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INSIGHT: No-Poachers Find Themselves in Hot Water

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''Don't come after my employees, and I won't come after yours.'' Perhaps this arrangement seems fair to the untrained antitrust eye. Businesses might in fact justify such an agreement as necessary to maintain a sense of staff stability and firm culture. Make no mistake, however, a ''no-poach'' agreement, as these arrangements are now called, unlawfully harms employees, labor markets, and ultimately even consumers. Employers who enter into them could also find themselves facing a government investigation criminal prosecution (read: fine + jail time), *and* private civil litigation.

This article examines the harm that no-poach agreements cause and how antitrust law provides an important tool for courts to understand, analyze, and address their harm to competition. It further discusses why courts should apply the *per se* standard in future no poach cases.

No-Poach Agreements and the DOJ ''No-poach'' agreements, which have recently garnered a great deal of media attention within the legal community, are agreements between employers not to compete for one another's employees. In these arrangements, employers agree not to solicit, make offers of lateral employment, or otherwise recruit another firm's employees. This type of agreement is extremely common among employers, so many were surprised in October 2016 when the Department of Justice (''DOJ'') not only publicly condemned no-poach agreements, but also announced its intention to prosecute them criminally.

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Given that the DOJ's proclamation came at the end of the Obama administration, many employers may have adopted a wait-and-see approach before updating their human resource policies and practices. However, any hope that the Trump administration would abandon the position announced in 2016 was quashed earlier this year, when the Assistant Attorney General of the Antitrust Division, Makan Delrahim, revealed that his Division opened several criminal investigations into no-poach agreements among employers.

Delrahim's revelation set the legal community abuzz, but not because the government's pursuit of these agreements was anything new. The DOJ has pursued no-poach cases in the past, but it has always treated them as *civil* offenses, not criminal acts. *E.g.*, *United States v. Adobe Sys., Inc.*, No. 10-CV-1629, 2011 BL 418023 (D.D.C. Mar. 17, 2011). Now, people could go to jail.

Why Is the DOJ Adopting a Hardline Stance on No-Poach Agreements? The possibility of imprisonment for executives involved in no-poach arrangements certainly presents a harsh new deterrent for employers looking to enter into such agreements. In addition to jail time, companies face large fines if indicted. Justifying its policy shift, the DOJ stated that ''these types of [no-poach] agreements eliminate competition in the same irredeemable way as agreements to fix the prices of goods or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.''

Indeed, no-poach agreements depress the salaries of the most desirable employees, by preventing competition for their services. Lateral offers of employment frequently attempt to lure an employee away from his or her current position with an offer of greater compensation. To prevent lateral hires and promote employee retention, employers preemptively raise wages in competitive labor markets. Therefore, no-poach agreements not only deter employees from accepting higher paying jobs with another firm, they obviate the need for the employee's current firm to offer preemptive raises. This results in the employee accepting a lower wage, regardless of place of employment, and the harm does not stop there.

Eliminating competition for the most desirable employees results in wage stagnation across the entire affected market, as many employers enforce wage-parity policies causing similarly situated employees to earn comparable levels of compensation. Thus, when employers refuse to raise wages for the highest paid employees, that decision trickles down to all similarly situated employees. For example, faculty members at Duke and the University of North Carolina medical schools recently alleged the existence of a no-poach agreement between the schools. *Seaman v. Duke Univ.*, No. 1:15-cv-462, 2018 BL 34111 (M.D.N.C. Feb. 1, 2018). Rather than attempting to prove that particular faculty members would have received lateral employment offers for higher compensation or received preemptive raises, plaintiffs argue that ''this individual faculty compensation suppression was spread to all faculty through the defendants' internal equity structures.'' *Id.* at *13. In fact, plaintiffs in this case argue that the schools' wage-parity policies effectively spread the anticompetitive harm to all members of both medical schools' faculty. If the most renowned faculty member's wage is artificially stagnated, his or her fellow faculty members suffer through the same wage stagnation.

In the longer term, wage stagnation can also cause market contraction. Professors Kruger and Posner, of Princeton University and the University of Chicago Law School respectively, argue that ''[i]f employers act in concert to suppress wages below the prevailing level . . . [they] reduce pay *and employment* for workers.'' (emphasis added). They further argue that by artificially deflating wages, employers hire fewer employees and operate with vacancies, because they are unable to attract enough talent at the wages offered. The long-term result may be that no-poach agreements not only unlawfully suppress wages, but also tend to reduce the size of the affected labor market as well. *See id.*

In addition to lowering compensation and shrinking the size of the labor market, no-poach agreements limit worker mobility. *Id.* (''[I]f employers restrict their employees' outside options . . . they can reduce worker mobility and suppress wages below competitive levels.''). Lower mobility in the workforce curbs competition among employees, narrows the talent pool from which employers hire, and ultimately damages productivity and stymies innovation. The ultimate consequence then may fall upon consumers, who are unable to obtain the quality of goods and services that would be available had competition, productivity, and innovation not diminished.

It is therefore not hard to see why the DOJ likened these arrangements to traditional agreements to fix the prices of goods or allocate markets.

Applying Antitrust Law to Police No-Poach Agreements It is not immediately clear what the DOJ's stance means for private civil litigation, particularly in light of the challenges no-poach agreements present to traditional antitrust analysis by courts. Close evaluation of these challenges, however, merely underscores the importance of antitrust law as a tool to analyze and deter the formation of no-poach agreements.

Considering the problem of no-poach agreements through an antitrust lens presents a number of interesting but surmountable challenges. First, traditional antitrust analyses focus on the behavior of sellers, *see, e.g.*, Phillip C. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles And Their Application, ¶101 (4th ed. 2017) (''The members of Congress who enacted the Sherman Act wanted to preserve 'competition' . . . and most of those involved in the debate appeared to use [competition] to mean . . . the presence of multiple sellers in a market.''), but in no-poach agreements, the anticompetitive actors are *buyers*.

Accordingly, the market being analyzed is an input market: the labor market. Employers are buyers of labor, and no-poach agreements impact markets in which labor is bought and sold. Competitors in an input market frequently are not competitors in downstream markets, so would-be input market competitors may not be immediately identifiable. Consider the case of *In re High-Tech Employee Antitrust Litigation*. 289 F.R.D. 555 (N.D. Cal. 2013). Defendants included Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar. Lucasfilm and Pixar, for example, were not creating professional software, and so they were not competing with Adobe to sell finished products. They were, however, competing with Adobe to hire software engineers. That is until they entered into a no-poach agreement, which the court found to restrict competition in the input market, even absent an inquiry into harm to competition in each Defendant's respective downstream markets.

Courts do have some experience analyzing unlawful restraints in buyer-side markets. Antitrust law acknowledges the harm buyer-side conduct can cause to competition, and has developed decades of case law analyzing unlawful monopsony power. A monopsonist—a sole or dominant buyer—can be thought of as the buyer-side equivalent of a monopoly—a sole or dominant seller.

When courts discuss buyer-side conduct, even they occasionally use seller-side language. *See, e.g.*, *United States v. Griffith*, 334 U.S. 100 (1948). Thus buyer-side antitrust violations can be analyzed similarly to seller-side conduct, as noted by the DOJ. In fact, courts have frequently analogized buyer-side conduct to a seller-side counterpart, and they should do the same when considering no poach agreements. *See, e.g.*, *Nat'l Macaroni Mfg. Assoc. v. FTC*, 345 F.2d 421 (7th Cir. 1965) (analyzing an agreement among buyers to purchase less wheat in an effort to suppress the price of wheat as a price fixing scheme); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983) (analyzing an agreement among lumber producers that designated regions in which each would bid to log timer as a market allocation scheme); *United States v. Capitol Service, Inc.*, 756 F.2d 502 (7th Cir. 1985) (analyzing an agreement among movie theaters that divided which movies each would bid to show as a bid rigging scheme). Indeed, no-poach agreements have elements that are similar to market allocation agreements, and other elements more analogous to traditional price fixing. Consider that under a no-poach agreement, the incumbent employer, or buyer, retains exclusive negotiation rights with its employees, just as an incumbent seller in a market allocation scheme retains exclusive negotiation rights over its allocated customers. In other words, parties to a no-poach agreement can be said to have effectively allocated to one another portions of an input market. But the fundamental goal of these agreements is to reduce, through the elimination of competition, the amount employers are required to pay to attract skilled employees. In other words, the goal of no-poach agreements is fixing, stabilizing or lowering wages. As the DOJ essentially argued, no-poach agreements are effectively buyer side price fixing agreements.

Thus, courts should view no-poach agreements similarly to seller side conduct, and follow the DOJ's lead in analyzing such agreements as *per se* unlawful, rather than the rule of reason analysis typically afforded no-poach cases. In fact, several cases in the employment context have proceeded on this premise. For example, in *Todd v. Exxon Corp.* plaintiff sued 14 oil and petrochemical companies claiming that by exchanging detailed compensation information, they had effectively set a ceiling for the salaries of their managerial, professional, and technical employees, even absent an explicit agreement to fix wages. 275 F.3d 191 (2d Cir. 2001). For another example of claimed price fixing in the employment context see, e.g., *Hall v. United Air Lines, Inc.*, 296 F. Supp. 2d 652 (E.D.N.C. 2003). Although plaintiff did not claim that such an explicit wage fixing agreement existed, the court noted that had plaintiff been able to allege ''that defendants actually formed an agreement to fix [] salaries, [the] *per se* rule would likely apply.'' 275 F.3d at 198. Similarly, where plaintiffs can allege an explicit agreement among employers not to poach one another's employees, courts should find that those agreements deserve *per se* treatment.

Finally, by declaring no-poach agreements *per se* unlawful, courts would achieve the twin goals of antitrust policy: protecting competition and protecting consumers. *See generally*, Areeda, above, at ¶103. By forcing employers to compete rather than collude in the labor market—and putting them on notice that entering into no-poach agreements will always run afoul of antitrust law—courts could work to restore and protect competition in input markets. Restoring that competition would ultimately also protect consumers, as the deleterious effects of no-poach agreements eventually also harm productivity and innovation, reducing the quality of goods and services available in the marketplace.

Conclusion The proclamation issued under the Obama administration, and the subsequent Trump-era announcement that criminal prosecutions would be forthcoming, underscore that the DOJ's increasingly severe treatment of no-poach agreements is non-partisan and based on the manifest anticompetitive harm these restraints inflict on labor markets. No-poach agreements harm competition and ultimately they harm consumers. Fortunately, antitrust law offers the proper and most appropriate legal framework through which to diagnose and remedy no-poach injuries.

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