CRIMINAL AND CIVIL LIABILITY FOR NO-POACH AGREEMENTS IN THE COVID-ERA

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CPI ANTITRUST CHRONICLE MAY 2022

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CRIMINAL AND CIVIL LIABILITY FOR NO-POACH AGREEMENTS IN THE COVID ERA

By Dan M. Forman, Esq.

This article details the potential exposure to criminal and civil liability from no-poach or wage-fixing agreements between competitors under antitrust laws. The first antitrust lawsuits related to no-poach agreements burgeoned on the scene in 2010, and now in 2022, the Department of Justice fulfilled its promise to vigorously prosecute these cases. This article takes a deep dive into the recent cases prosecuted by the Department of Justice, and related developments for franchisors-franchisees. While there is no binding appellate or Supreme Court guidance that no-poach agreements are an antitrust violation, and recent jury verdicts have largely acquitted defendants, companies and executives should proceed with caution and follow the compliance strategies outlined in this article to avoid facing criminal and costly civil liability.

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In the COVID-era, employers seeking to protect their employee base and maintain compensation levels must be very careful not to run afoul of potential criminal and civil liability that can arise from no-poach or wage-fixing agreements reached with competitors. A no-poach agreement is an agreement among two or more employers not to hire each other's employees and/or to restrict compensation and/or benefits so that employees are not able to locate better compensation packages from the competition. Wage-fixing occurs when competitors agree to set salaries or wages or not to increase compensation. During the COVID-19 era, the United States Department of Justice ("DOJ") increased criminal prosecutions of employers in the health care arena with alleged no-poach agreements. In addition, many states have their own antitrust laws that provide for additional remedies, prosecution and litigation.

The first antitrust lawsuits related to no-poach agreements commenced in 2010 when the DOJ filed civil antitrust actions in the high-tech industry against Adobe, Pixar, Intel, Intuit and other name brand high-tech and entertainment firms arising from the employers' agreements not to recruit each other's employees. The non-recruitment agreements eliminated competition for employees and depressed compensation. The parties settled and the judgment enjoined the employers from entering into further agreements or restraining efforts to recruit or solicit the employees of competitors for five years. In 2013, a class-action case was filed against, essentially the same defendants, alleging violations of California's antitrust statute and right to compete law. By 2015, the Court approved over $400 million in settlements for the certified class of 65,000 employees.

In October 2016, the DOJ and the Federal Trade Commission published "Antitrust Guidance for Human Resource Professionals"[2] to warn employers against entering into formal or informal "no-poach" agreements. The DOJ's warning included notice that future matters will be subject to civil and criminal prosecution and threatened substantial fines and jail time. Criminal penalties associated with antitrust laws are significant. Corporations found guilty of criminal violations of antitrust laws may be liable for fines up to $100 million and individuals may be subject to $1 million in fines and up to 10 years in prison.

In 2018, the DOJ stepped up its commitment to combatting no-poach agreements when it promoted settlement of *USA v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation,* Case No. 1:18-cv-00747. The DOJ justified its civil settlement and lack of criminal prosecution because the no-poach agreements at issue had ceased before its 2016 guidance.

A significant civil antitrust settlement in excess of $50 million took place in 2019 against Duke University and the University of North Carolina Heath Care Systems' alleged agreement not to compete for certain employees with each other. The litigation was framed as a private class action on behalf of approximately 5,500 academic doctors and was supported, in part, by the DOJ as the settlement included injunctive relief to be monitored by the DOJ.

I. CRIMINAL PROSECUTIONS BY DOJ

At the end of 2020 and in early 2021, the DOJ fulfilled its long time promise to criminally prosecute parties to "no-poach" agreements as a criminal wage-fixing case, charging two employees of a Texas healthcare staffing company for colluding with another staffing company to decrease pay rates for physical therapists and physical therapist assistants.[3] A few months later, they filed three more no-poach criminal cases against other healthcare companies and their employees in Texas,[4] Nevada[5] and Colorado.[6] Each prosecution claims that the defendants reached agreements with their competitors not to recruit or hire each other's senior-level employees, and one of the cases involved wage-fixing claims, too, where the employers agreed to not only freeze wages, but actually agreed to decrease compensation.

The defendants in each case moved to dismiss the indictments and argued that no-poach agreements had not been criminally prosecuted before and that the agreements were not *per se* illegal.[7] Thus far, the Defendants have not been successful.[8] In November 2021, the Eastern District of Texas court denied the defendants' motion, and held that wage fixing fell within the *per se* rule against price fixing. And, of

2 See https://www.justice.gov/atr/file/903511/download.

3 United States v. Jindal, et al., No. 4:20-cr-00358 (E.D. Tex.).

4 United States v. Surgical Care Affiliates LLC et al., 3:21-cr-00011 (N.D. Tex.).

5 United States v. Hee, 2:21-cr-00098 (D. Nev.).

6 United States v. Thiry et al., 1:21-CR-00229 (D. Col.).

7 *See* https://www.pbwt.com/content/uploads/2022/02/Jindal-MTD-3.pdf.

8 *See* Jindal, 2021 WL 5578687 (E.D. Tex. Nov. 29, 2021); Thiry, 2022 WL 266759 (D. Colo. Jan. 28. 2022).

significance, the Court was not sympathetic and rejected defendants' argument that due process was violated even if the case was the first one to be prosecuted commenting on the stroke of bad luck for the defendants to be the first ones prosecuted criminally.

In Colorado, the Court also denied the defendants' motion to dismiss the criminal charges arising from the alleged no-poach agreements. The Court concluded that the no-poach agreements at issue constituted a standard horizontal market restriction long recognized as a per se Sherman Act violation and rejected the due process argument, too, siding with the DOJ.

More recently, on the East Coast, in January 2022, the DOJ brought forth criminal charges following a Portland, Maine, federal grand jury indictment of four individuals.[9] The defendants are owners and/or managers of home health care agencies that hire Personal Support Specialists ("PSS") workers and allegedly agreed not to hire each other's workers (no-poach agreements) and agreed to fix the wages of the workers. While the DOJ announced that it was the first indictment of antitrust prosecution in the PSS industry, it appears to continue the DOJ's COVID-era trend of focus on the greater health care industry and alleged attempts by certain employers to keep wages frozen and depress competition at a time of great demand on this sector.

II. THE FRANCHISOR-FRANCHISEE RULE OF REASON EXCEPTION

In 2018, three cases were filed by employees seeking damages and order to enjoin the enforcement of no-poach agreements in the United States District Court for the Eastern District of Washington.[10] The plaintiffs claimed that the no-poach agreements that each franchisee employer had executed, were unlawful per se antitrust violations because of the anticompetitive effects of the agreements and that horizontal competition for employees was being stifled. However, most antitrust cases, historically, have recognized that a franchise's no-poach agreement may be enforced under the "rule of reason." The rule of reason requires a fact finder to decide whether the questioned practice, here a no-poach agreement, imposed an unreasonable restraint on competition after accounting for a variety of factors.

The DOJ filed Statements of Interest confirming that it took the position that franchisor-franchisee agreements do not provide grounds for antitrust claims under either the "quick look" or *per se* antitrust analysis and that the rule of reason should continue to apply because the franchisor and the franchisee conduct business at different levels of the market structure. The DOJ concluded that intrabrand restrictions (i.e., geographical limits on franchisees ability to hire employees of other franchisees under the same franchisor) on competition promote competition against competitors, or interbrand competition. Thus, under the rule of reason, a plaintiff faces substantial hurdles to even raise a claim asserting improper market power in the relevant market when franchisee employees are not precluded from seeking other fast food jobs from competitors, and are only limited from seeking employment from other franchises of the same franchise. However, that same Statement of Interest points out that a different antitrust conclusion may apply if the franchisor also competes in the same market as its franchisee. Shortly thereafter, the Washington's Attorney General filed its own brief claiming that the *"per se"* standard applied under state law.

All three cases in the Eastern District of Washington settled and were dismissed and the Courts did not adopt or comment on either the DOJ or the Washington AG's positions.

III. CURRENT LEGISLATIVE CLIMATE

The legislative climate in Washington DC is not likely to support new legislation that would remove no-poach agreements from civil or criminal antitrust prosecution. To the contrary, future enforcement actions are likely as the DOJ puts more resources toward criminal prosecution of no-poach agreement parties.

Other signals demonstrate that the Congress will not support such legislation as "employee friendly" laws are getting support from the legislature and the Oval Office. HR 4445 passed the House and the Senate in a bi-partisan manner and was signed into law amending the Federal Arbitration Act to prohibit mandatory arbitration of employee claims of sexual harassment or sexual assault. The Biden administration has signaled support to restrict the use of non-compete agreements with employees, and the Federal Workforce Mobility Act (FWMA) is said to have bi-partisan support. The FWMA, if passed, will prohibit most non-compete agreements with employees. Moreover, while it might not survive in the Senate, the House passed the Forced Arbitration Injustice Repeal Act of 2022 (FAIR) which prohibits enforcement of arbitration agreements if the agreement requires arbitration of an employment, consumer, antitrust, or civil rights dispute.

9 https://www.pbwt.com/content/uploads/2022/02/Manahe-Indictment.pdf.

10 *Stigar v. Dough Dough Inc.*, No. 2:18-cv-00244; *Harris v. CJ Star LLC*, No.2:18-cv-00247; and *Richmond v. Bergey Pullman Inc.*, No. 2:18-cv-00246.

IV. THE JURIES ARE IN

On April 14 and 15, 2022, the jury in each of Jindal and Thiry returned not guilty verdicts on the anti-trust charges related to the no-poach agreements.[11] The DOJ found solace in the conviction of Jindal for obstructing the FTC's investigation.

V. CAUTION AHEAD

DOJ prosecutions are not limited to formalized documents entitled "No Poach" agreement but will prosecute cases based on email, verbal conversations and inferences drawn from such communications. Thus, employers should be diligent and train managers responsible for hiring and retention to be alert at all times and avoid situations that might imply a "no-poach" agreement. Such diligence should treat such communications with the same level of gravity as when working to prevent sexual harassment or other forms of discrimination. Moreover, an employer that utilizes third-party recruiters could be liable if the recruiters are considered complicit in a no-poach scenario among competitors.

Industry conferences, round tables and seminars provide a ripe environment for executives to reach a handshake agreement not to hire employees of competitors or to freeze wages for certain categories of employees. While such agreements might provide short term relief from employee departures, it also can bring long term expensive and costly civil litigation and potentially jail time for those involved.

In addition to training, employers should develop a written policy against no-poach agreements and what to do if a competitor implies or suggest that a no-poach agreement could be a "win-win."

The DOJ's history of criminal prosecution of no-poach agreements in the healthcare industry will continue as it promotes its prosecutions as good policy to support employee care givers at a time of a health crisis. However, other industries should stay alert because with increased funding for prosecuting these cases, it is expected that the DOJ will seek criminal prosecutions in other industries in the very near future. Also, even though the DOJ concluded that the Washington franchisor-franchisee no-poach agreements were not per se antitrust violations, given the change in administration and the caveats that the DOJ's statements included, the DOJ might take a very different position if it examines the franchisor-franchisee no-poach situation, especially where the franchisor competes with its franchisee.

And, while the District Courts have, to date, sided with the DOJ's criminal prosecution of no-poach agreement parties, it should be noted that the Courts of Appeal have not addressed a single case on this topic. Thus, there is no binding appellate or Supreme Court guidance that no-poach agreements are, indeed, per se, antitrust violations that come with criminal penalties and prison sentences. And, while the juries vindicated the defendants on the claims related to no-poach agreements, the DOJ, will learn lessons from these initial prosecutions from which future defendants will pay the price.

11 *See* https://www.justice.gov/opa/pr/former-health-care-staffing-executive-convicted-obstructing-ftc-investigation-wage-fixing; and https://coloradosun.com/2022/04/15/federal-jury-acquits-davita-ex-ceo-kent-thiry-in-antitrust-case/.

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