm the provision seeks to prevent does not exist. Said another way, consent is consistent with the spirit of an anti-poaching provision if not the letter of it. As a result, it seems unlikely a franchisor would seek to enforce an anti-poaching provision when prior consent was granted, or where subsequent consent or acquiescence can be inferred because no one ever complains about it.

32 McDonald’s “company-owned” restaurants are owned and operated by direct and indirect subsidiaries of McDonald’s Corporation and McDonald’s USA, LLC, collectively referred to as the “McOpCo” companies. See Deslandes v. McDonald’s, infra note 39 at 5, and McDonald’s USA, LLC, Franchise Disclosure Document, Items 1, 12, 20 and Exhibit P (Issuance Date: May 1, 2019), https://www.wdfi.org/apps/ franchiseSearch/details.aspx?id=622145&amp;hash=116971778&amp;search=external&amp;type=GENERAL.

33 See id. and accompanying text.

34 Krueger et al., supra note 10, at 5-6.
7. Should Different Provisions Be Treated The Same?

While various states have focused on these provisions in the last few years, the scope and breadth of these provisions have been substantially ignored. While all of these provisions can generally be classified as “anti-poaching provisions,” there can be significant differences between them, which arguably should have an impact on how they are evaluated. Yet, as discussed below, the U.S. Department of Justice and the state authorities have treated these provisions generically, without differentiating between their scope and coverage.

Is a narrowly crafted anti-poaching provision “better” than a broadly written one? In the case of non-competition covenants in employment agreements, that principle is broadly accepted as true. Legislatures and courts have repeatedly found that when employers have a legitimate protectable business interest, non-competition covenants can be enforceable when they are narrowly tailored to protect that interest. But the same cannot be said for anti-poaching provisions in franchise agreements. At this point, whether anti-poaching provisions should be evaluated based on their scope or whether they should all be evaluated in the same manner regardless of their scope is a matter of debate, and thus far the government authorities have been espousing the view that they should all be treated the same.

C. The History of Actions on Anti-Poaching Provisions

The U.S. Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) have targeted unlawful agreements with respect to labor markets as far back as the 1990s. However, the activity focused on anti-poaching provisions is a more recent phenomenon that began in 2016. Below is a chronology of the key events:

- October 2016 - The DOJ and FTC first addressed this subject in its Antitrust Guidance for Human Resource Professionals, alerting human resource professionals that agreements among competing employers to limit the terms of employment for potential hires may violate antitrust laws if the agreement constrains individual decision-making regarding terms of employment or job opportunities.

- February 2017 - Two current and former employees of Carl’s Jr. franchisees filed a statewide class action lawsuit against the franchisor, Carl’s Jr. Restaurants, LLC, and its predecessor, Carl Karcher Enterprises, LLC, in California state court, asserting that the anti-poaching provision in Carl’s Jr. franchise agreements violated three California statutes. The plaintiffs alleged that as a result of the anti-poaching provision they and the putative class suffered injury “in the form of reduced wages and worsened working conditions.”


38 Id. at 5.
- **June 2017** – A former employee of a McDonald’s franchisee filed a nationwide class-action lawsuit against the franchisor, McDonald’s USA, LLC, in federal court in Illinois, alleging that the anti-poaching clause contained in franchisor’s standard franchise agreement violated the federal Sherman Act and two Illinois statutes. The plaintiff alleged that as a result of the anti-poaching provision, she and the putative class suffered injury “in the form of reduced wages and worsened working conditions.”

- **September 2017** - Alan Krueger and Orley Ashenfelter of Princeton University published their study on the prevalence and effects of anti-poaching provisions in the franchise sector titled “Theory and Evidence on Employer Collusion in the Franchise Sector,” which presented economic models supporting the proposition that anti-poaching clauses limit the job mobility of workers and help to prevent wages from rising.


- **November 2017** - An employee of a Pizza Hut franchisee filed a nationwide class-action lawsuit against the franchisor, Pizza Hut, LLC, in federal court in Texas, alleging that the anti-poaching clause contained in Pizza Hut’s standard franchise agreement violated the Sherman Act and two Texas statutes. The plaintiff alleged that as a result of the anti-poaching provision, she and the putative class suffered injury “in the form of reduced wages and worsened working conditions.”

- **January 2018** – A former employee of a Jimmy John’s franchisee filed a nationwide class-action lawsuit against the franchisor, Jimmy John’s Franchise, LLC, in federal court in Illinois, alleging that the anti-poaching clause contained in the franchisor’s standard franchise agreement violated the Sherman Act and two Illinois statutes. The plaintiff alleged that as a result of the anti-poaching provision, he and the putative class suffered injury in the form of “reduced wages, reduced hours, reduced employment benefits, loss of professional growth opportunities, and worsened, illegal working conditions.”

- **March 2018** – Senators Elizabeth Warren and Corey Booker co-sponsored a bill in the U.S. Senate entitled the “End Employer Collusion Act” that would make it illegal to

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40 *Id.* at 21.

41 Krueger et al., *supra* note 10.


44 *Id.* at 85.


46 *Id.* at 34.
enforce anti-poaching provisions in franchise agreements. 47 The next month, Representative Keith Ellison introduced a companion bill in the U.S. House of Representatives. 48 These bills were referred to appropriate Senate and House subcommittees in March and May, 2018 respectively, but no further action has been taken.

- July 2018 – The State of Washington announced that it has entered into its first Assurances of Discontinuance (“AODs”) concerning anti-poaching provisions with seven franchisors. All of these franchisors were in the quick service restaurant (“QSR”) industry. 49 Since that time that scope has expanded and the state has entered into AODs with franchisors in at least 12 other industries. 50

- July 2018 – The states of California, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon and Pennsylvania jointly initiated inquiries regarding anti-poaching provisions in franchise agreements. Similar to Washington, they began their review with franchisors in the QSR industry. 51

- November 2018 – Daniel Levy and Timothy Tardiff published an economic study titled “Measurement of Market Concentration Faced by Labor Pools: Theory and Evidence from Fast Food Chains in Rhode Island with No-Poaching Clauses” (the “L&T Study”). The L&T Study directly refuted the analysis in the Princeton Study and asserted that its conclusions were invalid.52

- March 2019 – The DOJ filed a statement of interest in the pending case of Stigar v. Dough Dough, Inc., in federal court in Washington, in which it took the position that most franchisor-franchisee anti-poaching provisions are not “naked no-poach agreements between competitors” and should be subject to the rule of reason analysis under anti-trust law. 53

47 Supra note 7.

48 Id.


50 Infra Section V.A.2.

51 See Infra note 138.


September 2018 – A former employee of a Little Caesars franchisee filed a nationwide class-action lawsuit against the franchisor, Little Caesar Enterprises, Inc., in federal court in Michigan, alleging that the anti-poaching clause contained in Little Caesar’s standard franchise agreement violated the Sherman Act. The plaintiff alleged that the anti-poaching provision “suppressed [his] wages, inhibited his employment mobility, and lessened his professional work opportunities.” In July 2019, the court dismissed this action for failure to state a viable anti-trust claim.

Each of these events is discussed in more detail below. Overall, this progression shows a steady march of increasing legal and legislative challenges to anti-poaching provisions and the rapidly-escalating risk to franchisors who use them, particularly within the QSR industry which has been on the forefront of the issue.

D. Overview of Arguments For and Against Anti-Poaching Provisions

1. Arguments Against Anti-Poaching Provisions

   a. The Legal Arguments

   In the litigation context, the arguments against anti-poaching provisions in franchise agreements have evolved to the point where, currently, they are based almost exclusively on the assertion that these provisions constitute an “unreasonable restraint of trade” in violation of federal and state antitrust laws, as the other state law claims have fallen aside.

   Sections III and VI of this paper provide in-depth review of the law and the arguments made in the leading cases to date. These cases have coalesced around the central legal question concerning which antitrust analysis applies to these provisions. Specifically, under the antitrust laws, a restraint must fall under one of three rules of analysis: (1) the rule of reason, (2) the per se rule, or (3) the quick look analysis. Each analysis has its own pleading requirements and evidentiary standards. Plaintiffs have consistently argued that anti-poaching provisions are principally horizontal restrictions between competitors, and therefore must be subject to either the per se rule or, alternatively, the quick-look rule. The defendants in these cases have consistently argued that anti-poaching provisions are principally vertical restraints, and therefore subject only to the rule of reason analysis. It can be difficult for a plaintiff to prevail in a case where the rule of reason analysis applies because of the evidentiary burden it carries. Accordingly, because the outcome largely depends on which analysis applies, this issue has been the issue in all of the reported decisions to date – and to date, no court has yet entered a final ruling on whether an anti-poaching provision is a horizontal or vertical restraint.

   With respect to the government’s involvement on this issue, different law enforcement agencies have voiced different positions. For example, the State of Washington has taken the

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55 Id. at ¶109.


position that anti-poaching provisions are principally horizontal restraints that cannot be sustained under the *per se* rule, or alternatively, the quick look analysis. Whereas, conversely, the DOJ has asserted the position that these provisions are merely ancillary to vertical agreements and therefore subject to the rule of reason analysis. On the legislative front, proposals to ban anti-poaching provisions in franchise agreements have been based on the actual or potential harm to workers alone (without regard to antitrust or any other legal challenge). Consequently, the legislative initiatives have been undertaken before the legal matters have been fully resolved by the courts.

b. **The Factual Arguments**

In the leading cases challenging anti-poaching provisions to date, the plaintiffs have relied almost universally on the same basic allegations of injury, which is that the anti-poaching provision has caused and continues to cause reduced wages, loss of professional growth opportunities, and worsened working conditions for the employees. The evidence supporting these claims tends to fall into two groups: (1) personal stories of the plaintiffs; and (2) economic theories illustrated by the Princeton Study.

With respect to personal stories, the facts alleged by the named plaintiff in the *Deslandes v. McDonald’s* is among the most illustrative. The plaintiff, Leinani Deslandes, averred that she began working at a franchised McDonald’s restaurant in Florida as an entry-level crew member in 2009, and over the next few years was promoted to shift manager, then department manager, and then began training to become a general manager. During this time she claims she suffered a difficult work environment and was required to work mandatory overtime without receiving proper overtime wages, raises, or bonuses. By 2015 the last step to complete her training was a weeklong course at Hamburger University in Illinois. She claims that when her supervisors learned she was pregnant they cancelled her training and would not let her attend. She then sought to leave that restaurant and found a promising opening with another McDonald’s franchisee that offered higher pay and growth opportunity. The other franchisee expressed interest in hiring her but could not unless she was “released” by her existing restaurant. Her existing employer then refused to grant consent because she was told she was “too valuable.” At this point, from her perspective, Leinani alleges she was effectively stuck in her role. In the months that followed she did not receive any raises or promotions. In 2016 she quit and left the McDonald’s system entirely. This fact pattern illustrates a specific example of how anti-poaching provisions could operate to harm employees - restricting their mobility and depressing their wages. Those who argue against anti-poaching provisions argue that similar fact patterns could be playing out for thousands of employees across the workforce.

With respect to economic theories, the Princeton Study examined three models evaluating the effect of anti-poaching provision in franchise systems. While these economic models are somewhat complex, they provided argument and evidence that anti-poaching provisions in a franchise system depress wages and limit the job opportunities of workers. Specifically, these

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58 See *supra* class action lawsuits summarized in Section II.C.


60 *Supra* note 39, at 51-62.

61 The models are: (1) static oligopsony; (2) dynamic monopsony; and (3) bargaining over the division of specific human capital. *Supra* note 10, Section III, at 8-17.

62 *Id.*
models indicated that anti-poaching provisions reduce the elasticity of the labor supply faced by individual franchisees, and effectively make that franchise system a single employer in a given labor market, which increases employer concentration and reduces competition for employees in that market, thereby negatively impacting wage growth and opportunity for job advancement.\textsuperscript{63} All three models supported this result. However, the authors did not assert any absolute conclusions from this study, noting that “systematic evidence on the impact of no-poaching agreements on workers’ pay and within-franchise [system] job mobility is not available.”\textsuperscript{64} In their conclusion, the authors recommended that more research be done to obtain more statistical evidence and further explore the premise.\textsuperscript{65} In November 2018, the Princeton Study was challenged by the L&T Study, as discussed in Section II.D.2 below.


a. The Intent

Those who support anti-poaching provisions commonly argue that the intent of the provision is to prevent “free-riding” in a franchise system by franchisees who would prey upon their fellow franchisees for their own benefit. A basic assumption in franchise systems is that it is the responsibility of each franchisee to commit its own resources, time, and effort to build its own business, which includes the hiring, training, and investing in its own employees. However, in reality some franchisees tend to focus on their own needs and disregard the good of the franchise system overall. These franchisees may seek short cuts, and poaching employees may be a particularly valuable short cut because it enables the poacher to obtain an employee who has been trained and developed at someone else’s expense - saving the poacher substantial money, time, and effort.\textsuperscript{66}

For the purpose of illustrating this point, consider two examples noted above: Jiffy Lube and H&R Block. Jiffy Lube is a franchise system in the automotive industry that requires its franchisees and their managers to complete 20 hours of classroom training and 40 hours of on-the-job training, plus job-specific certifications that can range from 30 days to 1,095 days to complete, depending on the position and certification level involved.\textsuperscript{67} H&R Block is a franchise system in the financial services industry that requires its franchisees and their management employees to successfully complete an initial training program that covers 20 subjects in 32 hours of classroom training and 30 hours of on-the-job training, presented in two parts, plus annual training of 15-30 hours per year, in addition to various other recommended tax preparation

\textsuperscript{63} Id.

\textsuperscript{64} Krueger et al., supra note 10 at 20.

\textsuperscript{65} Id.

\textsuperscript{66} It has been observed that the true cost of replacing employees can be up to twice their base salaries depending on their wage, role and experience. See Misra, supra note 15.

classes. When a franchisee is able to acquire an employee who has already had this training and holds the requisite credentials, all of this time can be saved.

The other critical factor is cost. Many franchisors charge fees for the training they provide. However, even in cases where the franchisor provides training without a fee, franchisees normally must still bear all expenses for the training materials, travel, lodging, meals, and wages for each employee, as well as provide coverage for their role while they are away from the business. It is therefore easy to see the cost savings that poaching could provide.

Those who support anti-poaching provisions argue they were not intended to reduce wages in the marketplace or unduly restrict the ability of employees to change positions. Rather, they are for an entirely different purpose - to force franchisees to talk to each other, to avoid friction in the system, and help to avoid the circumstance where a terrific employee who has become unhappy leaves the franchise system entirely to join an outside competitor -- which would be the worst outcome for the franchise system as a whole.

b. The Effects

Those who support anti-poaching provisions argue that the provisions benefit employees because they encourage and incentivize employers to invest in those employees. Specifically, by preventing poaching without consent, anti-poaching provisions enable franchisees to invest in training and development for their staff because the provisions offer at least some protection for that investment -- although there is no protection from poaching by other brands and competitors outside the franchise system.

The competitive circumstances are important to this argument. For example, wouldn’t an excellent manager at a McDonald’s restaurant also make an excellent manager at a Burger King restaurant? Although these two restaurants may have different operational systems, wouldn’t that person’s management skills be desirable in both businesses – and every other restaurant in town? Franchisors are apt to point out that training involves more than teaching brand-specific technical skills (like learning how to use a particular cash register), it also involves developing non-brand-specific and highly-transferrable skills such as management, leadership, and organizational abilities (like how to run a crew schedule and how to identify, hire, and retain the best talent).

Supporters of the provisions highlight how poaching can have negative implications on the franchise system as a whole and ultimately be brand-damaging. If a franchisee has its employees poached, that franchisee may be angry and seek retribution against the poaching franchisee. The attitude of “if you hire my employees, I will do the same to you” can quickly escalate and destroy what otherwise would be harmonic relationships between fellow franchisees and the franchisor. In the day-to-day business, franchisees and franchisors must collaborate and work together (for example, on local marketing efforts). It is difficult for business owners to work together when they cannot trust each other. In addition, it is important for a franchisor to make sure that the system remains aligned and focused on building the business. Distractions such as poaching issues take attention and resources away from building the brand.

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Supporters of anti-poaching provisions distinguish these provisions from non-competition agreements. They do not restrict employees from pursuing employment opportunities anywhere -- either within the franchise system (where consent is required) or outside the franchise system (where consent is never required). Accordingly, this argument supports the proposition that anti-poaching provisions should not affect employees’ market value because that is set by the labor market as a whole. This has been challenged on a variety of fronts, including by the arguments put forward in the Princeton Study.

Supporters of anti-trust provisions may challenge the Princeton Study on its assumptions and methodology, including its presumption that when an anti-poaching provision exists franchisees are not permitted to hire from each other, which is not true. In addition to the matter of consent, some franchisees simply may not abide by the provision in the first place. Currently there is no empirical data on the frequency of consent or of disregard for the restriction. The Princeton Study recognizes these facts, stating that “Anecdotal evidence from recent court cases suggests that at least some franchisees do abide by no-poaching agreements, but systematic evidence on the impact of no-poaching agreements on workers’ pay and within-franchise [system] job mobility is not available.” Further, the study’s conclusion recommends more research, stating: “A first order question for future research is to document whether [job-to-job transitions within the same franchise system] are lower for franchise chains that have no-poaching agreements compared with those that do not.” One could argue that this question goes to the heart of the issue – and demonstrates there is no actual data proving the systemic harm alleged by the plaintiffs in the recent class action lawsuits.

About a year after the Princeton Study was issued it was challenged by the L&T Study, which concluded that the Princeton Study was flawed because it relied on inaccurate assumptions. The L&T Study first noted that even though the Princeton Study remained an unpublished working paper, it required serious consideration because journalists, State Attorneys General, and private litigants were relying on its conclusions. The L&T Study began by examining how anti-poaching provisions work and who they affect. Based on this, the authors determined that there is no single measure of concentration for workers in markets under anti-poaching provisions, because there are different groups of workers, each of which have different employment opportunities in the same market. The authors then presented a different measure to reflect the concentration of the various different employee groups, and used this measure to analyze the same market analyzed in the Princeton Study (QSR restaurants in Rhode Island). Using this alternate approach the study came to a starkly different result – concluding that “there is no evidence that no-poaching clauses in Rhode Island significantly alter market concentration

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69 See Id. For example, in the framework it presents for static oligopsony the study states: “To see what effect the no-poaching agreement [in this framework] has on labor market competition we simply assume all franchisees in the [same franchise system] are one company.” Id. at 11 (emphasis added).

70 Krueger et al., supra note 10 at 20.

71 Id.

72 Supra notes 41, 42, 47, and 49.

73 Supra note 52.

74 Id. at 2-3.

75 Id. at 4-5.
or market power as measured [in the Princeton Study].” The authors asserted that the root cause of this difference was that the Princeton Study relied on the erroneous assumption that the existence of an anti-poaching provision in a franchise system effectively makes that franchise system a single employer in a given labor market. They stated:

The claim in [the Princeton Study] that the no-poaching clause makes all franchise employers within a brand into a single employer is not based on empirical findings, the theoretical models [they] cite, or the employment limitations imposed on employees . . . Rather, it is an unsupported assumption . . . Without this unsupported assumption, . . . [their] evidence of the negative effect of no-poaching clauses in franchise agreements vanishes.77

Whether any lawsuit will reach a stage where these types of arguments can be made, probed, and thoroughly tested remains to be seen.

III. ANTITRUST LAWS AND ENFORCEMENT OF ANTI-POACHING PROVISIONS

A. Federal Law

Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy” in restraint of interstate trade or commerce.78 More than 100 years of antitrust case law has recognized three analyses courts use to find an “unreasonable restraint of trade” under the antitrust laws. To sufficiently plead an unreasonable restraint, a plaintiff must include allegations showing that the restraint will fall under one of three rules of analysis: (1) the rule of reason, (2) per se, or (3) quick look.79 Each analysis has its own pleading requirements, discussed below.

Naked restraints of trade among horizontal competitors – such as those competing for employees in a labor market – are per se unlawful.80 Under per se analysis, once the plaintiff shows that certain agreements exist, courts conclusively presume the agreement unreasonable as a matter of law.81 Because these agreements “have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, [ ] they are deemed unlawful per se.”82 The per se rule “reflect[s] a longstanding judgment” that the alternative, resource-intensive “rule of reason” analysis is unnecessary for practices that “by their nature have a substantial potential” to restrain competition unreasonably.83 Because such agreements are

76 Id. at 25.
77 Id. at 4.
78 15 U.S.C. § 1. See also, e.g., Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 (9th Cir. 1991) (listing elements of a Section 1 claim as: “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce”).
presumptively unreasonable as matter of law, there is no requirement to plead or prove a relevant market for restraints of competition that are illegal *per se*.

Most common in the category of *per se* violations are agreements among horizontal competitors to fix prices or to divide markets. It matters not whether any specific price was literally “fixed” or agreed-to, rather than simply suppressed. Agreements that divide markets—by customers or geography—are also *per se* violations of antitrust laws. While the most common horizontal conspiracy cases involve an agreement among sellers to raise prices, antitrust laws equally apply to horizontal conspiracies among buyers to stifle competition.

The same application is generally true in a labor market, where employers compete to *buy* labor from workers who *sell* labor. No-poach and no-solicitation agreements among competing employers are “a type of customer allocation scheme which courts have often condemned in the past as a *per se* violation” of the federal antitrust laws. And thus it is *per se* unlawful for competing employers/buyers to agree with each other not to compete for workers/sellers. *Per se* liability is what all plaintiffs—enforcers and private parties—plead in their complaint against franchise systems for their use of anti-poaching provisions. In the franchise anti-poaching context, the plaintiffs argue that franchisees, among themselves and with the franchisor, are direct competitors for the acquisition labor, and are thus rightly subject to *per se* liability.

As separately owned and operated entities with discretion to make independent hiring and employment decisions—such as who to hire and how much to pay—the various plaintiffs argue that anti-poaching agreements are agreements among employers not to compete for workers. And, in strict antitrust analysis, agreements among employers not to compete for workers are

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85 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007); see Socony-Vacuum Oil, 310 U.S. at 218 (“This Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se*.’’); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 986 (9th Cir. 2000).

86 Supra note 85, at 222; see Superior Court Trial Lawyers, 493 U.S. at 422 (constricting supply is “the essence of ‘price-fixing’”).

87 Supra note 82, at 344 n.15; United States v. Coop. Theaters of Ohio, Inc., 845 F.2d 1367, 1373 (6th Cir. 1988) (agreement between ticket booking agents not to solicit each other’s customers is *per se* unlawful, even if agents could entertain unsolicited business from those same customers).

88 Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948) (finding antitrust liability “even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers.”) (footnotes omitted); see also Knevelbaard Dairies, 232 F.3d at 988–89 (“[A] buying cartel’s low buying prices are illegal and bring antitrust injury.”).

89 United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991) (agreements among competitors limiting upstream inputs—such as labor—can be *per se* unlawful).

90 Coop. Theaters of Ohio, Inc., 845 F.2d at 1373; see supra note 45 at 794–95 (“[A]ntitrust laws are meant [sic] protect the labor market . . . because ‘employer conspiracies controlling employment terms . . . tamper with the employment market and thereby impair the opportunities of those who sell their services there.’” (Citation omitted)).

91 In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (plaintiffs “successfully pled a *per se* [antitrust claim] for purposes of surviving a 12(b)(6) motion” in alleged conspiracy among defendants to fix and suppress employee compensation and to restrict employee mobility through “Do Not Cold Call” agreements).
both horizontal labor market allocations and price fixing conspiracies. Under the rule of reason analysis, the competitive effect of a restraint is determined only after analyzing the facts peculiar to the business, the nature of the restraint and its effects, the history of the restraint, and the reasons why the restraint was imposed. The rule of reason essentially asks whether the anticompetitive effects of the challenged restraint outweigh the pro-competitive benefits. “The rule of reason requires the fact-finder to ‘weigh [ ] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.’” A plaintiff pleading a case under the rule of reason satisfies its burden by demonstrating either (1) “actual anticompetitive effects, such as reduction of output, increase in price, [ ] deterioration in quality of goods or services[,]” or (2) that the defendant possesses market power—“the ability to raise prices above those that would prevail in a competitive market.” Part of the rule of reason analysis generally involves the plaintiff establishing an anti-competitive effect by presenting proof of a relevant market and of market power.

If the plaintiff establishes adequate evidence of anticompetitive effects or market power, the burden shifts to the defendant “to show that the challenged conduct promotes a sufficiently pro-competitive objective.” The plaintiff then has a chance to rebut the defendant’s procompetitive justification by demonstrating that the defendant’s conduct was not fairly necessary to achieve the procompetitive objective. The fact-finder then weighs all the effects and circumstances of the case and determines if the agreement is, on balance, anticompetitive. Ultimately, under the rule of reason, “the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.” As of the writing of this paper, no known plaintiff has pled a full rule of reason complaint against a franchise system over use of anti-poaching provisions.

“Quick look” sits between rule of reason and per se. Quick look review asks whether “a great likelihood of anticompetitive effects can easily be ascertained” by examining the restraint, and considering defendants’ justifications of it. In the spectrum of antitrust analyses, “[a]n abbreviated or ‘quick-look’ analysis is appropriate when an observer with even a rudimentary

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92 Supra note 57 at 1039 (‘The court thus finds that the United States’ allegations concerning agreement between eBay and Intuit [not to hire each other’s employees] suffice to state a horizontal market allocation agreement’ that is per se unlawful); Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 157–58 (N.D.N.Y. 2010) (holding that information exchange between defendants to fix nurse wages was illegal per se and tantamount to a conspiracy to fix prices); see supra note 90 at 1045 (holding that agreements among competitors limiting upstream inputs can be per se unlawful).


95 Id. (citations omitted).

96 Leegin, 551 U.S. at 885–86.

97 Brown, 5 F.3d at 669.

98 Id.


100 Id.

understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." Among other situations, courts use the quick look approach when a restraint would normally be illegal *per se*, but "a certain degree of cooperation is necessary if the [product at issue] is to be preserved." In other words, quick look review "is usually best reserved for circumstances where the restraint is sufficiently threatening to place it presumptively in the *per se* class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications."

Additionally, like *per se* analysis, where there is a likelihood of anticompetitive effects, there is no need for the plaintiff to prove or analyze market power under a quick look approach. If the court finds no legitimate justifications for facially anticompetitive behavior (such as price-fixing), no market power analysis is necessary and the court "condemns the practice without ado." While plaintiffs filing suit against franchisors and franchise systems over use of anti-poaching provisions primarily plead *per se* liability, all plaintiffs appear to plead a quick look theory in the alternative.

**B. State Laws**

Most states, including Washington State, have enacted their own antitrust laws to prohibit anticompetitive conduct affecting commerce within their states and to supplement enforcement of federal antitrust laws. While state and federal antitrust laws are similar, state antitrust laws vary from state to state. For example, some state antitrust laws, such as those in Washington, substantially track the language of their federal counterparts. Other states, however, only incorporate select sections of federal antitrust laws, recite specific types of prohibited acts, or include new areas of substance entirely. In many cases, state antitrust laws are more expansive than the federal antitrust laws in terms of the amount and quality of prohibited conducted. The interpretation of state antitrust laws may, but will not always, substantially mirror the federal antitrust laws.

In Washington specifically, the antitrust laws are codified in the State’s Consumer Protection Act (“CPA”). Much like Section 1 of the Sherman Act, the Washington CPA declares unlawful “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce.” The Washington legislature intentionally patterned this antitrust statute after Section 1 of the

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102 Id.


107 Deslandes, supra note 59.

108 WASH. REV. CODE § 19.86.030.

109 Id.
federal Sherman Antitrust Act, 15 U.S.C. Section 1.\textsuperscript{110} For that reason, federal court decisions interpreting the Sherman Act guide Washington courts in construing the state analogue.\textsuperscript{111}

In Washington, while federal court decisions guide state antitrust law construction, Washington State antitrust laws are not mere mirror images of their federal counterparts. Indeed, the principle that state antitrust laws in general can and do follow different paths than their federal counterparts was firmly enshrined by the Supreme Court in \textit{California v. Arc America Corp.}\textsuperscript{112} In that case, the Supreme Court allowed states to recover damages under state law for indirect purchases notwithstanding that federal antitrust laws do not permit such recovery.\textsuperscript{113} In so holding, the Supreme Court acknowledged a “long history of state common-law and statutory remedies against monopolies and unfair business practices” and that “plain[ly], this is an area traditionally regulated by the States.”\textsuperscript{114}

As \textit{Arc America} demonstrates, state antitrust laws are not beholden to their federal counterparts. Consistent with that principle, the Washington State CPA and the cases interpreting it demonstrate that federal judicial interpretations are guiding, but not binding, on state courts determining what conduct violates the Washington CPA.\textsuperscript{115} The Washington State Supreme Court has reaffirmed this relationship, noting that “RCW 19.86.920 does not adopt any federal judicial precedents . . . [and] [i]n the final analysis, the interpretation of [the CPA] is left to the state courts.”\textsuperscript{116} As one court put it, “[t]he directive to be guided by federal law does not mean that we are bound to follow it.”\textsuperscript{117}

Thus, while Washington’s antitrust laws do track their federal counterparts in a variety of respects, Washington courts have departed from federal law “for [ ] reason[s] rooted in our own statutes or case law . . . .”\textsuperscript{118} And, although there is certainly no dispute that federal case law is persuasive, perhaps often highly so, the Washington State Legislature had expressed its preference that courts interpreting the CPA should be free to depart from federal antitrust law in appropriate circumstances.

\begin{enumerate}
\item \textsuperscript{110} \textit{State v. Black}, 100 Wn.2d 793, 799, 676 P.2d 963 (1984).
\item \textsuperscript{111} \textit{WASH. REV. CODE} § 19.86.920 (“It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters.”); \textit{see also Boeing Co. v. Sierracin Corp.}, 108 Wn.2d 38, 54, 738 P.2d 665 (1987).
\item \textsuperscript{112} \textit{California v. ARC America Corp.}, 490 U.S. 93 (1989).
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id. at 101.}
\item \textsuperscript{115} \textit{Supra} note 112 (“[i]n construing this act, the courts be guided by final decisions on the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters . . . .”).
\item \textsuperscript{116} \textit{State v. Reader’s Digest Ass’n, Inc.}, 81 Wash. 2d 259, 275, 501 P.2d 290, 301 (1972); \textit{see also Panag v. Farmers Ins. Co.}, 166 Wash. 2d 27, 47, 204 P.3d 885, 894 (2009).
\item \textsuperscript{117} \textit{Blewett v. Abbott Labs.}, 86 Wash. App. 782, 787, 938 P.2d 842 (1997).
\item \textsuperscript{118} \textit{Id. at 788; see State v. LG Elecs., Inc.}, 186 Wash. 2d 1, 10-11 (2016) (“[W]e have declined to follow federal law where the language and structure of the CPA departs from otherwise analogous federal provisions.”).
\end{enumerate}
C. Horizontal Restraint or Vertical Restraint

Restraints subject to prohibition under either the Sherman Act or state analogues are generally categorized as either “horizontal” or “vertical.” A naked horizontal restraint is typically one imposed by agreements between “competitors on the way in which they will compete with each other.” On the other hand, a vertical restraint is typically one “imposed by agreement between firms at different levels of distribution” on matters over which they do not compete.

The distinction between the two forms of restraint is quite significant as naked horizontal restraints may be subject to per se liability while vertical restraints are more likely subject to the full rule of reason analysis. As noted earlier, the per se standard provides the least imposing hurdle to plaintiffs. Under this rule, a plaintiff need only show that the alleged conduct occurred in order to find antitrust liability; no evidence of intent or effect is necessary. In contrast, the more rigorous rule of reason requires a balancing of competitive benefits and harms to determine whether the alleged conduct unreasonably restrains trade.

Franchisor defendants, and possibly the Department of Justice, argue that anti-poaching provisions in franchise agreements are vertical restrictions entered into by firms at different levels of distribution. Specifically, those franchisors who have found themselves defending against antitrust claims argue that all provisions in the franchise agreements—including anti-poaching provisions—follow the vertical relationship between the franchisor selling a franchise and the franchisee buying that franchise. As such, franchisor defendants—and the DOJ—argue that the rule of reason is the appropriate evaluative framework to determine antitrust liability here.

On the other hand, Plaintiffs—including the state Attorneys General investigating these provisions—believe that anti-poaching provisions in franchise agreements are horizontal in nature because they involve restrictions on those participating at the same level within a labor market. Specifically, because those restricted by an anti-poaching provision would ostensibly be in competition to employ the same worker, they are equally situated market participants, buyers of labor, operating at the same level in a labor market seeking to acquire the same units of labor, i.e., workers.

For the most part, all Plaintiffs filing lawsuits against franchise systems for violations of federal or state antitrust laws plead the conduct as subject to per se liability or, at most, a quick look review. Based on a non-exhaustive survey of such actions, no plaintiff has pled a claim under the rule of reason. To date, no court has entered a final ruling on whether the conduct at issue is inherently horizontal or vertical in nature. With that said, no defendant has successfully dismissed

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121 As discussed below, in March 2019, the DOJ filed Statements of Interest in three private anti-poaching lawsuits filed by former franchise employees against Auntie Anne’s, Arby’s, and Carl’s Jr., respectively. In its filings, DOJ generally argued that the franchisor-franchisee relationship is inherently vertical because the franchisor and its franchisee typically operate at different levels of the market structure. DOJ did clarify that notwithstanding a general vertical relationship, a typical anti-poaching provision in a franchise agreement could be a horizontal restraint if it restrains competition between two interrelated entities. The DOJ explained that if a franchisor actually competes with a franchisee in the same pool of labor, then the restraint would properly be characterized as horizontal.
a complaint by claiming that, as a matter of law, anti-poaching provisions in a franchise agreement are inherently vertical and thus subject to the rule of reason.

IV. FEDERAL INVOLVEMENT

A. Department of Justice and Federal Trade Commission Joint Guidelines

In October 2016, the Department of Justice and the Federal Trade Commission first weighed in on this subject in its Antitrust Guidance for Human Resource Professionals, alerting human resource professionals that agreements among competing employers to limit or fix the terms of employment for potential hires may violate antitrust laws if the agreement constrains individual decision-making regarding terms of employment or job opportunities. 122 The Department of Justice indicated that it intended to proceed criminally against “naked wage-fixing or no-poaching agreements.”

B. U.S. Statements of Interest in Class Actions

In March of 2019, the U.S. Department of Justice filed a statement of interest in federal district court for the eastern District of Washington in connection with a pending case, Joseph Stigar v. Dough Dough, Inc. 123 While acknowledging that naked anti-poaching agreements between competitors are per se unlawful, the Department of Justice stated that most franchisor-franchisee restraints are not “naked no-poach agreements between competitors” and should be subject to the rule of reason and that these alleged restraints deserve a full rule of reason analysis, not a “quick look.” In its statement, the Justice Department argued that for a plaintiff to prove a Sherman Act violation in the franchisor/franchisee context, the plaintiff must prove: (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis: and (3) the restrain affected interstate commerce.

As to the first element, an agreement, conspiracy or combination between two or more entities, the Department of Justice pointed to two US Supreme Court decisions, Copperweld Corp. v. Independent Tube Corp. and American Needle, Inc. v. National Football League, in stating that two or more entities could be found to exist if the franchisor has a distinct economic interest from its franchisees. 124 However, as to the second element, whether a per se or rule of reason analysis should apply, the Department of Justice reiterated that a naked anti-poaching agreement among franchisees could be subject to a per se analysis. However, in citing to the case of Continental T.V., Inc. v. GTE Sylvania Inc., the Supreme Court applied the rule of reason to vertical restraints imposed by franchisor on its franchisees. 125

The Department of Justice statement also addressed and rejected the argument that the anti-poaching agreement found in franchise agreements constitutes a hub-and–spoke conspiracy. In rejecting this argument, the Department of Justice concluded that there was no

122 Supra note 36.
123 Stigar, supra note 53.
“rim” to the wheel in the form of an agreement among horizontal competitors. When franchisees enter into separate franchise agreements with a franchisor which contain anti-poaching provisions but the franchisees have no connection with each other (they did not lobby the franchisor to add this provision and enforce these commitments), these independent vertical agreements should be subject to a rule of reason analysis.

Finally, the Department of Justice concluded that since the anti-poaching provisions were ancillary under the ancillary-restraints doctrine, the quick look analysis should be rejected in favor of a complete rule of reason review.

C. Perspectives of Government Representatives

On the Congressional level, U.S. Senators Cory Booker and Elizabeth Warren have aggressively taken on the issue of anti-poaching provisions. On March 1, 2018, they co-sponsored a bill titled the End Employer Collusion Act that would make it unlawful to enter into or enforce an anti-poaching provision. The bill includes a private right of action for violations, including attorneys’ fees and punitive damages. A comparable bill was introduced in the House of Representatives in April, 2018, by Representative Keith Ellison. However, neither bill has advanced out of committee and at this point seems unlikely that such a bill would become law.

Senators Booker and Warren followed up on their proposed legislation in July 2018 by sending letters to the CEOs of eighty-nine franchisors in the United States asking them to answer questions about the use of anti-poaching provisions in franchise agreements and recommending their removal from franchise agreements. No company is under any legal obligation to respond to this inquiry (and it is unclear how many, if any, of these companies have responded). Senators Booker and Warren do not appear to have taken any action following this inquiry.

V. STATE INVOLVEMENT

A. State Of Washington

1. The State’s Perspective – Per Se Violations

Throughout 2018 and into 2019, the Washington Attorney General has been leading the charge on investigating anti-poaching provisions in franchise agreements and securing agreements from franchisors to eliminate the practice of using such provisions. The initiative began with a September 2017 article in the New York Times titled “Why Aren’t Paychecks Growing? A Burger-Joint Clause Offers a Clue.” The article focused on the downward pressure


127 Supra note 7.

128 Id.

129 Id.

130 Supra note 8.


132 Abrams, supra note 42.
anti-poaching provisions among fast-food franchises place on wages. The article cited the Princeton Study, highlighting the possible harm to workers caused by the practice.

As discussed above, the Princeton Study presented economic models offering evidence that anti-poaching clauses in franchise agreements reduce opportunities for low-wage workers and stagnate wages, harming workers in Washington and across the nation. In January 2018, the Washington Attorney General’s Antitrust Division launched an investigation into these anti-poaching provisions.

2. Assurances of Discontinuances

As of August 2019, the Washington Attorney General has entered into sixty-six Assurances of Discontinuances (“AODs”) with franchise systems. For background, an Assurance of Discontinuance is a legally binding commitment set forth in Washington State’s CPA that allows the Attorney General to mutually resolve claims brought under that statute without filing suit. Importantly, per the terms of the statute, the AOD “shall not be considered an admission of a violation for any purpose; however, proof of failure to comply with the assurance of discontinuance shall be prima facie evidence of a violation of” the CPA. AODs are filed in and subject to approval by the Washington Superior Court.

As part of the Washington Attorney General’s AODs, each of the sixty-six franchise systems who have entered into an AOD agreed to: (1) immediately stop enforcing the anti-poaching provisions nationwide, (2) remove anti-poaching language from future franchise agreements on a nationwide basis, and (3) seek to amend all Washington-based franchise agreements to immediately remove anti-poaching provisions. Further, the franchisors all agreed to provide notice to their franchise systems of the agreement with the Washington Attorney General as well as the general terms of the agreement. For parties entering into an AOD, the Washington Attorney General is not seeking any monetary relief—penalties, damages, restitution, or investigatory costs and fees—that would otherwise be recoverable under the state’s CPA. No franchisee has been asked to enter into an AOD.

The initial targets and AODs entered as part of the Washington Attorney General’s initiative were centered in the fast food and quick serve industries. However, since September 2018, the Attorney General’s investigation has spanned across several industries. To date, the Attorney General has secured AODs from franchisors in the following sectors: automotive services, child care, cleaning services, convenience stores, custom window treatment services, electronics repair services, home healthcare services, hotels, insurance adjustor services, parcel services, tax preparation, and travel services.

These investigations are continuing, with four additional AODs entered into as recently as August 2019.

Franchisors that do not agree to enter into an AOD face a lawsuit from the Washington Attorney General’s Office naming the franchisor and its Washington-based franchisees as

133 Krueger et al., supra note 10.
134 WASH. REV. CODE § 19.86.100.
135 Id.
defendants. For example, in October 2018, the Attorney General filed the first lawsuit by a state attorney general against a franchise system for using anti-poaching provisions. That lawsuit was filed against Jersey Mike’s Franchise System and its twenty-three Washington franchisees.\textsuperscript{136} Per the complaint, in addition to seeking the relief requested in the AOD from other parties, the Washington Attorney General is also seeking penalties under the state CPA as well as costs and fees for bringing the lawsuit.\textsuperscript{137} That lawsuit against Jersey Mike’s and its Washington franchisees is ongoing.

B. Other States: California, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon and Pennsylvania

Following the actions of Washington State, ten other states – California, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon and Pennsylvania – jointly initiated inquiries similar to the State of Washington regarding anti-poaching provisions in franchise agreements. Like Washington, they began their review with members of the QSR industry. Of these states, all eleven have Democratic state’s attorneys-general, which has contributed to concerns about this becoming a political issue.

This quest for information began in July 2018 with a formal inquiry of eight franchisors including – Arby’s, Burger King, Dunkin’ Donuts, Wendy’s and Panera Bread.\textsuperscript{138} Like Washington, the states have alleged that the anti-poaching provisions constitute a violation of the states’ antitrust laws and the methods, acts or practices may constitute an unfair method of competition and/or unfair or deceptive acts or practices in the conduct of trade or commerce under the states’ consumer protection laws. In addition, at least some of these states have laws governing the free exercise of the right to contract for employment which also may be violated by anti-poaching provisions. All of these areas of inquiry bear upon the issue.

1. Settlement Agreements

Based on their investigations, these ten states have entered into joint settlement agreements with certain franchisors whereby the franchisors agree to the following:\textsuperscript{139}

- they will not enforce any anti-poaching provision in any existing franchise agreement and not intervene in any action brought by any of these states against a franchisee that seeks to enforce an existing anti-poaching provision;

- they will no longer include anti-poaching provisions in any franchise agreements in the United States;

\textsuperscript{136} Complaint, Washington v. Jersey Mike’s Franchise Systems, Inc., et al., No. 18-2-25822-7 SEA (King City Sup. Ct. Oct. 15, 2018). Assistant Attorney General Rahul Rao, a co-author on this paper, is trial counsel representing the State of Washington in this lawsuit.

\textsuperscript{137} Id. at 15.


\textsuperscript{139} Id.
they will notify all current franchisees with locations in these states that the Attorney General of these states is requesting that the anti-poaching provision be removed from its existing franchise agreement and ask franchisees to sign an amendment to their franchise agreement removing this provision;

the notice to franchisees will also request that each franchisee post a notice at the workplace in a location where it can easily be read informing employees of this Agreement and that the notice be posted through December 31, 2020; both in English and Spanish;

the franchisors will post the same notices in their company-owned stores;

if a franchisor becomes aware that a franchisee is seeking to enforce a anti-poaching provision, and the franchisor is unable to persuade the franchisee to not enforce this provision, the franchisor must notify the applicable Attorney General;

within 5 months of signing an agreement, the franchisor must provide the states with a list of all franchisees in the applicable states containing information whether the franchisee has executed or refused to execute the amendment deleting the anti-poaching provision and send copies of the executed amendments to the respective Attorney Generals; and

the franchisor must submit, within 180 days of execution, a declaration to the Attorneys General, signed under penalty of perjury, stating whether all provisions of the Settlement Agreement, have, to the best of its knowledge, been satisfied.

C. Are These Actions Disclosable in a Franchise Disclosure Document?

To answer this question, the Disclosure Requirements and Prohibitions Concerning Franchising promulgated by the Federal Trade Commission (the “FTC Franchise Rule”) must be considered. Under the FTC Franchise Rule, a franchisor must make specific disclosures in Item 3 of its Franchise Disclosure Document when it:

(i) has pending against it an administrative, criminal, or material civil action alleging a violation of a franchise, antitrust, or securities law, or alleging fraud, unfair or deceptive practices, or comparable obligations.

(ii) was a party to a material civil action involving the franchise relationship in the last fiscal year.

(iii) has in the past 10 years been held liable in a civil action, involving an alleged violation of a franchise, antitrust, or securities law, or involving allegations of fraud, unfair or deceptive practices, or comparable allegations.

140 16 CFR §436.5(c).

141 These same disclosure obligations apply with respect to the franchisor’s predecessor, a parent or affiliate who induces franchise sales by promising to back the franchisor financially or otherwise guarantees the franchisor’s performance, an affiliate who offers franchises under the franchisor’s principal trademark, or any person identified in Item 2 of the Franchise Disclosure Document. Id. Under the FTC Franchise Rule certain other types of litigation must be disclosed that are not relevant and are omitted for brevity. See id.
(iv) is subject to a currently effective injunctive or restrictive order or decree resulting from a pending or concluded action brought by a public agency and related to the franchise or to a Federal, State, or Canadian franchise, securities, antitrust, trade regulation, or trade practice law, the action must be disclosed.

When a franchisor agrees to an AOD with the State of Washington, the answer is no. In connection with one of the early AOD negotiations with the Washington State Attorney General’s Office, when this question was posed, the Washington Attorney General’s Office consulted with the Washington Department of Financial Institutions (“DFI”) which administers the Washington franchise law, which advised the Attorney General’s Office that the Washington AOD did not have to be disclosed in a franchisor’s FDD. This is consistent with a plain reading of Item 3 of the FTC Franchise Rule. The AOD was entered into as part of an investigation by the Washington Attorney General’s Office and did not involve the filing of a “civil action involving an alleged violation of a franchise, antitrust or securities law, or involving allegations of fraud, unfair or deceptive practices, or comparable allegations.” In addition, it can be argued that the Washington AOD is not a “currently effective injunctive or restrictive order or decree resulting from a pending or concluded action brought by a public agency…” Again, while an investigation was conducted, no state court action was necessary to activate the AOD.

When considering the Settlement Agreements executed with the other 11 State Attorneys General, the answer may not be so clear. The Settlement Agreement itself specifically states that it shall have “the same effect as an Assurance of Discontinuance, Assurance of Voluntary Compliance, or a Stipulated Judgment, and it may be filed in court pursuant to the respective laws of each settling state.” This footnote states that with respect to California, the Settlement Agreement “will only become effective once it has been entered as a stipulated judgment pursuant to California Code of Civil Procedure Section 664.6.”

The State of California is requiring that the Settlement Agreement actually be entered as a stipulated judgment. The language of Section 664.4 states that if “parties to pending litigation stipulate, in a writing signed by the parties outside of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement.” While the Settlement Agreement is not “pending litigation,” by requiring that a court enter judgment pursuant to the terms of the settlement, it is difficult to argue that this does not constitute a “currently effective injunctive or restrictive order or decree resulting from a pending or concluded action brought by a public agency…” Therefore, it appears because of this California language, the franchisor may need to disclose the Settlement Agreement in the franchisor’s FDD. Due to the ongoing nature of the terms, it probably needs to remain in the FDD indefinitely.

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143 Id.
VI. PRIVATE ACTIONS

A. Bautista v. Carl’s Jr.

In February 2017, Luis Bautista and Margarita Guerrero, current and former employees of two Carl’s Jr. franchisees in the Los Angeles area, filed a statewide class-action complaint against the franchisor Carl’s Jr. Restaurants, LLC (“Carl’s Jr.”), and its predecessor, Carl Karcher Enterprises, LLC (“CKE”) in California state court, asserting that the anti-poaching provision contained in Carl’s Jr. standard preliminary agreements and franchise agreements violated the California Cartright Act and constituted unfair competition and illegal covenants not to compete under the California Business and Professions Code.\(^{144}\)

The plaintiffs contended that Carl’s Jr.’s anti-poaching provisions constituted an illegal agreement among competitors that unlawfully prevented franchisees from competing against other franchisees and the franchisor for restaurant managerial staff,\(^{145}\) resulting in reduced wages and worsened working conditions.\(^{146}\) The anti-poaching provisions at issue stated:

**Preliminary Agreement**

Applicant and Other Individuals agree that they will not discuss salaries with [Carl's Jr.] personnel and that they will not knowingly employ or seek to employ any person then employed by [Carl's Jr.] or any franchisee of [Carl's Jr.] as a shift leader or higher, or otherwise directly or indirectly induce such person to leave his or her employment without [Carl's Jr.'s] prior written consent.\(^{147}\)

**Franchise Agreement**

Franchisee covenants and agrees that, except with CKE’s prior written consent, during the term of this Agreement, and for a period of 2 years following its expiration, transfer, or termination, Franchisee shall not, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with, any person, firm, partnership, corporation, or other entity: … (b) Knowingly employ or seek to employ or seek to employ any person then employed by [Carl’s Jr.] or any franchisee of [Carl’s Jr.] as a shift leader or higher, or otherwise directly or indirectly induce such person to leave his or her employment.\(^{148}\)

Among the class action lawsuits reviewed, these restrictions are unique in that they appear in both a preliminary agreement and a franchise agreement, and in that the preliminary agreement expressly permitted hiring with consent, whereas the franchise agreement did not.

The defendants moved to dismiss the complaint, and in March 2018 the court ordered further briefing on the motion.\(^{149}\) In its order the court noted that the parties did not cite or discuss


\(^{145}\) Phrased as “shift leaders or higher” in both the Preliminary Agreement and the Franchise Agreement. *Id.* (Complaint at ¶¶49-52). Consequently, the putative class included all current and former shift leaders, assistant managers, and general managers of CKE restaurants in California whether owned by CKE or CKE franchisee. *Id.* at 110).

\(^{146}\) *Id.* at 108.

\(^{147}\) *Id.* at 50.

\(^{148}\) *Id.* at 52.

the Copperweld case, the “intra enterprise conspiracy doctrine, or the ‘vertical relations doctrine’ in antitrust law.” With regard to the aspect of vertical restraint, the court referred to the benefits of inter-brand competition, which, to be effective, requires some level of cooperation by those operating within the trademarked enterprise (i.e., the franchise system). Notably, the court did not, however, remark on the aspect of horizontal competition between the franchisee’s restaurants and the franchisor’s restaurants, which was clearly alleged in the complaint. Whether this was an indication of the direction the courts final analysis would follow is not clear. In June 2018 this case moved toward final settlement. Accordingly, the court did not issue a final decision on the defendants’ motion.

B. Deslandes v. McDonald’s

In June 2017, Leinani Deslandes, an employee of Bam-B Enterprises of Central Florida, Inc., a franchisee of McDonald’s USA, LLC (“McDonald’s”) filed a class-action complaint in the U.S. District Court for the Northern District of Illinois on behalf of all current and former employees of McDonald’s restaurants. Plaintiff alleged that the anti-poaching provision contained in McDonald’s standard franchise agreement was an illegal restraint of trade under Section 1 of the Sherman Act, under either the per se rule or the quick look analysis. Plaintiff also alleged that the anti-poaching provision violated the Illinois Antitrust Act, and the Illinois Consumer Fraud and Deceptive Trade Practices Act.

Because McDonald’s affiliates (collectively referred to as McDonald’s operating companies or “McOpCo”) operated company-owned restaurants alongside McDonald’s franchisees, the plaintiff contended that McDonald’s anti-poaching provision unlawfully restricted franchisees from competing against the franchisor as well as other franchisees for restaurant managers and staff. As a result of this restriction, plaintiff claimed that she had been prevented from being offered a higher paying job at another McDonald’s restaurant, and that all of the putative class members had suffered reduced wages and worsened working conditions. The anti-poaching provision at issue is set forth in Section II.B. above.

In October 2017, McDonald’s moved to dismiss the complaint. As to the Sherman Act, McDonald’s argued that plaintiff had failed to adequately state a claim because the provision was a vertical restraint subject to the rule-of-reason analysis, and defendant had failed to allege that

150 Id.
151 Id.
152 Id. at 75-81.
154 Supra at 25..
155 Id.
156 Id. at 7-8, citing the Complaint, Deslandes v. McDonald’s USA, LLC, No. 1:17-CV-04857 (N.D. Ill. June 28, 2017) [ECF No. 1]. at ¶92.
157 Id.; supra note 11 and accompanying text.
McDonald’s held the requisite market power under that analysis. McDonald’s argued that the provision was not a horizontal restraint that would invoke either the *per se* rule or quick look analysis because the restraint applied to McOpCo and franchised restaurants alike and had been “spearheaded” by the entity at the top of the chain (McDonald’s Corporation), and therefore applied only to parties at different levels within the same supply chain. McDonald’s further argued that the restriction had procompetitive effects because it promoted inter-brand competition. Under McDonald’s theory, by protecting franchisees from having their best employees lured away by other McDonald’s restaurants, the restriction encouraged franchisees to invest in training their employees for management positions, which strengthened the brand as a whole versus its competitors, like Burger King and Wendy’s. With respect to the state law claims, McDonald’s argued that they were excluded from coverage under the plain language and established scope of the Illinois Antitrust Act, and the Illinois Consumer Fraud and Deceptive Trade Practices Act.

In June 2018, the court granted in part and denied in part McDonald’s motion to dismiss. The court held that plaintiff’s claims were excluded under both of the Illinois statutes based on the plain language and fundamental scope of those statutes. The thrust of the court’s ruling, therefore, focused on the Sherman Act.

In its ruling on the Sherman Act, the court rejected McDonald’s argument that the anti-poaching provision was only a vertical restraint, and determined that it was both a vertical and horizontal restraint because the McOpCo restaurants compete with the franchised restaurants for talent. The court ruled that, “This case . . . is not about competition for the sale of hamburgers to consumers. It is about competition for employees, and, in the market for employees, the McDonald’s franchisees and McOpCos within a locale are direct, horizontal, competitors.”

After assessing the horizontal aspect, the court determined that the *per se* rule did not apply because the anti-poaching provision was “ancillary” to the franchise agreements. When a restraint is “ancillary” to an agreement that is procompetitive, it is subject to either the rule-of-reason or the quick look analysis. The court found that McDonald’s franchise agreements were procompetitive because they enhance output in the market by enabling other parties to own and operate McDonald’s-branded restaurants.

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158 Supra note 132.
159 Memorandum Opinion and Order, Deslandes v. McDonald’s USA, LLC, at 10, ECF 53.
160 Id. at 14.
161 Id. at 15.
162 Id. at 17.
163 Id. at 18.
164 Id. at 14-15.
165 Id. at 12-13.
166 Id. at 13 (citing Eichorn v. AT&T Corp., 248 F.3d 131, 144 (3d Cir. 2001)).
167 The court reasoned that every time McDonald’s signed a new franchise agreement it increased the output of burgers and fries in the marketplace, which is “output enhancing.” See id. at 13. The court then decoupled the franchise agreement from the anti-poaching provision and dispatched the notion that the anti-poaching provision itself was output enhancing.
The court then addressed the question of whether the complaint plausibly alleged that the restraint might be found unlawful under the quick look analysis, and finding that it did, the court allowed the case to proceed under the quick look analysis and granted plaintiff leave to amend the complaint to state a claim under the rule-of-reason analysis.\textsuperscript{168}

As described above, the quick look analysis allows the plaintiff to proceed with discovery and present evidence that the defendant lacks any legitimate justification for facially anticompetitive behavior, which if shown, would allow the court to “condemn the practice without much ado” and hold the anti-poaching provision invalid without needing a full analysis of market power that would otherwise be required under the rule-of-reason analysis. The rule-of-reason analysis, the court noted, would be more difficult to prove because it requires more extensive review to determine the relevant market and whether the defendant has sufficient market power, in this case the market power “to suppress wages.”

There are four key holdings in the \textit{Deslandes} decision. First, the court found that the market at issue was the labor market for restaurant workers, not the broader market for food and beverage sales in which the McDonald’s restaurant system competes for customers.\textsuperscript{169} Second, the court determined that within this market the anti-poaching clause in McDonald’s franchise agreements acted as both a vertical restraint and a horizontal restraint because the anti-poaching provision applied to company-owned restaurants as well as franchised restaurants that competed for employees in the same geographic areas.\textsuperscript{170} This fact pattern may be common in certain industries, like the QSR industry, in which franchisors with company-owned outlets operate in close proximity to franchised outlets.

Third, the court held that the \textit{per se} rule does not apply in this context because the anti-poaching provision is ancillary to a franchise agreement, which itself has a procompetitive purpose and effect. While this may offer some comfort to franchisors, that comfort may be short lived because the fourth critical holding was that the quick look analysis applied in this set of circumstances. This is consistent with the position asserted by some state authorities, such as the Washington Attorney General.\textsuperscript{171} The quick look analysis offers plaintiffs an opportunity to demonstrate that an anti-poaching provision has no legitimate justification, and offers the defendants the opportunity to argue that the anti-poaching provision has procompetitive justifications in an effort to demonstrate that a full rule-of-reason analysis may be necessary.\textsuperscript{172} To do this, the parties need to proceed with the case, which can be costly. The courts have

\textsuperscript{168} \textit{Id.} at 14.

\textsuperscript{169} \textit{Supra} note 32 and accompanying text.

\textsuperscript{170} With respect to geographic areas, the court noted that McDonald’s standard franchise agreement did not grant any exclusive rights or territories and franchisees were specifically warned that they may face competition from other franchisees, new franchisees, and restaurants owned by McOpCos. \textit{Id.}

\textsuperscript{171} \textit{Supra} note 166 and accompanying discussion.

\textsuperscript{172} \textit{Supra} note 160 (citing Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012); see Nat’l Collegiate Athletic Ass’n v. Bd. Of Regents, at 109; and Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n, 95 F.3d 593, 600 (7th Cir. 1996)).
recognized that “discovery in these cases can be incredibly expensive” and thus there is an inherent motive for settlement.¹³³

C. Ion v. Pizza Hut, LLC

In November 2017, Kristen Ion, an employee of Aurora Huts, LLC, a franchisee of Pizza Hut LLC (“Pizza Hut”), filed a class-action lawsuit in the U.S. District Court for the Eastern District of Texas against Pizza Hut on behalf of all current and former managers of Pizza Hut restaurants alleging that the anti-poaching clause that was contained in Pizza Hut’s standard franchise agreement was an illegal restraint of trade under Section 1 of the Sherman Act, under either the per se rule or the quick look analysis.¹³⁴ Plaintiff also alleged that the anti-poaching clause violated the Texas Free Enterprise and Antitrust Act of 1983, and the Texas Deceptive Trade Practices Consumer Protection Act.¹³⁵

Plaintiff contended that Pizza Hut’s anti-poaching provision unlawfully restricted franchisees from competing against the franchisor as well as other franchisees for restaurant managers, artificially suppressed compensation, wages, benefits, and growth opportunity.¹³⁶ The anti-poaching provision at issue stated:

During the Term neither [Pizza Hut] nor Franchisee may employ, directly or indirectly, any individual in a managerial position who is at the time, or was at any time during the prior 6 months, employed in a managerial position by the other party, nor may Franchisee employ, directly or indirectly, any individual in a managerial position by another franchisee of [Pizza Hut] without written consent of the current or former employer. This restriction will not be violated if, at the time [Pizza Hut] or Franchisee employs the individual, the current or former employer has given its written consent. If the restrictions contained in this Section [ ] are violated, . . . the former employer will be entitled to liquidated damages in an amount equal to twice the total annual compensation of the employee involved . . . plus reimbursement of all costs and attorney’s fees incurred.¹³⁷

This provision is similar to the McDonald’s anti-poaching provision in that it was mutual between franchisor and franchisee, and covered all fellow franchisees, and set a 6 month timeframe for the coverage. However, the scope was limited to managerial employees rather than all employees as in the McDonald’s provision which applied to “any person.”¹³⁸ The Pizza Hut provision also provided an express exception that the restriction did not apply when the former employer provided written consent, and established liquidated damages for a violation.

¹³³ See infra note 188, explaining the need for the heightened pleading standard in antitrust cases that requires the plaintiff to provide specific allegations that give rise to a plausible right to relief (citing Kendall v. Visa U.S.A., Inc., 518 F.3d 1042 (9th Cir. 2008).


¹³⁵ Id.

¹³⁶ Id. at 100.

¹³⁷ Id. at 6.

¹³⁸ Krueger et al., supra note 10 at 5-6.
Pizza Hut moved to dismiss the complaint. Pizza Hut argued that the plaintiff lacked standing to bring the claim because it did not apply to her, and that the per se rule did not apply to the anti-poaching provision because every court that addressed the issue “has held that the per se rule does not apply to no-hire clauses because such clauses can conceivably have procompetitive benefits.” The thrust of Pizza Hut’s argument was that competition with other pizza restaurant brands was fostered and enhanced by the anti-poaching provision because it enabled Pizza Hut franchisees to invest in training their managers with the knowledge that those managers would not be stolen away by other Pizza Hut franchisees who wished to avoid the work, expense, and time of training their own managers. In response, the plaintiff continued to focus on the fundamental argument laid out in the original complaint that the “principle of free competition applies to the labor market as well as to trade,” antitrust laws apply to the labor market, Pizza Hut and its franchisees are competitors in the labor market, and therefore the anti-poaching provision warranted per se treatment or at the very least, the quick look analysis.

The plaintiff voluntarily dismissed the complaint without prejudice in July 2018. At that time the court had not yet issued a decision on Pizza Hut’s pending motion to dismiss. How Pizza Hut’s argument that anti-poaching provisions must be analyzed under the rule of reason analysis would have fared is highly questionable given the rulings in the Deslandes decision above and the Butler decision, below.

D. Butler v. Jimmy John’s

In January 2018, Sylas Butler, an employee of Kidds Restaurant, Inc., which was a franchisee of Jimmy John’s Franchise, LLC (“Jimmy Johns”) filed a class-action complaint in the U.S. District Court for the Southern District of Illinois on behalf of all Jimmy John’s restaurant employees alleging that the anti-poaching clause contained in Jimmy John’s standard franchise agreement was an illegal restraint of trade under Section 1 of the Sherman Act, under either the per se rule or the quick look analysis. Plaintiff also alleged that the anti-poaching clause violated the Illinois Antitrust Act, and the Illinois Consumer Fraud and Deceptive Trade Practices.

As in the Deslandes and Ion cases, plaintiff contended that Jimmy John’s anti-poaching provision unlawfully restricted franchisees from competing against the franchisor as well as other franchisees for restaurant employees, artificially suppressed wages, benefits, worsened working conditions, and limited growth opportunity. However, the nature of the anti-poaching provision was much more onerous than McDonald’s or Pizza Hut’s. Jimmy John’s anti-poaching provision had evolved over time. At the time of the suit it provided that each franchisee must not:

180 Id. at 6.
183 Supra note 45.
184 Id.
185 Id. The text of Jimmy John’s anti-poaching provision evolved over time. The plaintiff claimed the original restriction shown here was in place beginning no later than 2012 (and likely back to at least 2007). Id. Between 2012 and 2015, the anti-poaching provisions were changed to limit the scope of certain elements, but the essential restrictions remained for purposes of the antitrust claims. See id.
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.\(^{186}\)

Importantly, the Jimmy John’s franchise agreement also: (1) stated that all current and former franchisees were third-party beneficiaries of the anti-poaching provision with an independent right of enforcement; and (2) imposed liquidated damages for a breach that increased if the poached employee was a manager and could lead to a $50,000 penalty against a violating franchisee.\(^{187}\) Under the Jimmy John’s franchise agreement the franchisees further agreed:

- to restrict [their] own employees, as a condition of their employment with [franchisees], from becoming a partner or owner/investor with, or working for, another Jimmy John’s franchisee for at least twelve (12) months after they leave [the franchisee’s] employment and to advise them that other Jimmy John’s franchisees are contractually prohibited by [Jimmy John’s] from recruiting them as partners or investors/owners, or from hiring them, for at least twelve (12) months after they leave your employment (regardless of the reason for their departure).\(^{188}\)

To assist its franchisees to comply with this obligation, Jimmy John’s provided its franchisees with a standard form non-competition covenant that fulfilled this requirement and went further to protect the business against external, interbrand, competition at the same time. Specifically, it provided that the employee: (1) may not work for or hold any ownership interest in a competing sandwich shop within specified radius\(^ {189}\) of any existing Jimmy John’s sandwich shop during their employment and for 2 years afterwards; (2) notify the franchisee if the employee receives any employment offers from a competitor; and (3) must reimburse the franchisee and Jimmy Johns for all costs and expenses of enforcing the covenant.\(^ {190}\) It is the combination of all these elements that made the Jimmy John’s structure much more restrictive than the McDonald’s and Pizza Hut anti-poaching provisions in the cases above.

In March 2018, Jimmy John’s moved to dismiss the complaint.\(^ {191}\) Like McDonald’s and Pizza Hut, Jimmy John’s challenged plaintiff’s standing to bring the case and argued that the per se rule was not applicable, but rather that the anti-poaching provision was purely a vertical restraint subject to the rule-of-reason analysis.\(^ {192}\) But unlike these cases, in the Jimmy John’s franchise system 98% of all restaurants were franchised and only 2% were company-owned (about 54 restaurants out of the approximate number of 2,700 noted in the opinion).\(^ {193}\) This fact

\(^{186}\) Id.; see also supra note 45 at 790.

\(^{187}\) Id.

\(^{188}\) Id. at 7 and 90.

\(^{189}\) See id. at 96, alleging that Jimmy John’s had changed the radius from within 3 miles to within 2 miles but maintained the restriction.

\(^{190}\) Id. at 92-97; Butler v. Jimmy John’s Franchise, LLC, supra note 45 at 790.

\(^{191}\) Memorandum in Support of Motion to Dismiss, Butler v. Jimmy John’s Franchise, LLC, supra note 45, EFC No. 28-1.

\(^{192}\) Id.
affected the court’s analysis. With respect to the state law claims, Jimmy John’s argued that the claims were excluded from coverage under the plain language and established scope of the Illinois Antitrust Act, and the Illinois Consumer Fraud and Deceptive Trade Practices Act.

In July 2018, the court granted in part and denied in part Jimmy John’s motion to dismiss. A significant portion of this court’s ruling addressed whether a horizontal restriction could be found when the franchisor has few, if any, restaurants that directly compete with franchised restaurants for labor. The court held that it was plausible that a horizontal restriction could be found based on the “hub-and-spoke” theory under the Sherman Act. The court then dismissed plaintiff’s claims under the Illinois statutes for the same reasons explained in the McDonald’s case.

In its ruling, the court explained that under the hub-and-spoke theory one company (the “hub”) enters into multiple vertical agreements with other companies (the “spokes”) in such a manner that the spokes effectively enter into tacit agreements between themselves that are horizontal, in violation of the Sherman Act. As the court explained, “[t]he idea here is that since the hub orchestrated the horizontal wheel, it can be held per se liable for that horizontal agreement – even though the hub did not enter into a horizontal agreement itself.” In its discussion the court found that the arrangement in this case was similar to the arrangement that was challenged in Toys “R” Us, Inc. v. F.T.C. and determined that:

[Jimmy John’s] franchisees are independently-owned horizontal competitors, just like the toy manufacturers [in the Toys “R” Us case]. Jimmy John’s corporate enters into a franchise agreement with each franchisee, which contains the no-hire provision. The franchisees tacitly agree amongst each other to enforce the no-hire provision through austere enforcement of the employee non-compete contracts. And most damningly, the franchise agreements give the franchisees a contractual right to enforce the no-hire agreements directly against each other through the third-party beneficiary provision. This is a horizontal agreement.

But the court then went on to address the key distinguishing feature between this case and the Toys “R” Us case:

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193 Butler v. Jimmy John’s Franchise, LLC, supra note 45 at 789.

194 infra note 199 and accompanying text on the hub-and-spoke theory of horizontal restrictions.

195 Butler v. Jimmy John’s Franchise, LLC, supra note 45 at 797-798.

196 Butler v. Jimmy John’s Franchise, LLC, supra note 45.

197 Id.

198 Id.

199 Id. at 796. The court also quoted the recent case of United States v. Apple, Inc., to explain that “when determining whether an agreement is horizontal or vertical, courts should focus on the effects of the restraint rather than the characters who imposed it.” Id. at 796 (citing United States v. Apple, Inc., 791 F.3d 290, 297 (2d Cir. 2015), cert. denied, 136 S. Ct. 1376, 194 L. Ed. 2d 360 (Mar. 7, 2016).

200 Id. at 795-796.

201 Id. at 795-796.
But there is one massive elephant in the room that distinguishes this case from *Toys “R” Us*. All of the firms in this case deal with the same brand: Jimmy John’s sandwiches. That is quite different from Toys “R” Us going to manufacturers like Hasbro and Mattel in order to injure Costco, because as Jimmy John’s points out, antitrust law is more concerned with *inter*brand restraints, not *intra*brand restraints. . . . This dichotomy puts these proceedings in murky waters: Should the *per se* rule apply to a horizontal price fixing and group boycott scheme, even though the horizontal agreement is amongst firms dealing in the same brand? Butler recognizes this distinction, considering he pleads in the alternative that the Court should apply the quick-look rule rather than the *per se* rule.²⁰²

After assessing whether the quick look analysis could apply to this set of facts, the court concluded that any of the three antitrust analyses could ultimately apply depending on what the evidence ultimately shows. But for the current purpose of Jimmy John’s motion to dismiss, the plaintiff had pleaded a claim sufficient for the case to proceed:

Ultimately, however, the Court cannot decide at this early stage in the proceedings which rule will apply. If the evidence in this case shows that the franchisees are truly independent . . . this case will likely result in a quick look analysis. If the evidence of franchisee independence is Herculean, then the *per se* rule might even apply. And if the evidence of franchisee independence is weak, or if Jimmy John’s carries its burden under the quick look approach, then the rule of reason may rear its head and burn this case to the ground.

The most important part of this ruling is the application of hub-and-spoke theory to an anti-poaching provision in a franchise agreement to sustain a Sherman Act claim where there is very little or no direct competition for employees between the franchisor and franchisee-owned businesses. When read alongside the Deslandes and Ion cases, this case illustrates the risk that *any* anti-poaching provision in a franchise agreement could potentially run afoul of the Sherman Act regardless of whether the franchisor operates company-owned outlets or not.

In its assessment, the court placed heavy significance on the fact that the franchisees were able to enforce the anti-poaching provision as third-party beneficiaries, and then reinforced the provision with non-compete agreements that the court described as “austere.”²⁰³ These factors were highlighted as the evidence from which one could plausibly conclude there was a tacit horizontal agreement between the franchisees under the hub-and-spoke theory of the *per se* rule. This line of reasoning raises the question of whether an antitrust claim could be sustained in cases where the franchisor does not operate company-owned units or require the franchisees to impose restrictions on their employees, and where the franchisees are not third-party beneficiaries of the anti-poaching provision (either expressly or by operation of law). In other words, if an anti-poaching clause was narrowly tailored to protect only the interests of the franchisor for the purpose of interbrand competition, would it qualify as a purely vertical restraint and/or be deemed valid under the quick look and rule of reason analyses?

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²⁰² *Id.* at 796-797.

²⁰³ *Id.* at 796.
This question may never be reached because the second most important aspect of this ruling is that the court did not address the question of whether the anti-poaching provision was “ancillary” to a procompetitive agreement, which could preclude the application of the _per se_ rule. In _Deslandes_, the court held that the anti-poaching provision was ancillary to a franchise agreement, which is naturally procompetitive, and therefore must be judged either under the quick look or rule of reason analyses. In _Butler_, the court did not address this question and held that the _per se_ rule could apply depending on the evidence presented. The difference between these courts’ reasoning has not been settled. But both led to the same result to the question at hand, which is that the plaintiffs in these cases adequately pled Sherman Act claims sufficient to withstand motions to dismiss.

E. **Ogden v. Little Caesars**

In September 2018, Christopher Ogden, a former employee of McMillan Properties, LLC, a franchisee of Little Caesar Enterprises, Inc. (“Little Caesars”), filed a nationwide class-action lawsuit in the U.S. District Court for the Eastern District of Michigan against Little Caesars on behalf of all current and former managers of Little Caesars franchised restaurants. The plaintiff alleged that the anti-poaching clause that was contained in Little Caesars standard franchise agreement was an illegal restraint of trade under Section 1 of the Sherman Act, under either the _per se_ rule or the quick look analysis. The plaintiff contended that the Little Caesars anti-poaching provision unlawfully restricted franchisees from competing against the franchisor as well as other franchisees for restaurant managers, artificially reduced wages, employment benefits, growth opportunities, and worsened working conditions. The anti-poaching provision at issue provided that franchisees may not:

Employ or seek to employ, directly or indirectly, any person serving in a managerial position who is at the time or was at any time during the prior six (6) months employed by Little Caesar or its affiliates, or a franchisee of any restaurant concept franchised by Little Caesar or its affiliates, without the prior written consent of the then-current or prior employer.

The plaintiff further alleged that some Little Caesars franchise agreements also contained a third-party beneficiary clause entitling an aggrieved franchisee to enforce the provision and obtain liquidated damages as follows:

Violations of the [above provision] shall entitle the prior employer to liquidated damages equal to twice the annual salary of the employee (while employed by the prior employer), plus reimbursement of all costs and attorney fees incurred. A prior

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204 *See supra* notes 166 and accompanying text.

205 *Supra* note 16 (citing _Eichorn v. AT&T Corp._, 248 F.3d 131, 144 (3d Cir. 2001)).


207 *Id._ at ¶110.

208 *Id._ at ¶7.
employer shall be deemed to be a third-party beneficiary of this [provision], with an independent right to bring an action based upon a violation hereof.\textsuperscript{209}

This provision was similar to the anti-poaching provisions noted in the McDonald's and Pizza Hut cases in that it covered all franchisees and set a 6 month post-employment timeframe for coverage.\textsuperscript{210} It was also similar to the provision in the Jimmy John’s case in that it expressly provided third party beneficiary rights to fellow franchisees and established liquidated damages for a breach.\textsuperscript{211} However, this restriction varied from some of these other examples in terms of its scope. Notably, on one hand, it limited coverage to managerial employees, but on the other hand, it encompassed any other restaurant concept franchised by Little Caesars or its affiliates.\textsuperscript{212} Conceptually, that could sweep quite broadly in the future if Little Caesars were to develop, acquire or affiliate with several other restaurant brands, which can be common in the restaurant industry.\textsuperscript{213}

Little Caesars moved to dismiss the complaint for failure to state a claim under the Sherman Act, and upon review the court agreed.\textsuperscript{214} In July 2019, the court ruled that the plaintiff had not made a serious effort to state a case under the rule of reason analysis, and failed to plead sufficient facts to fit within the narrow set of cases subject to the \textit{per se} analysis or even the quick-look approach.\textsuperscript{215} Moreover, under any analysis the court determined that the plaintiff had not pleaded sufficient facts to establish any cognizable injury as a result of the anti-poaching provision.\textsuperscript{216}

At the outset of its opinion, the court observed that the rule-of-reason analysis is the “default” and “most commonly applied” test, which is favored by the federal courts in nearly all antitrust cases.\textsuperscript{217} It noted that the plaintiff did not even attempt to advance any arguments supporting a claim under the rule-of-reason standard.\textsuperscript{218} The court said that might have made sense for a tactical reason, because attempting to define the relevant market for fast-food

\begin{footnotesize}
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\item \textsuperscript{209} Id. at ¶7-8.
\item \textsuperscript{210} See id.
\item \textsuperscript{211} See id.
\item \textsuperscript{212} See id.
\item \textsuperscript{213} For example, through a common parent company the franchisor of Cinnabon® bakeries is affiliated with seven other restaurant and food concepts including Carvel®, Auntie Anne’s®, Schlotzsky’s®, Moe’s Southwest Grill®, Jamba Juice®, and McAlister’s Deli®, and through shared control via private equity funds is also affiliated with several other franchise concepts including the Arby’s®, Buffalo Wild Wings®, Rusty Taco®, and Sonic® brands, among others. See Cinnabon Franchisor SPV, LLC, Franchise Disclosure Document, Item 1 (Issuance Date: March 28, 2019, as amended June 6, 2019), https://www.wdfi.org/apps/FranchiseSearch/details.aspx?id=621854&hash=1468598049&search=external&type=GENERAL.
\item \textsuperscript{214} Motion to Dismiss, \textit{Ogden v. Little Caesar Enterprises, Inc., et al.}, No. 2:18-CV-12792 (E.D. Mi. Oct. 26, 2018), ECF No. 20.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id. at 9.
\item \textsuperscript{218} Id.
\end{itemize}
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employees under the rule-of-reason analysis may prove “problematic.” But it cut against the plaintiff’s argument that the court should not address dispositive motions until some discovery has taken place. Thus, the court concluded it was appropriate to make a determination on the pleadings.

The court first reviewed the plaintiff’s claims under the per se rule. Having considered the parties’ arguments about whether the franchise agreements constituted horizontal or vertical agreements, and/or created a hub-and-spoke pattern, the court explained that “regardless of the alignment of the parties, the per se doctrine only applies if a restraint “unquestionably falls within one of the handful of categories that have been collectively deemed per se anticompetitive.” As relevant to this case, the Sixth Circuit has applied the per se rule only to explicit agreement to fix wages or divide the labor market into exclusive territories, and the complaint did not allege that the defendants or their franchisees engaged in either of these things. Due to the third-party beneficiary rights in the Little Caesars anti-poaching provision, the court stated that there was authority for the proposition that this restriction is not merely vertical. However, a horizontal element alone does not necessarily invoke the per se rule. Rather, the court noted that an agreement that has a vertical component is complex and not amenable to the per se approach. The court observed that the anti-competitive effects of vertical restraints can be adequately policed under the rule-of-reason analysis; and that these concerns weigh in favor of the rule-of-reason analysis here -- especially in light of the fact that Little Caesars anti-poaching does not prohibit intrabrand hiring but merely requires consent.

The court then considered the quick-look analysis. In determining that the plaintiff failed to state a claim under the quick-look analysis, the court distinguished the facts plead in this case from those plead in both the McDonald’s and Jimmy John’s cases described above. The court found the facts in those cases to be far more compelling towards sustaining such a claim. The court stated,

The “quick look” analysis may provide refuge for near-miss per se antitrust plaintiffs, but the framework still requires an equivalent amount of obviousness that is lacking here. That is especially so here, there the agreements display both vertical and horizontal components, and therefore required a more in-depth analysis to determine reasonableness.
The court then returned the specific application of the rule-of-reason analysis to this case, where it began its discussion, noting again that it is the “default position” for most antitrust cases.\textsuperscript{228} The court found that the complaint failed to state a claim under the rule-of-reason analysis because the plaintiff did not put forth any allegations to define the scope of the relevant market, or to show any anti-competitive effects of the anti-poaching provisions are not negated by the pro-competitive effects on interbrand competition, which are required for such a claim to proceed.\textsuperscript{229}

Finally, the court determined that the plaintiff had not adequately plead any antitrust injury under any theory.\textsuperscript{230} Plaintiff did not allege that he was ever actually restrained from seeking a transfer to another Little Caesars outlet. He averred no facts that the anti-poaching provision affected his wage, or caused the loss of any other job opportunity. The court observed that “even in the most generous light, the allegations suggest nothing more sinister than that the plaintiff, unsatisfied with the conditions of his employment, simply decided to seek, and found, work elsewhere.”\textsuperscript{231}

This case is instructive in how it focused on the presumption in favor of the rule-of-reason analysis (and how it is appropriate for complex restraints that involve both vertical and horizontal elements), the narrow application of the \textit{per se} rule, and the allegations of actual injury. It is evident that broad and generic allegations of harm are insufficient where the named plaintiff has personally suffered no actual specific injury or loss.

\textbf{VII. CONCLUSION}

Amidst all of these lawsuits, government actions, and mounting risks surrounding anti-poaching provisions, many franchisors are trying to determine what they should do. The answer to this question should begin with a robust assessment of the importance of these provisions to the franchise system. It appears that many franchisors have either determined that these provisions are not critical to their systems or have concluded that the time, effort, and cost of fighting to preserve their provisions simply outweigh the benefits they provide. Other franchisors may just be waiting on the sidelines while the legal challenges play out in other systems. At the time of this writing, at least two franchisors are still fighting – Jersey Mikes and Jimmy Johns.\textsuperscript{232}

One could argue that it is unlikely that the removal of anti-poaching provisions from franchise agreements is going to result in a huge increase in poaching activity because franchisees should recognize that if they engage in an aggressive campaign of poaching employees from fellow franchisees or their franchisor, they will damage these important business relationships and may find their own businesses being aggressively poached in kind. However, after the elimination of anti-poaching provisions, it is logical to expect at least some increase in poaching activity. It is wise, therefore, for franchisors to anticipate this and plan their response to

\textsuperscript{228} \textit{Id.}

\textsuperscript{229} \textit{Id.} at 18.

\textsuperscript{230} \textit{Id.} at 19.

\textsuperscript{231} \textit{Id.} In its discussion the court characterized the non-compete agreement at issue in the Jimmy John’s case “draconian,” with the effect of forcing the plaintiff in that case out of the sandwich shop industry altogether. \textit{Id.} at 20.

\textsuperscript{232} \textit{Supra} notes 137-138 and accompanying discussion.
the friction that may arise, which will need to be managed as a relationship matter rather than a legal one.

It is difficult to predict what will come next. Hypothetically, if the horizontal antitrust analysis prevails in this context, some may seek to challenge the horizontal v. vertical analysis in other areas of the franchise model – particularly if the franchisor also operates company-owned outlets. As a result, previously settled antitrust questions may become unsettled again. For example, territorial exclusivity provisions are well-established and common provisions in franchise systems that are essential to the operation and financial viability of many businesses. Could these come under a new level of scrutiny? At first blush that seems unlikely, since courts would need to reverse decades of case law upholding these provisions. But that doesn’t mean litigants wouldn’t try, particularly in controversial areas such as employment relations.

The best advice for franchisors is to continuously evaluate restrictions in their franchise agreements to be sure that they are relevant and necessary for their particular system. If they are, review whether they are appropriately tailored for their purpose. A key lesson here is that one should not assume a clause is essential just because it has been in the form Franchise Agreement for years. Stress test your agreement. If a clause is no longer needed or relevant to the system, eliminate it. Eliminating unnecessary restrictions will be perceived by franchisees as a gesture of good will and demonstrate that the franchisor is forward-looking and striving to maintain fairness in the relationship.
Biographies

Brian Forgas is Senior Counsel – Americas Development & Global Franchise Regulatory for Hilton in McLean, Virginia. Brian leads Hilton’s franchise regulatory compliance program for its 16 hotel brands globally. He also manages franchise enforcement matters, defaults and terminations in the Americas. Previously, Brian was in-house counsel with McDonald’s Corporation in Oak Brook, IL where he was a U.S. Division/Business Counsel responsible for regions encompassing about 3,000 restaurants. Before that he was in private practice in Washington, DC. Brian received his J.D. cum laude from The Catholic University of America in Washington, DC. He has written and spoken for the ABA Forum on Franchising and the International Bar Association. He is a chapter author of the Franchise Deskbook, Third Edition. Brian teaches on franchising topics as an adjunct professor at American University’s Washington College of Law. He is also a member of the Georgetown Law Hotel and Lodging Summit Advisory Board, and serves on the Steering Committee for the ABA Forum on Franchising’s Corporate Counsel Division.

Rahul Rao is Assistant Attorney General for the State of Washington, in the Antitrust Division of the Attorney General’s Office in Seattle, Washington. Rahul is responsible for labor competition matters investigated and litigated by the Antitrust Division, including investigations and litigation into franchise no-poach agreements as well as investigations into non-compete agreements. In addition to his responsibilities in the Antitrust Division, Rahul is a member of the Washington Attorney General’s Opinions Committee. Run under the direction of the Solicitor General’s Office, Attorney General Opinions are official opinions on questions of laws at the request of designated public officials on issues arising in the course of their duties. After beginning his legal career as a judicial clerk on the D.C. Court of Appeals, Rahul joined the Trial Department at McDermott Will & Emery LLP in Washington, DC, where he focused on Supreme Court and Appellate Advocacy, as well as White Collar and Securities Defense. Rahul later moved to the Litigation Practice Group at Morgan, Lewis & Bockius LLP in New York, New York where he continued his focus on White Collar and Securities Defense. While at Morgan Lewis, Rahul was seconded to the in-house legal department of Deutsche Bank, where he focused on managing the bank’s US RMBS-related litigation. Rahul received his J.D., with honors, from George Washington University Law School in Washington, DC, and his bachelor’s degree in Economics from Villanova University in Villanova, Pennsylvania.

Sandy Wal is a transactional franchise attorney with over 35 years of experience and extensive in-house experience. She has counseled and represented clients across a broad spectrum of industries (including restaurants and food service, hotel and service businesses). Sandy rejoined DLA Piper in 2015 after spending 11 years as Managing Counsel of the Franchise Practice Group of McDonald’s Corporation, where she led the team responsible for franchise law compliance matters. Under her leadership, the group was responsible for issuing franchise documents to all franchisees in the US and the preparation, maintenance and filing of
McDonald's franchise disclosure document. With extensive international experience, she was an integral part of the team responsible for creating the current form of Multi-Unit Franchise Agreement being used internationally by McDonald's. She also was an Associate General Counsel for Sears, Roebuck & Co., where she was responsible for general commercial contracts as well as the structuring of Sears franchise and licensing programs. Sandy is a member of the ABA’s Forum Committee on Franchising, the North American Securities Administrators Association Advisory Committee, and the Illinois Franchise Advisory Board, and has been named as a *Franchise Times* “Legal Eagle” annually for the past several years. She was also a chapter editor for the *Franchise Law Compliance Manual*. Sandy received her J.D. from Northwestern University and her B.A. from the University of Illinois.