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A new player: DOJ opines in private "no-poach" litigation

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Over the last several weeks, the U.S. Department of Justice (DOJ) submitted notices of intent to file statements of interest in five "no-poach" class actions.[1] While each case dealt with the same substantive issue – alleged "no-poach" agreements – DOJ recommended different antitrust standards of review apparently based on the facts as alleged in each complaint. These notices of intent should be closely monitored for two reasons. First, these notices provide additional guidance regarding DOJ's position on "no-poach" agreements. Second, litigants should carefully consider how best to leverage DOJ's engagement in these cases to their advantage.

Changing no-poach landscape

Agreements between companies that compete for employees have always been subject to antitrust scrutiny. DOJ and the U.S. Federal Trade Commission (FTC) reiterated and expanded on this principle in 2016 by publishing "Antitrust Guidance for Human Resource Professionals." The DOJ/FTC guidance focused in particular on "no-poach" agreements, which the agencies defined as agreements between companies "to refuse to solicit or hire [another] company's employees." The DOJ/FTC guidance explained that the agencies viewed "naked" no-poaching agreements – those that are not tied or ancillary to legitimate business agreements such as a joint venture or acquisition proposal – as per se illegal. These agreements would therefore be deemed illegal without any inquiry into their competitive effects.

The DOJ/FTC guidance also noted that DOJ "intends to proceed criminally against naked wage fixing or no-poaching agreements" entered into, or continued, after publication of the guidance. However, the only enforcement action by DOJ to date has been in the civil context. Nevertheless, the current DOJ administration has indicated that it is actively reviewing "no-poach" agreements and has signaled that there are more "no-poach" cases to come. In addition, state attorneys general, largely led by the Washington state attorney general, have also increased their scrutiny of potential "no-poach" agreements, particularly (but not exclusively) in the fast-food industry.

Class actions – the new battleground

As is often the case, private follow-on litigation alleging illegal "no-poach" agreements has increased in connection with the heightened government scrutiny of these issues. In April of 2018

[1] *In re Railway Industry Employee No-Poach Antitrust Litigation*, C.A. No. 2:18-mc-00798-JFC (W.D. Pa.); *Richmond v. Bergery Pullman, Inc., et al.*, C.A. No. 2:18-cv-00246-SAB (E.D. Wash.); *Stigar v. Dough Dough, Inc., et al.*, C.A. No. 2:18-cv-00244-SAB (E.D. Wash.); *Harris v. CJ Star, LLC, et al.*, C.A. No. 2:18-cv-000247-SAB; *Seaman v. Duke University, et al.*, C.A. No. 1:15-cv-00462-CCE-JLW (M.D. N.C.).

DOJ announced a settlement with Knorr and Wabtec, two rail equipment supply companies, for allegedly entering into a no-poach agreement. Shortly thereafter, 26 private class actions were filed in the Western District of Pennsylvania specifically relying on the DOJ settlement. Similarly, several private cases have been filed in direct response to the agreements between the Washington state attorney general and various fast food companies.[2] A key issue in all of these private actions is whether the alleged "no-poach" agreements should be analyzed under the per se or rule of reason standard. As a practical matter, if the agreements are analyzed as per se unlawful, the plaintiff's path to proving its case is typically much easier. Plaintiffs have often cited the DOJ/FTC guidance as support for their arguments that the alleged agreements are per se violations of the antitrust laws. In response, defendants argue that the rule of reason is the appropriate standard of review because courts have historically applied the rule of reason standard to similar agreements or because the agreement at issue was vertical in nature.

The few courts that have weighed in to this debate have reached widely disparate results. Judge Robert J. Bryan, of the U.S. District Court for the Western District of Washington, ruled on a motion to dismiss filed by Cinnabon, that the appropriate standard of review in that case was the rule of reason. While Judge Reagan of the Southern District of Illinois, held in the Jimmy Johns case that it was too early in the proceedings to determine whether the rule of reason or the per se rule would apply but plaintiffs had nevertheless "stated a plausible claim for relief under Section 1 of the Sherman Act." Finally, in a Northern District of Illinois case involving McDonald's, Judge Alonso held that the quick look test – an abbreviated form of rule of reason – may apply.

Class actions – a third party enters the field

Perhaps because of the disparity in the courts' analyses of these cases, DOJ has recently filed notices of intent to submit briefing about the relevant antitrust standard of review in three private no-poach cases:

- The Knorr-Wabtec rail case[3]: Here, plaintiffs have alleged an agreement between two direct competitors. Accordingly, DOJ's notice of intent argued that "[C]ourts have held that no-poach agreements among competitors in labor markets are per se unlawful in the same way that customer and market-allocation agreements in product markets are per se unlawful."

- The fast-food cases[4]: In contrast to the rail case, in these cases involving alleged no-poach provisions in fast-food franchise agreements, DOJ argued that the rule of reason should apply because "[v]ertical restraints, as a category, are typically assessed under the rule of reason . . . A no-poaching agreement between a franchisor and a franchisee, within the same franchise system, likely falls within one of these two categories and thus merits rule of reason analysis at the proper procedural stage."

- The Duke University Case[5]: Plaintiffs in this case allege that Duke University and the University of North Carolina conspired to suppress the wages of medical school professors. Unlike the other two notices, DOJ did not state whether the per se rule or rule of reason should apply to the case and instead noted that it had not yet reviewed the parties briefing on the appropriate standard of review because the briefing was submitted under seal. Presumably, DOJ will provide its opinion after it has an opportunity to review the underlying materials.

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[2] *Stigar v. Dough Dough Inc. et al.*, No. 2:18-cv-00244 (E.D. Wa. 2018); *Richmond v. Bergery Pullman Inc. et al.*, No. 2:18-cv-00246 (E.D. Wa. 2018); *Ashlie Harris, et al. v. CJ STAR, LLC*, No. 2:18-cv-00247-SAB. (E.D. Wa. 2018).
[3] *In re Railway Industry Employee No-Poach Antitrust Litigation*, C.A. No. 2:18-mc-00798-JFC (W.D. Pa.).
[4] *Stigar v. Dough Dough Inc. et al.*, No. 2:18-cv-00244 (E.D. Wa. 2018); *Richmond v. Bergery Pullman Inc. et al.*, No. 2:18-cv-00246 (E.D. Wa. 2018); *Ashlie Harris, et al. v. CJ STAR, LLC*, No. 2:18-cv-00247-SAB. (E.D. Wa. 2018).
[5] *Seaman v. Duke University, et al.*, C.A. No. 1:15-cv-00462-CCE-JLW (M.D. N.C.).

Impact for private litigants

DOJ's engagement in these cases is meaningful for two reasons.

First, DOJ's statements provide additional guidance regarding its view of no-poach agreements between franchisees and franchisors. Notably, DOJ's position is that because the agreeing parties are in a vertical relationship, these no-poach agreements should be analyzed under the rule of reason.

Second, litigants should keep DOJ intervention in mind when developing litigation strategies:

- Filings: Private litigants should be aware that DOJ is monitoring filings in these class actions and consider the impact on their pleadings and arguments. For example, litigants should consider how facts regarding the nature of the relationship between the alleged conspirators (e.g., whether they stand in a vertical relationship) will impact the court's and DOJ's analysis. And DOJ's position with respect to rule of reason treatment for certain agreements may lead more plaintiffs to attempt to allege facts sufficient to plead a rule of reason case in the alternative.
- DOJ enforcement: Defendants should assume that DOJ is monitoring every "no-poach" case filing and consider the possibility of criminal DOJ enforcement of naked "no-poach" agreements that were entered into or continued after October 2016. Defendants should consult experienced, external counsel who can assist them in assessing their options, including whether to seek amnesty.
- Advocacy to DOJ: Parties on both sides should consider advocacy to DOJ through white papers and other mechanisms to encourage DOJ to intervene favorably on its behalf.

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