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RESTRAINTS ON WORKERS' WAGES AND MOBILITY: NO-POACH AGREEMENTS AND THE ANTITRUST LAWS

Donald J. Polden*

A decade ago, the United States Justice Department's Antitrust Division filed an antitrust complaint against several major Silicon Valley tech companies for their longstanding secret agreements to not "poach" or hire-away each other's' employees, notably engineers and animators. The companies quickly settled the case, but it served to focus great national attention on the prevalent use of various restraints on worker mobility and compensation by use of agreements among competitors. This Article examines the impact on the Silicon Valley no-poach conspiracies on workers and the growing recognition that restraints on workers can constitute violations of federal and state antitrust laws. The Article also describes the recent and aggressive enforcement efforts of the Antitrust Division through strong policy statements, submissions of "letters of interest" in private party litigation involving no-poach agreements in several other industries, and its own criminal and civil antitrust enforcement. However, the Article also argues that private and government enforcement efforts could be even stronger if, the courts established the applicability of the rule of per se illegality, or the "quick look" approach, to many of these agreements. The Article also argues that there needs to be great scrutiny of related restrictive agreements imposed on many workers, such as covenants not to compete and no-hire agreements.

* Dean Emeritus and Professor Law, Santa Clara University. He expresses his appreciation to members of the Santa Clara Law Review Editorial Boards both in 2018-2019 and 2019-2020 for their work on this article and on the Law Review Symposium held on March 1, 2019, that produced this symposium issue. He also expresses his appreciation to Dayaar Singla of NALSAR Law School in India for his very helpful research for this article.

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I. INTRODUCTION

In September 2010, the United States Justice Department’s Antitrust Division filed an antitrust complaint against several major technology companies for violations of Section 1 of the Sherman Act.¹ The complaint culminated the Department’s investigation into a long-standing set of agreements between the Silicon Valley companies that began about 2005 and continued unabated until the Justice Department filed suit in 2010.² The Department’s investigation showed that the informal agreements were entered into by the Chief Executive Officers (CEOs) of leading technology companies and, in those agreements, the CEOs

1. See generally Complaint, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010) (No. 1).

2. Press Release, U.S. Dep’t of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements: Settlement Preserves Competition for High Tech Employees (Sept. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee> [hereinafter High-Tech Co. Press Release].

pledged to each other that they would not “poach” employees from each other.³ Initially forged by legendary tech and entertainment company CEOs George Lucas and Steve Jobs, the agreements were often verbal, although they were followed by email communications to shore up the details of the agreements and, in some instances, to enforce compliance with the agreements.⁴ The agreements were adhered to by the CEOs (and often the heads of human resources office) and their adherence to, and compliance with, the agreements exerted devastating effects on the career earning power of thousands of technology engineers and animation engineers and artists.⁵ The simplicity of the agreements added to their effectiveness in gaining and maintaining agreement by the CEOs and they resulted in blunt impacts on their targets—company employees.⁶

When the anticompetitive agreements were discovered, and a government enforcement action was initiated against the conspiring CEOs’ companies, many in the Silicon Valley business community were perplexed as to why these business leaders would implement agreements that had, as their only purpose, the suppression of wages and job mobility for their own employees. Why would corporate executives, schooled as they all are in antitrust compliance programs and government enforcement concerns, feel comfortable entering into these agreements? Why would they believe that their companies’ best interests were antithetical to the interests of their employees? Why would they put the interests of profitability and shareholders return above that of their own employees? Those questions—which, frankly, were not completely answered or addressed in either the ensuing federal government cases or the private litigation brought by injured employees—will be discussed in this article as will the broader policy implications involved in application of the federal antitrust laws to markets for labor and employment. Importantly, the Silicon Valley no-poach conspiracies spawned considerable reflection of the failings of the federal antitrust laws to enforce current laws against collusive and anti-competitive activities in employment and

3. For purposes of the complaint and the subsequent consent decree final judgment, the tech companies’ illegal conduct included agreed-to restraints “from soliciting, cold calling, recruiting, or otherwise competing for employees” of the other conspirators. Final Judgment, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. 2011), <https://www.justice.gov/atr/case-document/final-judgment-0>.

4. *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1201 (N.D. Cal. Aug. 20, 2015).

5. *Nitsch v. Dreamworks Animation SKG Inc.*, 315 F.R.D. 270 (N.D. Cal. May 25, 2016).

6. Ted Johnson, *Studios Hit with New Class-Action Suit over Anti-Poaching Pacts*, VARIETY (Sept. 8, 2014), <https://variety.com/2014/biz/news/disney-dreamworks-animation-lawsuit-1201300974/>.

labor markets and signaled the beginning of an era of great governmental protection of workers from anti-competitive conduct in those markets.

In the aftermath of the private and government actions against the tech giants and their conspiring CEOs, the country has seen an increased focus by state and federal antitrust enforcers against anticompetitive restraints in labor and employment markets.⁷ This article will consider some of the challenges to enforcement of federal antitrust laws in those markets, including the economic problem of monopsony and the difficulty of ensuring antitrust enforcement in buyer's markets, and then will consider some of the normative implications of using antitrust law to address restrictive practices in markets for employment and labor. The central theme of the article is that the government's enforcement of the antitrust laws in the Silicon Valley no-poach cases has led to enforcement initiatives in markets for labor and employment and has sparked greater academic and private enforcement efforts in those markets. This is a positive development because enforcement of antitrust law in these markets has been neglected and the growing national concern about limits on worker mobility, wages, and economic prosperity requires greater attention, perhaps even by federal competition law and policy.

This article begins with a factual and historical examination of the no-poach agreements used by tech companies in Silicon Valley. This background section also discusses the growing use of anticompetitive agreements in employment or labor markets by major firms and industries and begins an evaluation of the positions taken by the courts and by government agencies (mainly the Federal Trade Commission, the Justice Department's Antitrust Division and state attorney generals) in response to growing national concerns about economic conditions in labor markets. The following sections examine how government agencies and courts in private antitrust litigation have recently been applying antitrust laws to labor markets including applying current antitrust analysis to no-poach and other explicit restrictions on workers' mobility. In particular, this article uses the Justice Department Antitrust Division's statements of interest in several current no-poach cases as a door to looking more broadly at antitrust analysis in labor markets. The final section argues that labor markets have been neglected by antitrust enforcement, due in large part to economic and conceptual difficulties in approaching competition issues in labor markets and to limitations on the ability of current antitrust laws to address those market problems. Concluding, this article

7. See Michael Murray, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Presentation at the Santa Clara University Law Review Symposium: Antitrust Enforcement in Labor Markets: The Department of Justice's Effort 7-8 (Mar. 1, 2019), <https://www.justice.gov/opa/speech/file/1142111/download> [hereinafter Murray, *Justice's Efforts*].

argues that perhaps the Steve Jobs and George Lucas led conspiracies to restrain their workers futures were cathartic to antitrust enforcers and have fostered much greater recognition of competition problems in labor markets and the need for special antitrust treatment in those markets.

II. THE SILICON VALLEY NO POACH AGREEMENTS AND RESTRAINTS OF TRADE IN EMPLOYMENT

The history of Section 1 of the Sherman Act includes some of the most audacious conspiracies among competitors to restrain trade by fixing prices or restraining competition through anticompetitive conduct such as boycotting competitors, allocating territories, or rigging market prices. The infamous “phase of the moon” bid-rigging conspiracy by the four firms manufacturing electricity generating equipment set a new standard for corporate collusion inspired by greed. It resulted in several executives of the four major corporate defendants being convicted of criminal violations of the Sherman Act.⁸ The Silicon Valley no-poach agreement conspiracies were as effective in stifling competitive conditions as the electrical equipment conspiracy cases of the 1950s, although none of the tech company CEOs went to prison.⁹ This section of the article identifies the harms suffered by Silicon Valley workers and corporations because of the antitrust conspiracies from the Silicon Valley no-poach agreements and then describes significant actions taken by government antitrust enforcement agencies in the wake of the conspiracies.

A. An Overview of the Silicon Valley Agreements

In the early 2000s, Steve Jobs, CEO of Apple, Inc., began to resent the effects on the company’s innovative consumer product projects caused by employee—mainly project engineers—turnover.¹⁰ The Valley was jumping with new startup firms seeking the next great computer or software innovation and the economic vibrancy was fueled by

8. See Myron W. Watkins, *Electrical Equipment Antitrust Cases—Their Implications for Government and for Business*, 29 U. CHI. L. REV. 97, 101 n.8 (1961).

9. High-Tech Co. Press Release, *supra* note 2; Final Judgment at 4, United States v. Adobe Systems, Inc., No. 1:10-cv-01629 (D.D.C. Mar. 18, 2011) (prohibiting defendants enforcing any agreement not to compete for employees of another).

10. See *When Rules Don’t Apply*, FILMMAKERS COLLABORATIVE SF, <https://www.whenrulesdontapply.com/>; Levi Sumagaysay, “*When Rules Don’t Apply*”: Did Silicon Valley Tech Giants Learn from No-Poaching Antitrust Cases?, SAN JOSE MERCURY NEWS (May 24, 2019), <https://www.mercurynews.com/2019/05/24/when-rules-dont-apply-did-silicon-valley-tech-giants-learn-from-no-poaching-antitrust-case/>; Mark Ames, *The Techtopus: How Silicon Valley’s Most Celebrated CEOs Conspired to Drive Down 100,000 Tech Engineers’ Wages*, PANDO (Jan. 23, 2014), <https://pando.com/2014/01/23/the-tech-topus-how-silicon-valleys-most-celebrated-ceos-conspired-to-drive-down-100000-tech-engineers-wages/>.

engineers (mainly computer and electrical) who were managing new product design and development for the latest technology devices and products.¹¹ The demand for their talent catapulted salaries.¹² The expanding technical needs from historically less technical industries, such as animation and music, further enhanced the demand for project managers, research and development and other engineering talent.¹³ Jobs' response to the challenges of keeping key talent within the company was to ask other Silicon Valley technology companies' CEOs, many of whom served on Apple's Board of Directors, to refrain from hiring Apple's engineers and, in exchange, Jobs promised that Apple would not hire their talent.¹⁴ Apparently, George Lucas of Lucasfilm suggested these agreements to Jobs because Lucas had previously implemented similar arrangements with respect to animator artists and engineers at several major animation production companies.¹⁵ The alleged Silicon Valley conspiracy involved agreements between or among companies under the control of Steve Jobs and/or a company that shared at least one director with Apple's Board of Directors.¹⁶

The agreements between these tech industry firms took two forms: (1) an anti-solicitation scheme in which the conspirators agreed not to solicit each other's engineer employees, mainly by refraining from "cold calling" prospective employees at other conspirators' companies and (2) agreements to compensation ranges for classes of professional employees.¹⁷ The agreements between the companies lasted from 2005 to 2009 and they were all similar in their purpose to suppress the compensation and job mobility of the technical, creative, and selected other salaried employees.¹⁸ The initial group of Silicon Valley companies investigated by the Department of Justice were Adobe Systems, Inc., Apple, Inc., Google, Inc., Intel Corporation, Intuit, Inc., and Pixar.¹⁹ The group of

11. FILMMAKERS COLLABORATIVE SF, *supra* note 10; Sumagaysay, *supra* note 10; Ames, *supra* note 10.

12. FILMMAKERS COLLABORATIVE SF, *supra* note 10; Sumagaysay, *supra* note 10; Ames, *supra* note 10.

13. FILMMAKERS COLLABORATIVE SF, *supra* note 10; Sumagaysay, *supra* note 10; Ames, *supra* note 10.

14. See *Animation Workers*, 123 F. Supp. 3d at 1199-1204; *Dreamworks*, 315 F.R.D. at 277, 289-92; see also Ames, *supra* note 10.

15. It appears from the pleadings in the *In re Animation Workers Antitrust Litig.* cases that "the roots of the conspiracy reach back to the mid-1980s, when George Lucas, the former Lucasfilm Chairman of the Board and CEO, sold Lucasfilm's 'computer division' to Steve Jobs, who had recently left Apple." *Animation Workers*, 87 F. Supp. 3d at 1201.

16. *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1172 (N.D. Cal. 2013).

17. See *Animation Workers*, 87 F. Supp. 3d at 1200-04; *High-Tech Emp.*, 985 F. Supp. 2d at 1172-73.

18. See *High-Tech Emp.*, 985 F. Supp. 2d at 1172.

19. *Id.* at 1200.

corporate defendants later enlarged to include eBay and international tech giants.²⁰

Upon learning of the agreements, the Justice Department's Antitrust Division (the "Department") began an investigation in 2009 that ultimately spawned civil antitrust actions against six companies in the computer and animation industries.²¹ The defendants quickly entered into settlement agreements.²² Each of these agreements included a consent decree and final judgment wherein defendants did not admit any violations of law and further specified that the judgment would not have a conclusive effect in any subsequent private actions.²³ The consent decree was beneficial to the companies but it made it more difficult for the plaintiffs, such as engineers, who were harmed by the conspiracy to prove their case of conspiracy to suppress competition in worker salaries and mobility.²⁴

The Department's civil action was followed by several private class action law suits filed by current and former computer and animation engineers, creative animators, and other skilled employees of the defendant companies.²⁵ In addition, the State of California brought an action against some of the defendants under the state antitrust and unfair competition laws and in its *parens patriae* relationship to the citizen-employees of those corporate defendants.²⁶

The state and federal court lawsuits were just the beginning of the legal problems facing the major tech firms that participated in the no-

20. See *Dreamworks*, 315 F.R.D. at 275-76.

21. Final Judgment at 1, 5, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. Mar. 7, 2011) (suit against Adobe Systems, Inc., Apple, Inc., Google Inc., Intel Corporation; Intuit, Inc. and Pixar). See *Animation Workers*, 87 F. Supp. 3d at 1200.

22. See also High-Tech Co. Press Release, *supra* note 2; see also *Animation Workers*, 87 F. Supp. 3d at 1200; *Dreamworks*, 315 F.R.D. at 275.

23. Final Judgment at 1, *U.S. v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. Mar. 18, 2011); Competitive Impact Statement at 15, *U.S. v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (Sept. 24, 2010), <https://www.justice.gov/atr/case-document/file/483431/download>.

24. Section 5(a) of the Clayton Act permits a final consent judgment or decree entered in a suit brought by the U.S. Government to be used as prima facie evidence of the violation in a subsequent suit. 15 U.S.C. §16(a) (2012). The section also states that the prima facie rules do not apply if the consent judgement or decree was entered before testimony was taken, thus encouraging settlement of the government's case at an early stage. *Id.*

25. See generally *Animation Workers*, 87 F. Supp. 3d at 1195; *High-Tech Emp.*, 985 F. Supp. 2d at 1167.

26. The State of California brought actions on behalf of citizens injured by anticompetitive conduct of eBay and Intuit, Inc. and ultimately entered into settlements with both companies. See generally Second Amended Complaint, *State of California v. eBay*, No. CV12-5874-EJD-PSG (N.D. Cal. Oct. 11, 2013) (No. 32), http://www.agtechemploymentsettlement.com/media/227074/ca_doj_second_amended_complaint.pdf; Settlement Agreement, *State of California v. eBay*, No. CV12-5874-EJD-PSG (N.D. Cal. May 1, 2014) (No. 55-4), http://www.agtechemploymentsettlement.com/media/227062/settlement_agreement.pdf. Such *parens patriae* suits by state governments are permitted by 15 U.S.C. §15(c)(a)(1) (2012).

poach agreements. The government's litigation, which was quickly settled by the companies, gave way to multiple class action lawsuits brought by the tech and animation workers who were the victims of the no-poach agreements.²⁷ Current and former employees of other technology and animation companies joined the class action lawsuits claiming they had been injured by wage suppression, artificially fixed salaries, and suppression of job mobility that resulted in artificial constraints on their lifetime earning potential.²⁸

The private class action lawsuits brought on behalf of more than 64,000 engineers, animators and other adversely affected professional employees of defendants were settled, as was the State of California *parens patriae* suit brought on behalf of 31,000 Silicon Valley workers, with millions of dollars paid by defendants.²⁹ The sufficiency of the settlement amounts was fiercely contested by the district court, which initially refused to approve the settlement until defendants and plaintiffs agreed to a higher settlement amount.³⁰

The impact of the Silicon Valley no-poach agreements and the litigation that followed did not end with the consent decrees and the payment of class action settlement amounts. The Obama Administration's Justice Department, together with the Federal Trade Commission (FTC), decided that greater enforcement of antitrust laws was necessary in markets for talent and employees; and that began with a joint Antitrust Guidance memorandum for enforcement of those laws in markets for employees.³¹

B. DOJ/FTC Antitrust Guidance for Human Resources Professionals

In October 2016, the FTC and U.S. Department of Justice's Antitrust Division jointly published "Antitrust Guidance for Human Resource Professionals" (the "Antitrust Guidance") with the stated intention of providing guidance to corporations and other entities on the applicability of the antitrust laws to human resource and employment

27. Press Release, U.S. Dep't of Justice, Justice Department Requires eBay to End Anticompetitive "No Poach" Hiring Agreements (May 1, 2014), <https://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements>.

28. *Id.*

29. See generally *High-Tech Emp.*, 985 F. Supp. 2d at 1167. See generally Order Granting Motion For Final Approval of Settlement, *State of California v. eBay*, No. 5:12-cv-05874-EJD (N.D. Cal. Sept. 3, 2015) (No. 85).

30. Daniel J. McCoy & Sandra L. M. Riley, *Fenwick Employment Brief*, FENWICK & WEST LLP 3 (Mar. 25, 2015), <https://www.fenwick.com/FenwickDocuments/EB-03-25-15.pdf>.

31. See generally *Antitrust Guidance for Human Resource Professionals*, U.S. DEP'T OF JUSTICE ANTITRUST DIV. AND FED. TRADE COMM'N (Oct. 2016), <https://www.justice.gov/atr/file/903511/download> [hereinafter Antitrust Guidance].

practices.³² Nominally, the publication of the joint statement was intended to provide guidance to human resources professionals, but it also served as a major pronouncement of government antitrust enforcement initiatives in markets for talent and labor and is notable for more reasons than guidance to employers. First, it addressed some of the uncertainty manifested by the Justice Department's apparent hesitation to move against the Silicon Valley no-poach agreements criminally, rather than the civil litigation approach it took.³³ According to one former DOJ lawyer involved in the no-poach civil cases, there was some uncertainty about whether traditional antitrust doctrines were applicable in labor markets.³⁴ The Antitrust Guidance, however, makes it clear that the federal antitrust laws are fully applicable to all employers and for the protection of workers.³⁵ Second, the Antitrust Guidance specifies that some anticompetitive practices taken to stifle competition in employment markets would be prosecuted by the Department criminally and that the government may seek to invoke the per se rule in labor antitrust cases involving "naked restraints on worker wages."³⁶ In particular, the Antitrust Guidance states that "[g]oing forward, the Department intends to proceed criminally against naked wage-fixing or no-poaching agreements."³⁷

By this time, the administration in Washington D.C. had changed and the new leadership of the Antitrust Division and new membership of the FTC announced that they would continue vigorous enforcement of Section 1 of the Sherman Act in markets for employment.³⁸

32. Antitrust Guidance, *supra* note 31, at 1.

33. *Id.* at 2-4.

34. Statement of Gene Kimmelman, former Chief Counsel for Competition Policy, U.S. Department of Justice, in *WHEN RULES DON'T APPLY*, <https://www.whenrulesdontapply.com/> (stating that the government's case against the tech companies was the first to apply the antitrust laws to labor markets). However, in a subsequent statement, a leading DOJ Antitrust Division lawyer said, "[t]he historical relationship between antitrust law and labor markets is long and complicated." Murray, *Justice's Efforts*, *supra* note 7, at 6. Without a doubt, there has been a record of government enforcement of the antitrust laws in the context of labor and employment markets. See, e.g., *Anderson v. Shipowners' Ass'n of Pacific Coast*, 272 U.S. 359, 364-65 (1926) (holding that antitrust laws applies to wage-fixing conspiracies). But they have been infrequently applied to these markets and for a variety of reasons, some of which are discussed in a later section of the Article. See generally Ioana Marinescu & Eric Posner, *Why Has Antitrust Law Failed Workers?* (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335174.

35. Antitrust Guidance, *supra* note 31, at 3-4.

36. *Id.* at 3.

37. *Id.* at 4. Further, the guidelines state that "[t]hese types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customer, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct." *Id.*

38. See *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute 'No Poach' and Wage Fixing Agreements*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE (Apr. 10, 2018), <https://www.justice.gov/atr/division-operations/division-update-spring->

Following these agency announcements, the Antitrust Division has used its enforcement powers to bring cases against firms that utilize no-poach, no-hire, and related restraints on worker mobility and pay.³⁹ The following section describes these efforts and raises some important questions about government enforcement policies in cases involving no-poach or other labor-related restraints.

C. The Antitrust Division Efforts to Enforce Antitrust Guidance

Since the agencies' Antitrust Guidance was published, the Antitrust Division has taken an active enforcement position with respect to restraints on hiring, salary, and employment mobility.⁴⁰ Since the Antitrust Division announced its effort to prosecute employment-related restraints of trade, there have been several major developments related to its efforts to enforce the policy articulated in the Antitrust Guidance for HR Professionals.

First, the Antitrust Division has brought civil and criminal actions against companies imposing the restraints on their workers. The Justice Department reiterated that it would prosecute "naked" no-poach agreements criminally for "agreements that began after the date of that announcement, or that began before but continued after that announcement."⁴¹ For example, the government brought Section 1, Sherman Act actions against Knorr-Bremse AG and Westinghouse Air Brake Company, major firms in the railroad equipment suppliers industry, for entering into agreements not to hire or solicit each other's employees.⁴² The defendants settled the cases with the government and are defending class action lawsuits brought by employees who were the objects of the no-poach agreements.⁴³

2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

39. See Press Release, U.S. Dep't of Justice, No-Poach Approach: Division Update Spring 2019 (Sept. 30, 2019), <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach> [hereinafter No-Poach Press Release].

40. See, e.g., Murray, *Justice's Efforts*, *supra* note 7, at 4-5; see also No-Poach Press Release, *supra* note 39.

41. Andrew C. Finch, Principal Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the Heritage Foundation (Jan. 23, 2018), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-c-finch-delivers-remarks-heritage>.

42. See generally Complaint, United States v. Knorr-Bremse AG and Westinghouse Air Brakes Technologies Corp., No. 1:18-cv-00747 (D.D.C. Apr. 13, 2018) (No. 1), <https://www.justice.gov/atr/case-document/file/1048866/download>.

43. See generally Final Judgment, United States v. Knorr-Bremse AG and Westinghouse Air Brakes Technologies Corp., No. 1:18-cv-00747 (D.D.C. July 11, 2018) (No. 19), <https://www.justice.gov/atr/case-document/file/1084651/download>. For information on the private actions against the railway equipment conspirators, see generally *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 2019 WL 2542241 (W.D. Pa. June 20, 2019).

Second, the Antitrust Division has used its “Statements of Interest” practice to intervene in private litigation involving no-poach agreements and to influence and inform the federal district judges considering the antitrust significance of no-poach agreements. One of the key steps that the Department has taken in recent years since the tech industries’ no-poach conspiracies is through the amicus program, by which the Department files statements of interest in private antitrust actions in federal courts.⁴⁴ The amicus program is a priority of the new Justice Department Antitrust Division administration as a method of signaling the Department’s enforcement priorities.⁴⁵ One of the key areas of interest for the Department has been cases where competitive conditions in markets for talent, employment, and jobs have been allegedly harmed by conduct that arguably violates federal antitrust laws.⁴⁶ Several cases have involved private actions against parties for allegedly anticompetitive restrictions on employment through use of wage suppression agreements (such as no-hire or no-poach agreements) and job mobility restrictions.⁴⁷

The following sections briefly describe some of the recent Statements of Interest filed in federal district courts by the Antitrust Division in cases involving no-poach agreements and are intended to explicate the Department’s rationale in applying current antitrust law to no-poach agreements.

44. The Department of Justice has authority to submit statements in interest pursuant to 28 U.S.C. §517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. *See, e.g.*, Statement of Interest of the United States at 1, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, Civil No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 8, 2019).

45. *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. 29 (2018) (statement of the Hon. Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice). Some history on the use of amicus curiae filing in private antitrust litigation can be found in Murray, *Justice’s Efforts*, *supra* note 7, at 1-4.

46. *See* No-Poach Press Release, *supra* note 39 (“[T]he Division protects labor markets and employees by actively investigating and challenging unlawful no-poach and wage-fixing agreements between employers. When companies agree not to hire or recruit one another’s employees, they are agreeing not to compete for those employees’ labor. Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment. Under the antitrust laws, the same rules apply when employers compete for talent in labor markets as when they compete to sell goods and services.”).

47. *See, e.g.*, Statement of Interest of the United States of America, *Seaman v. Duke Univ.*, C.A. No. 1:15-cv00462-CCE-JLW (M.D. N.C. Mar. 7, 2019); Corrected Statement of Interest of the United States of America, *Joseph Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244-SAB (E.D. Pa. Mar. 8, 2019); Statement of Interest of the United States, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-00798-JFC (W.D. Pa. Feb. 8, 2019) (No. 158).

1. *In re Railway Industry Employee No-Poach Antitrust Litigation*

In *In re Railway Industry Employee No-Poach Antitrust Litigation*, plaintiffs alleged that there were agreements between two direct competitors, Knorr Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), and their subsidiaries to “refrain from soliciting or hiring each other’s employees without the consent of the current employer,” which were termed “no-poach agreements.”⁴⁸ The Department intervened and filed a Statement of Interest arguing that the rule of per se illegality should be applied by the court because of a horizontal market division arrangement. The Department argued to the District Court that:

Courts have long held that customer- and market-allocation agreements among competitors are *per se* unlawful. No-poach agreements among competing employers are a type of allocation agreement affecting a labor market. As with other allocation agreements, they are *per se* unlawful unless the facts show that they are reasonably necessary to a separate, legitimate business transaction or collaboration among the employers.⁴⁹

The Department’s Statement cited multiple decisions in which courts have denied defendants’ motions to dismiss claims of per se illegal conduct holding that the challenged no-poach agreements would be subject to the per se rule if the evidence demonstrated a “naked” price fixing agreement.⁵⁰ In all those cases, which were ultimately settled prior to trial, the courts held that the per se rule would be applied because the no-poach agreements should be characterized as conduct that was presumptively illegal.⁵¹ Because those cases settled before final adjudication, it is accurate to state that the rule of *per se* illegality has yet to be applied to a no-poach agreement.⁵²

2. *Seaman v. Duke University, et al.*⁵³

Plaintiff-university faculty members in *Seaman v. Duke University, et al.* alleged that the medical school deans of Duke University and the University of North Carolina conspired to suppress the wages of medical school professors by agreeing to a “no-poach agreement” under which

48. Statement of Interest of the United States, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-00798-JFC (W.D. Pa. Feb. 8, 2019) (No. 158).

49. *Id.* at 1-2.

50. *Id.* at 8-9.

51. Boris Bershteyn et al., *DOJ Wades Deeper Into No-Poach Advocacy*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Mar. 19, 2019), <https://www.skadden.com/insights/publications/2019/03/doj-wades-deeper>.

52. *Id.*

53. *Seaman v. Duke Univ.*, C.A. No. 1:15-cv00462-CCE-JLW (M.D. N.C.).

“they would not hire each other’s faculty in a lateral move [unless] there is an upward move, ie [*sic*] a promotion.”⁵⁴

The Department intervened in the private class action suit and filed a Statement of Interest arguing that the per se rule should apply to the alleged no-poach agreement unless Duke proved that it was reasonably necessary to have a separate legitimate collaboration with University of North Carolina Medical School.⁵⁵ In particular, the Department’s statement of interest asserts:

Just as an agreement between competitors to allocate customers eliminates competition for those customers, an agreement between them to allocate employees eliminates competition for those employees. As with other types of allocation agreements, an employee that is a victim of an allocation agreement between employers cannot reap the benefits of competition between those employers that may result in higher wages or better terms of employment. Furthermore, just as allocation agreements in product markets have almost identical anticompetitive effects to price-fixing agreements, no-poach agreement between competing employers have almost identical anticompetitive effects to wage-fixing agreements: they enable the employers to avoid competitive overages and other terms of employment offered to the affected employees.⁵⁶

Therefore, the Department argued that the district court should find the schools’ no-poach arrangements to be illegal per se.⁵⁷ The court agreed and rejected the defendant medical schools’ arguments that the general rule of reason should be the appropriate standard of antitrust review and that their agreement between the schools was ancillary to a valid relationship and therefore not presumptively illegal.⁵⁸ However, the court also rejected the medical schools’ arguments in their motion to dismiss for failure to state a claim, and accepted the Department’s argument that:

Duke also wrongly argues that the rule of reason must apply because the “schools collaborate and support each other” and a no-poach agreement could help prevent “free riding” on their investment in medical faculty. This is exactly the sort of argument the ancillary restraints doctrine is designed to address, but there are two

54. Statement of Interest of the United States of America at 2, *Seaman v. Duke Univ.*, No. 1:15-cv-00462-CCE-JLW (M.D. N.C. Mar. 7, 2019) (No. 325).

55. *See id.* at 4-5.

56. *Id.* at 22 (internal citation omitted). The statement also argued that the defendants do not qualify under the *Parker* “state action” exception and thereby, do not have *ipso facto* immunity as a sovereign representative of the state. *See id.* at 6-13.

57. *Id.* at 23.

58. Order Granting the United States of America’s Unopposed Motion to Intervene, *Seaman v. Duke Univ.*, No. 1:15-cv-00462-CCE-JLW (M.D.N.C. May 22, 2019) (No. 362), <https://www.justice.gov/atr/case-document/file/1165006/download>.

deficiencies in Duke's showing. First, for a restraint to be ancillary, there must be a separate legitimate collaboration that it renders more effective. Duke has not identified any specific collaboration between it and UNCSM to which the no-poach agreement would have been ancillary. Second, to be ancillary, a restraint must be *reasonably necessary* to achieve the benefits of the legitimate collaboration, but Duke cannot show that here while denying the restraint's existence.⁵⁹

The Department also argued that the *per se* rule ought to apply unless Duke met its burden of providing evidence for finding that it had a substantial, justifiable reason for its actions to impose the no-hire agreement and that reason was ancillary to some pro-competitive cooperation.⁶⁰

3. Joseph Stigar v. Dough Dough, Inc.

Joseph Stigar v. Dough Dough, Inc. involved the use of no-poach agreements in a fast food franchise setting where it was alleged that the no-poach provisions were imposed in franchisor-franchisee agreements and they prohibited franchisees from employing an employee of the franchisor or another franchisee⁶¹ The Department intervened and filed a Statement of Interest arguing that the rule of reason, and not the *per se* rule, should apply to the alleged no-poach agreement because franchisor-franchisee agreements are predominantly vertical in nature and the ancillary restraint doctrine and the rule of reason should be applied.⁶² The Department also argued that these agreements do not form a hub and spoke conspiracy and therefore the *per se* rule cannot apply.⁶³ The Department also argued that the court should evaluate the no-poach agreements under the ancillary restraint doctrine but that the court should not apply the *quick-look* form of analysis because the case arose in a franchise setting.⁶⁴

59. Statement of Interest of the United States of America at 28-29, *Seaman v. Duke Univ.*, C.A. No. 1:15-cv-00462-CCE-JLW (M.D. N.C. Mar. 7, 2019) (internal citations omitted).

60. Statement of Interest of the United States of America at 5, 19, 24, *Seaman v. Duke Univ.*, No. 1:15-cv-00462-CCE-JLW (M.D. N.C. Mar. 7, 2019) (No. 325).

61. Corrected Statement of Interest of the United States of America at 3-4, *Joseph Stigar v. Dough Dough Inc.*, No. 2:18-cv-00244 (E.D. Wash.).

62. Corrected Statement of Interest of the United States of America at 11-12, *Joseph Stigar v. Dough Dough Inc., et al.*, No. 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019), <https://www.justice.gov/atr/case-document/file/1141731/download> [hereinafter U.S. Dough Dough Corrected Statement].

63. *See id.* at 16-17.

64. Quick-look analysis under Section 1 of the Sherman Act is an intermediary form of analysis of restraints on competition, usually some type of restraint on price. It is used in situations where the court believes that the price restrictive conduct has some potential ameliorating aspects and, therefore, the rule of *per se* illegality should not be used. However, the court applying this analysis does not evaluate the procompetitive benefits and anticompetitive

The Department argued in the Statement that:

In the franchise context, the typical no-hire or no-solicitation agreement between a franchisor and a franchisee precludes the franchisee from hiring or soliciting other franchisees' employees. Such a typical restriction is a vertical allocation agreement "limiting the number of [employers] competing for ... a given group of [employees]," and its anticompetitive effects... can be adequately policed under the rule of reason.

Even though the typical no-poach agreement between a franchisor and one of its franchisees is vertical, it could be horizontal if it restrains competition between two interrelated entities. Specifically, a franchisor and one of its franchisees may actually or potentially "compete in the market in which the relevant employees are hired." If operating in the same geographic market, they both could look to the same labor pool to hire, for example, janitorial workers, accountants, or human resource professionals. In such circumstances, the franchisor is competing with its franchisee, "notwithstanding that they do not compete in the market in which their goods or services are sold." If a complaint plausibly pleads direct competition between a franchisor and its franchisees to hire employees with similar skills, a no-poach agreement between them is correctly characterized as horizontal, and, if not ancillary to any legitimate procompetitive joint venture, would be per se unlawful.⁶⁵

The Department's use of its Statement of Interest powers in these cases help shape the courts' decisions on important antitrust issues in private party no-poach cases. Without question, the several Statements of Interest in private cases have led to settlements and, more significantly, better antitrust analysis by the federal courts in those cases.⁶⁶ Despite these helpful steps, conceptual and practical ambiguities remain within the Department's recommendations. These ambiguities leave courts uncertain regarding the proper Section 1, Sherman Act analysis in cases involving employment related restraints. The next section of this article takes up the debate.

III. THE EFFICACY OF THE DEPARTMENT'S POSITIONS IN THE

effects to the same extent as performed under the rule of reason. See Edward D. Cavanagh, *What Happened to Quick Look?*, 26 U. MIAMI BUS. L. REV 39, 55-56 (2017).

65. U.S. Dough Dough Corrected Statement, *supra* note 62, at 12-13 (internal citations omitted).

66. See, e.g., *Danielle Seaman v. Duke University and Duke University Health System*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE (Oct. 21, 2019), <https://www.justice.gov/atr/case/danielle-seaman-v-duke-university-et-al> (settling approximately 6 months after the Statement of Interest); U.S. Dough Dough Corrected Statement, *supra* note 62; Statement of Interest of the United States, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-00798-JFC (W.D. Pa. Feb. 8, 2019) (No. 158).

STATEMENTS AND JUDICIAL RECEPTION OF THE GOVERNMENT'S
ARGUMENTS

This section continues the discussion of the Department's arguments and recommendations in its Statements and, more importantly, evaluates the strengths and weaknesses of those positions. It also describes the varying reactions of the courts in which the Statements were filed, although those private civil antitrust cases have either settled or are continuing, as revealed by opinions on motions to dismiss under Rule 12(b)(6) for failure to state a cause of action under the antitrust laws.

A. The Department's Enforcement Policy Articulated in its Statements of Interest

The Department's use of Statements of Interests in several no-poach agreement cases, as discussed in the previous section, as well as public comments by Department leaders reveal that the Department advocates a traditional approach to both the characterization of the no-poach restraints (i.e., either as a "naked" restraint or as vertical restraints that may demonstrate procompetitive attributes) and to the appropriate forms of antitrust analysis (i.e., either the per se rule approach or as one to be analyzed under the comprehensive rule of reason approach).⁶⁷ The Department's position is that a horizontal agreement to fix employee wages or not hire each other employees is a "naked" restraint of trade and lacks redeeming pro-competitive justifications and is therefore per se illegal.⁶⁸ Further, the Department's position is that for all other employment related restraints of trade, the appropriate form of antitrust analysis is the more comprehensive rule of reason analysis.⁶⁹ Thus, the Department has chosen to consider no-poach agreements, in their purpose and effect, to be like other forms of restraints that have been reviewed by the courts—such as customer or market allocations—and not as novel or a new form of commercial conduct that would require a threshold determination under the rule of reason or quick-look analysis

67. See *supra* Section I.B; see, e.g., Finch, *supra* note 41 ("Agreements between employers that eliminate competition for employees in the form of no-poach agreements are per se violations of the Sherman Act."); Antitrust Guidance, *supra* note 31, at 3-4, 8; No-Poach Press Release, *supra* note 39 (describing the Department's prosecution of and intervention in cases of naked no-poach agreements and its argument that such vertical restraints are subject to the per se rule).

68. See, e.g., No-Poach Press Release, *supra* note 39 ("[N]aked no-poach agreements between rival employers within a franchise system are subject to the per se rule.").

69. See, e.g., *id.* (explaining that, unlike horizontal agreements, "[a] restriction in a franchise agreement that forbids franchisees from poaching each other's employees . . . is subject to the rule of reason in the absence of agreement among the franchisees because it is a vertical restraint.").

to determine if it is mainly and usually anticompetitive.⁷⁰ That position by the government seems sensible and appropriate but some of the courts that received Statements did perform a threshold evaluation of no-poach and no-hire agreement to determine what form of analysis should be applied.⁷¹ In particular, the district court in *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, in an opinion on defendant's motion to dismiss, performed a thoughtful characterization process on a hard-core no-poach provision in a collaboration agreement between competitors in the market for travel nurses and associated tech personnel.⁷² The court's approach is instructive for other courts evaluating Section 1 claims in cases involving no-poach, no-hire, non-solicitation and similar agreements or provisions within some other collaborative arrangement.⁷³

However, the Department has indicated that it will advocate for application of the ancillary restraint doctrine in some types of no-poach and related restraint-on-employment cases rather than the more traditional reasonableness or per se illegal forms of analysis.⁷⁴ Further, the Department has repeatedly rejected application of the "quick-look" analysis in all cases involving no-poach agreements.⁷⁵ The next sections will discuss these positions by the Department and how the courts have responded to the Statements.

70. The Department has argued that no-poach and similar employment restraints agreed to be competitor-employers are substantially similar to customer allocation and market division agreements and has stated that the Supreme Court in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) and *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) reiterated that such agreements are illegal per se. See, e.g., Statement of Interest of the United States of America at 20, *Seaman v. Duke Univ.*, Civ. No. 1:15-cv-462 (M.D. N.C. Mar. 7, 2019).

71. See, e.g., *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 2018 WL 3032552 (S.D. Cal. June 19, 2018); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464 (W.D. Pa. 2019).

72. *Aya Healthcare*, 2018 WL 3032552, at *8-14 (S.D. Cal. June 19, 2018). The restrictive provision was imposed by defendant's agreements with subcontractors and software-platform providers in the national market for traveling nurses and medical technicians who travel throughout the country to perform temporary assignments in understaffed hospitals. Plaintiff operates a competitive business and claimed to have a difficult time getting traveling nurses because of the defendant's no-poach provisions in contracts with traveling nurse subcontractors and had entered into no hire agreements with competitors (like the plaintiff) whose businesses were to provide nurse subcontracts. The court described the no-poach provisions to "forbid the rival providers in perpetuity to initiate job offers or otherwise solicit any of [defendant's] designated 'employees,' no matter how or where employed, and even when not currently on assignment for [defendant]." *Id.* at *9.

73. The *Aya Healthcare Services* court's analysis of the employment restrictions in that case are discussed later in the article.

74. See, e.g., No-Poach Press Release, *supra* note 39 ("If there is an alleged agreement among the franchisees, the restraint is subject to the rule of reason so long as it is ancillary; that is, separate from, and reasonably necessary to, the legitimate franchise collaboration.").

75. See, e.g., *id.* ("[T]he 'quick-look' form of rule of reason analysis is inapplicable because the court should weigh the anticompetitive effects against the procompetitive benefits of franchise no-poach agreements that qualify as either vertical or ancillary restraints.").

B. Rejection of “Quick-look” Analysis

The “quick-look” form of Section 1, Sherman Act antitrust analysis has been somewhat controversial in recent years. Indeed, the United States Supreme Court has used it or rejected it in at least three decisions and, therefore, it remains somewhat murky in terms of its appropriate use in restraint of trade cases. Justice Souter rejected the court of appeals’ use of the quick-look approach in *California Dentists*, a case involving the FTC’s challenge to a dentists’ association limits on member price discounting and advertising.⁷⁶ The Court reasoned that the quick-look approach to anticompetitive conduct under Section 1 was not sensitive enough to the justifications for the dentists’ restrictions on members’ advertising.⁷⁷ The majority opinion in *California Dentists* acknowledged that Supreme Court cases “have formed the basis for what has come to be called abbreviated or ‘quick-look’ analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”⁷⁸ The Court also stated that “quicklook analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained.”⁷⁹

Subsequently, the Supreme Court in *Texaco Inc. v. Dagher*,⁸⁰ endorsed the viability of the “quick-look” analysis in Section 1 cases: “To be sure, we have applied the quick-look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability.”⁸¹ Despite the Antitrust Division’s position that it should not be used by courts in no-poach cases, quick-look analysis remains a recognized analytic approach to Section 1 cases involving agreements to restrain trade. There are two reasons that may explain why the government antitrust enforcement agency does not advocate for quick-look analysis in agreements to restrict employee compensation and job mobility. First, it may reflect the notion that the Department does not believe that the approach has “stay power” and will not be more broadly adopted by the courts as a viable analytic approach to these restraints. Second, the Department’s position may be due to its belief that there are aspects to the no-poach agreements that make “quick-look” inappropriate as a matter of antitrust analysis.

76. For a discussion of the application of the quick-look analysis in *California Dentist* case, see Cavanagh, *supra* note 64, at 54. See *Cal. Dental Ass’n v. Fed. Trade Com’n*, 526 U.S. 756, 759-64, 780-81 (1999).

77. See *Cal. Dental*, 526 U.S. at 780-81.

78. *Id.* at 770.

79. *Id.*

80. *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

81. *Id.* at 7, n.3 (citing *Cal. Dental*, 526 U.S. at 770.).

On the first possible reason, it is true that quick-look analysis has received little attention by trial courts and agencies, but several federal circuit courts of appeal have expressly approved the appropriate use of a quick-look approach in Section 1, Sherman cases.⁸² Since *National Society of Professional Engineers*, the Court has indicated that the traditional two-test approach—rule of reason or per se illegal—to restraints of trade may not be flexible and robust enough to permit courts to predictably sift through the matrix of industries, allegedly anticompetitive practices, and competitive implications of the accused practices, and that a broader set of possible analytic approaches is needed.⁸³ The Department’s position on prosecuting no-poach agreements strongly advocates for the use of the per se standard for “naked” restraints on price and the use of the rule of reason standard in all other cases involving no-poach agreements or employment restrictive practices.⁸⁴ Thus, a fundamental issue in recommending, or not, the use of the “quick-look” analysis is whether the restraint in question is a practice so plainly anticompetitive that it is a good candidate for the quick-look approach.⁸⁵ Alternatively, courts can consider whether there are procompetitive attributes of no-poach and related restrictive practices on employees that a full blown rule of reason analysis is needed to ensure that some positive and procompetitive practices are not prematurely struck down by reason of the truncated analysis involved in the quick-look approach.

At this point, it is helpful to canvas the categories of employment related restraints on trade (an antitrust law issue) and restraints on

82. See, e.g., *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 275 (6th Cir. 2014) (“Under the quick-look standard, the Plaintiffs have met their burden of raising a genuine issue of material fact as to whether Dean Foods violated the antitrust laws even without establishing the relevant geographic market.”); *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (“We find it appropriate to adopt such a quick look rule of reason in this case. Under a quick look rule of reason analysis, anticompetitive effect is established, even without a determination of the relevant market.”).

83. *Nat’l Soc. of Prof. Eng’rs v. United States*, 435 U.S. 679 (1978). Indeed, Justice Souter speaking for the Court in the *California Dental Association* case quoted Professor Philip Areeda, the most significant antitrust scholar of modern times, to suggest both that the courts already use a non-binary Section 1 analysis and, even then, it is potentially misleading to suggest that great precision in weeding out clearly illegal restraints from ones that should be permitted. 526 U.S. at 780 (quoting Philip Areeda, ANTITRUST LAW ¶1507, p. 402 (1986): “There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for....”).

84. See, e.g., Antitrust Guidance, *supra* note 31, at 3 (“Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects.”); No-Poach Press Release, *supra* note 39 (opining that, in the franchise context, naked restraints are per se unlawful while vertical restraints are subject to the rule of reason).

85. See *Texaco*, 547 U.S. at 7, n.3.

employment mobility (an employment law issue) and evaluate their potential for anti-competitive effects and any pro-competitive implications in use of those restraints. If there are few pro-competitive, redeeming virtues to these restraints, then the quick-look analysis might, as Justice Souter pointed out, “carr[y] the day,” and the court, applying the rationale of *Indiana Federation of Dentists*, would conclude without extensive evaluation that the restraint should be struck down.⁸⁶

At one end of a spectrum of practices,⁸⁷ that involve restraints on employees, are the limitations on competition after the sale of a business, including a merger or other acquisitive transaction.⁸⁸ These agreements have long been held to be permissible as a matter of state law favoring transactions that permit individuals to sell their businesses and are the result of business equals—a buyer and seller—who agree to the terms of the sale, including consideration for a forbearance by the seller from returning to the market and competing against the buyer.⁸⁹

86. See *Cal. Dental Ass’n*, 526 U.S. at 770-71.

87. A treatise on employment law described this spectrum of employer-employee arrangements that involve limitations on competition by the employee:

“A federal district court, applying California law which broadly proscribes non-compete agreements, identified five different types of contractual provisions that might implicate a violation of the prohibiting restrictive covenants and, potentially, a violation of antitrust law:

- (1) An agreement between an employer and an employee in which the employee agrees not to work for a competitor of the employer for a certain period of time (a classic non-compete agreement).
- (2) An agreement forbidding the solicitation of the employer’s customers by the employee for a certain period of time following termination of employment (a variation of non-compete provision).
- (3) An agreement between a business and its customer that provides services of its employees directly to a customer in which the customer agrees not to hire the business’ employees (a type of “no hire” agreement in which the agreement is between a business and its customer but not the business’ employee).
- (4) An agreement that restricts an employee or former employee from soliciting the employer’s other employees (such as by approaching them for the purpose of encouraging the employees to leave and work for a competitor).
- (5) An agreement between an employee and employer stipulating that the employee will not merely refrain from soliciting the employer’s other employees but will not hire those fellow employees.”

MARK BENNETT, DONALD POLDEN & HOWARD RUBIN, *EMPLOYMENT RELATIONSHIPS: LAW & PRACTICE* §11.03 [D][5], p. 31 (Wolters Kluwer 2019) (quoting from *Thomas Weisel Partners LLC v. BNP Paribas*, 2010 WL 546497 at *4 (N.D. Cal. 2010)).

88. See, e.g., *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144 (3d Cir. 2001) (holding that the district court properly applied rule of reason to no-hire agreement because it was a covenant not to compete and therefore a legitimate ancillary restraint executed upon transfer of owners of a business by merger transaction).

89. See Philip T. von Mehren et al., *The Enforceability of Non-Competition Covenants Incident to the Sale of a Business*, VENABLE LLP (May 30, 2019), <https://www.venable.com/insights/publications/2019/05/the-enforceability-of-non-competition-covenants> (explaining that “in both New York and Delaware, courts distinguish between the law governing covenants not to compete when incident to the sale of a business, and the law governing non-competition agreements arising solely out of employment”); see, e.g., CAL. BUS. & PROF.

An intermediate category of restraints includes employer-imposed non-competition agreements whereby the employee, with consideration, paid for agreement to forego competing against his former employer.⁹⁰ At English common law, which was later borrowed in American common law courts, these restrictions on subsequent employment were considered beneficial if the employee received some compensation and the reach and scope of the restriction on competing against the former employer was reasonable in scope and duration.⁹¹ In the early days of the Sherman Act, the courts attempted to factor in this reasonableness standard into the then new antitrust laws.⁹² Indeed, the reasonableness standard in Section 1, Sherman Act cases had its origin in common law cases' emphasis on enforcement of such agreements as long as they were reasonable in scope (e.g., geographical or customer limitations).⁹³ This intermediate list of restrictions on a former employee's competitive post-termination activities further included non-solicitation agreements (i.e., agreements prohibiting active recruitment of the employer's other employees) and non-disclosure agreements (i.e., agreements prohibiting a former employee from disclosing the employer's information and trade secrets).⁹⁴

At the other end of the spectrum are no-poach and no-hire agreements entered into by competitors in markets for labor. These are the Silicon Valley agreements.⁹⁵ Notwithstanding the Justice Department's failure to bring criminal action against the Silicon Valley companies, the Department's position is that these are "naked" restraints identical to cartel price fixing agreements and they could be prosecuted criminally.⁹⁶

Antitrust analysis of some forms of employment related restraints on employees should proceed under the rule of reason where the types of restraint (for example, covenants not to compete) have been evaluated for reasonableness by state courts for a long time. Further, evaluation of

CODE § 16601 (West 2007) (excepting the sale of a business from California's statute banning non-compete agreements).

90. See Michael J. Garrison & John T. Wendt, *Employee Non-Competes and Consideration: A Proposed Good Faith Standard for the "Afterthought" Agreement*, 64 U. KAN. L. REV. 409, 423-27 (2015) (describing what constitutes sufficient consideration to forgo competition among various states).

91. Melissa Ilyse Rassas, *Explaining the Outlier: Oregon's New Non-Compete Agreement Law & the Broadcasting Industry*, 11 U. PA. J. BUS. L. 447, 448-50 (2009).

92. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1987); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

93. See Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 773 (1955); Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2293-99 (2013).

94. Thomas M. Hogan, *Uncertainty in the Employment Context: Which Types of Restrictive Covenants Are Enforceable*, 80 ST. JOHN'S L. REV. 429, 430 (2006).

95. See Ames, *supra* note 10.

96. See Antitrust Guidance, *supra* note 31, at 4.

these restraints on workers under the rule of reason is analytically sound because there are arguably pro-competitive justifications for their use and the per se and “quick-look” analyses would be too inflexible in considering those benefits and justifications. However, no-poach and no-hire agreements between competitors have few pro-competitive justifications and the per se rule, as argued by the Department, and the “quick-look” analysis would be well suited to address these restraints on worker wages, benefits and mobility.⁹⁷

C. *The Utility of the Ancillary Restraint Doctrine*

The Department’s position on no-poach claims also recommends analysis that utilizes the ancillary restraint doctrine, which essentially justifies a restraint on trade if it is ancillary to a legitimate transaction, even where the restraint is characterized as a per se, or naked, restraint. Relying on Judge Bork’s decision in *Rothery Storage & Van Co., v. Atlas Van Lines, Inc.*,⁹⁸ the Department argued that:

[i]f the facts show that no-poach agreements are reasonably necessary to a separate, legitimate business transaction or collaboration among employers, they are not *per se* unlawful and would instead be judged under the rule of reason. Under the ‘ancillary restraint doctrine,’ an agreement ordinarily condemned as *per se* unlawful is ‘exempt from the *per se* rule’ if it is ancillary to a separate, legitimate venture between the competitors.⁹⁹

The Department Statement continues that “‘[t]o be ancillary,’ an ‘agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction,’ and reasonably necessary to ‘make the main transaction more effective in accomplishing its purpose.’”¹⁰⁰ According to the Antitrust Division, the issue of “ancillarity”—whether or not the restraint occurred as a part of a transaction the primary purpose

97. Some courts addressing the Department’s contentions in Statements of Interest have reached a similar conclusion and stated that, upon completion of discovery, they may decide to declare that the per se or quick-look analysis would be applied to those restraints. *See, e.g., Ry. Indus.*, 395 F. Supp. 3d at 481-82 (“The court’s decision that the agreements alleged by plaintiff are plausibly per se violations of the antitrust law is supported by the case law and the position of the DOJ, which was articulated by the government at the hearing on the motion to dismiss.”); *Conrad v. Jimmy John’s Franchise*, No. 3:18-cv-00133-NJR-RJD, 2019 WL 2754864, at *1-2 (S.D. Ill. May 21, 2019) (explaining that the prior judge disagreed with the DOJ’s Statement of Interest and held that the quick look analysis could be applied to vertical restraints on trade for franchise agreements depending on the facts of the case); *In re Papa John’s Emp. and Franchisee Emp. Antitrust Litig.*, No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *9 (W.D. Ky. Oct. 10, 2019) (declining to announce a quick look or rule of reason analysis without further factual development).

98. 792 F.2d 210, 224 (D.C. Cir. 1986).

99. Statement of Interest of the United States at 10, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, Civ. No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 8, 2019).

100. *Id.*

of which is procompetitive, is fundamental to the ultimate decision to apply the per se or rule of reason, because “there are two ways for a no-poach agreement to be subject to the rule of reason and not the per se rule: verticality and ancillarity.”¹⁰¹

The Department’s position is thus that no-poach provisions or covenants in franchise agreements must be reviewed under a rule of reason analysis where the relationship between the no poach provision and the franchise system is a vertical one and that the no poach restriction is necessary to make the franchise system work more efficiently in making the franchise system work.¹⁰² The verticality issue arises because of the Supreme Court’s recent decisions rejecting the longstanding use of the rule of per se illegality in virtually all vertical relationships and instead requiring a full blown rule of reason analysis.¹⁰³ However, in some franchise relationships, the franchisor functions in a vertical relationship to its franchisees while also competing against them when it operates company owned stores.¹⁰⁴ When this occurs, the restraint is horizontal and agreements between competitors (here, franchisor and franchisees or between franchisees) are therefore presumptively illegal.¹⁰⁵ Further, in other situations the no-poach restraint may be imposed vertically, such as by a franchisor who does not maintain company offices and therefore does not compete with its franchisees in either the market for the franchise branded product or in the market for the employees who produce the branded product. In that situation, the no-poach restriction is imposed vertically by the franchisor but is implemented for the benefit of the franchisees who are in a horizontal relationship with each other in the market for the franchise branded product. In these situations, either the restraint on trade is imposed by a horizontal agreement or the intended impact of the restraint on trade is felt on a horizontal level.

The difficulty with the Department’s analysis is the horizontal implications of these no-poach agreements. Are there clear pro-

101. Murray, *Justice’s Efforts*, *supra* note 7, at 13.

102. *Id.*

103. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018); *State Oil Co. v. Khan*, 522 U.S. 2, 22 (1997).

104. See Murray, *Justice’s Efforts*, *supra* note 7, at 12; Randy M. Stutz, Assoc. Gen. Counsel of the Am. Antitrust Inst., *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. 18 (July 31, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0-1.pdf [hereinafter Stutz, *Evolving Antitrust*]; see, e.g., *Blanton v. Domino’s Pizza Franchising LLC*, No. 2:18-cv-13207-VAR-DRG, 2019 WL 2247731, at *5 (E.D. Mich. May 24, 2019) (alleging that the defendants “orchestrated an agreement not to compete for labor among their franchisees”).

105. See, e.g., *Domino’s*, 2019 WL 2247731, at *4-5 (finding that the plaintiff plausibly pled an alleged anticompetitive agreement in the franchise context was sufficiently unreasonable under the per se rule and the quick-look analysis).

competitive benefits from these horizontal restrictions on workers' mobility, and with it the suppression of workers' wages, or are these restraints largely devoid of competition-enhancing attributes? The Court's rejection of bright line rules in some vertical restraint cases has made it clear that an overriding reason for the application of the rule of reason is that the vertically-related parties have aligned interests in maximizing sales through cooperation and, to some degree, a subordination of their respective self-interests in order to achieve sales.¹⁰⁶ However, in those cases the restraints occur in a single market, the intra-brand market, and not in two markets.¹⁰⁷ In the context of franchise relationships, the franchisees and franchisor have a common interest in the franchise product (e.g., hamburgers for fast food franchises) but that product is not fungible or interchangeable with the employees who make the burgers; the markets for hamburgers and employees are distinct.¹⁰⁸ A Department official stated that "[f]ranchisors and franchisees, of course, are primarily in a vertical relationship in their industry and generally not competitors with respect to the labor market."¹⁰⁹ However, the official stated that he is aware:

[T]hat companies can be competitors in the labor market but not competitors in product or service markets. Companies in different industries can compete in the same market for employees. But if they are not competitors in the labor market but instead are, for example, vertically related in their industry, then any agreement among them is subject to the rule of reason.¹¹⁰

A related concern is the Antitrust Division's position on the ancillary restraint doctrine's applicability to franchise system restrictions on workers of franchisor and franchisees. The Division has recommended that the doctrine be applied and the no-poach restraint analyzed under the rule of reason when it is collateral to the franchise arrangement and that it is necessary to make the franchise system work efficiently.¹¹¹ The clear purpose and effect of both no-hire and no-poach agreements—whether in the franchise context or in the independent or unrelated competitor context—is to restrict employee mobility and compensation for purposes of reducing the employers' costs by paying the employees less. While partial integration, such as by joint venture or creating a franchise

106. See, e.g., *Leegin*, 551 U.S. at 877 (holding that "vertical price restraints are to be judged by the rule of reason.").

107. See *id.* at 902-04; see also Murray, *Justice's Efforts*, *supra* note 7, at 11, 13.

108. See, e.g., *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *7-8 (N.D. Ill. June 25, 2018) (examining the relationship between noncompete agreement and pro-competitive benefits in the franchise context).

109. Murray, *Justice's Efforts*, note 7, at 12.

110. *Id.* at 11.

111. *Id.* at 12.

system, may result in cost-reduction opportunities for the firm, the reduction in employee costs by franchisor-franchisee no-poach agreements presents no benefits for the employees.

It might be helpful to look at the justifications for no-poach (and similar) restrictions on employee mobility and wages and balance them against the obvious anticompetitive implications of these restrictions. No-poach agreements are an extreme form of non-compete provision in that they both constrain or outright limit employee mobility during employment with the employer or, more often, after the employee or employer terminate the employment. It has been argued, and accepted by some courts and legislatures, that reasonable restrictions on worker mobility are necessary to protect the employer's trade secrets, confidential commercial information that the employee gained during employment, and to protect the employer's investment in the employee such as, by training.¹¹² However, the most significant difference between a non-compete provision and no-poach and no-hire agreements is that the employee does not agree to the employer's restriction on the employee's mobility and wages; it is imposed by employers' agreement. In most non-compete agreements between employers and employees, the employee must receive sufficient consideration for the agreement to be valid under state contract laws; no-poach and no-hire agreements most often involve no compensation for the employee.¹¹³ Employers have several methods for restricting employees from wrongfully taking and using the employers' trade secrets with subsequent employers, including the Uniform Trades Secrets Act, which has been adopted by nearly every state, and the federal Defend Trade Secrets Act. There are also contractual methods by which employers can secure their confidential commercial information and be reimbursed for the training and other investments they have taken in their employees that are short of outright restraints on worker mobility.¹¹⁴ With the availability of these much less restrictive measures to protect employers' legitimate interests, antitrust challenges to employer imposed non-compete arrangements may be successful.

The Department's arguments that no-poach provisions in franchise agreements should be considered vertical restraints and analyzed under the rule of reason are similarly weakened by the absence of any

112. See Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts* 5 (Sept. 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453433 [hereinafter Posner, *Antitrust Challenge*].

113. See Garrison & Wendt, *supra* note 90, at 424; Steven Massoni, *Limits of Noncompete, No-Poaching, and No-Hire Agreements*, HR DAILY ADVISOR (Nov. 29, 2018), <https://hrdailyadvisor.blr.com/2018/11/29/limits-of-noncompete-no-poaching-and-no-hire-agreements%E2%80%A2>

114. See Garrison & Wendt, *supra* note 90, at 422-23 (describing interests of employers and society in using non-compete agreements to protect trade secrets).

appreciable competitive benefits from the no-poach agreements between franchisees and the franchisor (when it also maintains stores that compete for workers with its own franchisees). There may be credible arguments as to why vertically imposed price and non-price restraints have procompetitive benefits, but it is not possible to identify them in vertically imposed restrictions on worker mobility.¹¹⁵ The franchisor, in those situations, is attempting to enhance its competitiveness on price in the inter-brand market for its product (e.g., hamburgers) by constraining inter-brand competition in a distinctly different market (e.g., workers who can make burgers) and thereby enables franchisees to eliminate competition in the market for workers. The Court in *Leegin Creative Leather Products v. PSKS, Inc.* considered a similar situation in the context of a minimum resale price maintenance scheme and, in a confusing juxtaposition, said that the cartel arrangements between either a manufacturers' group or a group of competing retailers are per se illegal but "[t]o the extent a vertical agreement setting minimum resale prices is entered up to facilitate either type of cartel, it, too would need to be held unlawful under the rule of reason."¹¹⁶ It is surprising that the Court would relegate these forms of cartel agreements, irrespective of the source of "facilitation," to the rule of reason analysis when the rule of per se illegality has been the longstanding analytic approach to agreements among competitors to restrain price competition.¹¹⁷ This may very well be a highly appropriate situation for the "quick-look" rule of reason approach to determine if there are facially valid competitive benefits to a franchisor's efforts to eliminate worker wage competition at the franchisee level.

A franchisor who uses no poach or no hire provisions in the franchise arrangement precludes worker wage competition in a horizontal context (i.e., where the franchisor also competes intra-brand at the franchisee level) or in a vertical context (i.e., where the franchisor agrees with franchisees to eliminate wage price competition at the franchisee

115. Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. 65, 71 (2019), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4919&context=lcp> ("There is, in any event, no credible argument for extending [Court's decisions in *GTE Sylvania*, *Khan* and *Leegin*] to labor-facing restraints imposed by franchisors upon franchisees. Franchisors do not hire out workers to franchisees. No propriety technology licensed by franchisors to franchisees is implicated in those relationships. Yet the Department of Justice chose to file a brief in these pending cases effectively supporting franchisors' position and suggesting that no-poach agreements limiting mobility among some of the lowest-wage, more vulnerable workers have legally cognizable benefits.").

116. 551 U.S. at 893.

117. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646-47 (1980); *Nat. 'l Soc. Prof. Eng'rs*, 435 U.S. at 692 (agreements that are "plainly anticompetitive" and lack any redeeming competitive virtue are conclusively presumed illegal without further examination).

level).¹¹⁸ It is difficult to imagine justifications or evidence of pro-competitive benefits from those restrictive policies in either the horizontal or the vertical context.¹¹⁹ But relegating them to a rule of reason analysis merely because the franchisor is in a vertical relationship to the impact of the wage fixing ignores the fact that the arrangements are plainly anticompetitive in most settings. The next section of this article describes how receptive courts have been to the Department's arguments concerning characterization and treatment of restrictions on worker wages and mobility.

D. The Courts' Evaluation of the Government's Position on No-Poach Agreement Litigation

Since the joint DOJ/FTC Guidance for Human Resources Professionals and, prior to that, the settlements in the Silicon Valley no-poach cases, there have been several cases brought for imposition of no-poach or no-hire agreements. In the main, these are class action lawsuits brought against employers for their use of no-poach, non-solicitation, and no-hire restraints. The cases have spanned several industries (fast food franchises¹²⁰, railroad equipment¹²¹, tenure-track faculty positions at two prestigious universities' medical schools¹²²) and several of these cases have involved the Department's use of their Statements of Interest to influence the judge on its resolution of key antitrust analysis.¹²³ An important policy question asks how has the Department fared in advocating for greater antitrust scrutiny of employment related practices and what does the judicial treatment of the Department's arguments suggest about future judicial treatment of these restriction on worker compensation and mobility.

The courts considering these antitrust issues have typically deferred to many of the Department's views on these difficult antitrust matters. Such deference is appropriate because the Antitrust Division has some of the nation's best antitrust lawyers. However, the courts have, in some instances, declined to follow all of the key arguments and recommendations that the government has advocated in its Statements and, instead,

118. See, e.g., *McDonald's*, 2018 WL 3105955; *Domino's*, 2019 WL 2247731; *Jimmy John's*, 2019 WL 2754864; *Papa John's*, 2019 WL 5386484.

119. See, e.g., *McDonald's*, 2018 WL 3105955, at *8 (rejecting the defendants' argument that no-hire agreements among franchises promote inter- or intra-brand competition).

120. See, e.g., *id.*; *Domino's*, 2019 WL 2247731; *Jimmy John's*, 2019 WL 2754864; *Papa John's*, 2019 WL 5386484.

121. See *Ry. Indus.*, 395 F. Supp. 3d at 464.

122. See *Seaman*, 2018 WL 671239.

123. See, e.g., *Ry. Indus.*, 395 F. Supp. 3d at 485; *Jimmy John's*, 2019 WL 2754864, at *2-3; *Papa John's*, 2019 WL 5386484, at *5.

have referred to case law precedents in their circuit.¹²⁴ This section briefly describes some of these recent holdings. In nearly all of these reported decisions, it is important to note that most have been issued on motions to dismiss under FRCP 12(b)(6) and do not involve decisions on the merits.¹²⁵

First, some of the federal district courts considering the legality of no-poach agreements have rejected the recommendations in the Statements because the Department is considered merely persuasive authority on the subject of antitrust law. For example, in *Conrad v. Jimmy John's Franchise, LLC*, the district court, in considering whether no hire restrictions are ancillary restraints and therefore subject to the rule of reason, stated “[b]ut the Department is not the ultimate authority on the subject, especially in a situation like this one: after the Department submitted its Statement of Interest, the American Antitrust Institute—another titan in the antitrust arena—penned a letter in staunch opposition to the DOJ.”¹²⁶ Other courts have rejected the Department recommendation that no-poach cases should not be evaluated under the “quick-look” approach. For example, in *Deslandes v. McDonald's USA, LLC*, the court, considering a motion to dismiss, rejected the defendant’s argument that the quick-look analysis was inappropriate for use in cases involving no-poach agreements because many such agreements must be analyzed under the rule of reason.¹²⁷ The court stated:

[e]ven a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other’s employee, wages for employees will stagnate. Plaintiff herself experienced the stagnation of her wages. A supervisor for a competing McDonald’s restaurant told plaintiff she would like to hire plaintiff for a position that would be similar to plaintiff’s position but would pay \$1.75-2.75 more per hour than she was earning. Unfortunately for plaintiff, the no-hire agreement prevented the [competing McDonald’s restaurant] from offering plaintiff the job. When plaintiff asked her current employer to release her, plaintiff was told she

124. See Leah Nylén & Joshua Sisco, *DOJ Weighs in on More Antitrust Cases with Mixed Success*, MLEX MARKET INSIGHT (Oct. 1, 2019), <https://mlexmarketinsight.com/insights-center/editors-/antitrust/north-america/doj-weighs-in-on-more-antitrust-cases-with-mixed-success>; see, e.g., *Jimmy John's*, 2019 WL 2754864, at *2-3 (comparing the DOJ’s and American Antitrust Institute’s positions on horizontal restraints in the franchise context); *Papa John's*, 2019 WL 5386484, at *5 (taking judicial notice of the DOJ’s Statement of Interest but explaining that the court “will not . . . abdicate its duty to apply the law to the facts of this case by blindly deferring to the DOJ’s analysis of distinct factual scenarios.”).

125. See, e.g., *McDonald's*, 2018 WL 3105955, at *3-4; *Domino's*, 2019 WL 2247731, at *2; *Papa John's*, 2019 WL 5386484, at *2; *Ry. Indus.*, 395 F. Supp. 3d at 477-78; *Seaman*, 2018 WL 671239.

126. 2019 WL 2754864 (refusing to grant franchisor’s motion to dismiss).

127. *McDonald's*, 2018 WL 3105955, at *7.

was too valuable. The Court agrees that an employee working for a below-market wage would be extremely valuable to her employer.¹²⁸

The courts considering no-poach agreements in franchise arrangements have not unanimously embraced the ancillary restraint doctrine as recommended by the Department. Some courts have reasoned that once discovery has been completed and the case is ready for trial, that would be the more appropriate time to evaluate the viability and applicability of an ancillary restraint allegation.¹²⁹ Yet, in other cases, like *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, the court, at the stage of considering motions to dismiss, stated that the plaintiffs had alleged a horizontal market allocation agreement and, therefore, without any evidence of a reasonable and ancillary purpose for the subcontractors agreements, the no poach agreements would be evaluated under the per se rule.¹³⁰

The lower court decisions have taken varying positions on the role of market power and market definition in these Section 1 cases. As a general proposition, in a rule of reason case under Section 1 of the Sherman Act, the plaintiff has the burden of showing anticompetitive conduct in a properly defined market or, rather than engaging in economic line-drawing in an effort to define the market, plaintiffs can show that the restraint had actual harm to competition, such as reduced output or higher prices.

In evaluating the competitive impact of no-poach agreements, recent decisions of lower courts have considered the area of the market harmed by no poach agreements. While some courts have looked to the product or brand sold by market participants, most courts have acknowledged that those cases involve competitive effects on the labor market.¹³¹ But some courts have expressed concern about evidence of limitations on intra-brand competition between franchisees of the same product or services brand.¹³² This is an important distinction: the courts that have

128. *Id.*

129. *See, e.g., id.* at *8 (“Though this Court has concluded that plaintiff has stated a claim for a restraint that might be unlawful under the quick-look analysis, the evidence at a later stage may not support it.”); *Jimmy John’s*, 2019 WL 2754864, at *3 (denying Jimmy John’s motion to dismiss a case alleging horizontal restraints of trade in the franchise context where “the method of antitrust analysis that should apply . . . will ultimately come down to the facts behind these no-poach agreements, the relative independence of Jimmy John’s franchisees, and more.”).

130. *Aya Healthcare*, 2018 WL 3032552, at *12. *See also* *United States v. eBay*, 968 F. Supp. 2d 1030, 1038 (N.D. Cal. 2013).

131. *See e.g., Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) (“Although the franchisees are dealing in the same brand, they are still competitors, and anyone with a rudimentary understanding of economics would understand that the no-hire agreements have an anticompetitive effect on the labor market targeted by those firms.”).

132. *See Ogden v. Little Caesar Enterprises, Inc.*, 393 F.Supp.3d 622, 637 (E.D. Mich. 2019) (citing *Williams v. Nevada*, 794 F. Supp. 1026, 1033 (D. Nev. 1992), *aff’d sub. nom.*

concluded that the antitrust focus should be on the competition for employees, rather than competition between products, arrived at the proper legal conclusion.¹³³

The Department's Statements of Interest have had a positive impact on judicial decision-making in this relatively new and clearly evolving area of law. In particular, the Statements have assisted courts in gaining a clear focus on the key issues of characterizing no-poach and similar restraints on competition in the market for workers, on the applicability of the ancillary restraint doctrine in cases involving franchisor-imposed restraints on worker mobility, and on the utility of the "quick-look" analysis to these restrictive practices. They have provided useful insights into technical areas of antitrust analysis and policy involving buyers' markets. However, these Statements have not yet fully defined the broader context of when restrictive practices are permissible in the area of worker mobility and wage suppression. No-poach and no-hire agreements are two forms of restraints on competition in labor markets, along with covenants not to compete and non-solicitation agreements; and they share the common element that they restrict worker mobility but are sometimes accompanied by beneficial attributes. The next section puts those clearly restrictive practices, which are subject to the reach of the antitrust laws, into the broader context of all forms of restraints on workers and on competition for labor.

IV. ANTITRUST CONSIDERATIONS IN LABOR MARKET RESTRICTIONS

The government's heightened interest in enforcement of the antitrust laws in markets for labor is a positive development for antitrust enforcement and the promotion of antitrust norms in the market for labor and workers, which has been neglected by antitrust.¹³⁴ It is also a positive development for protections of worker mobility, wage growth, and employees' career growth. It is estimated that approximately 18% of

William v. I.B. Fischer Nevada 999 F.2d 44 (9th Cir. 1993) ("Under the rule of reason, an inquiry must be made as to whether the purpose and effect of the hiring agreement were anti-competitive. The purpose the agreement is to prevent the franchises from hiring away each other's management employees. This agreement does not bar competitors of [other brand fast food restaurants] from hiring away these managerial employees. It only prohibits movement between the various franchises and since they are not competitive with each other, the agreement cannot be anti-competitive.").

133. See, e.g., *McDonald's*, 2018 WL 3105955, at *8 ("This case, though, 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 the McOpCos within a locale are direct, horizontal, competitors.").

134. See generally Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018) [hereinafter *Antitrust Remedies*]; Marinescu & Posner, *supra* note 34; Paul, *supra* note 115, at 65; Stutz, *Evolving Antitrust*, *supra* note 104.

employees in the U.S. workforce are currently subject to restraints on their mobility, wages and job growth prospects.¹³⁵ Although antitrust law and policy have frequently been implicated in cases involving restraints on employees or on employment,¹³⁶ this has not been an easy fit from an antitrust perspective. There are several reasons for this uneasy fit: First, markets for labor are commonly thought of as monopsony markets because the buyer—employer—has considerably greater power than the sellers—workers.¹³⁷ Antitrust has considerable experience with monopoly markets and the problems of monopoly—e.g., restricted output, higher prices charged to consumers, economic inefficiency, and social loss—but less experience in monopsony markets.¹³⁸ However, it has become increasingly evident that vigorous antitrust enforcement in monopsony labor markets is necessary to address the problems of suppressed job opportunities, suppressed worker salaries, and collateral market effects of widespread use of restraints on labor.¹³⁹

Second, in recent years there has been much greater interest in the true economic and social effects of the many forms of constraints on worker mobility and salary opportunities. The focus on the monopsony effects in markets for labor is a much more recently studied aspect of labor economics and antitrust policy. The conclusions are that the high percentage of U.S. workers who are subject to agreements and covenants restricting their employment opportunities are contributing to slow wage growth and rising inequality.¹⁴⁰ For example, recent studies have

135. See *Labor Market Monopsony: Trends, Consequences and Policy Responses*, COUNCIL OF ECON. ADVISERS ISSUE BRIEF 8 (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf [hereinafter White House Council]; Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force*, U. MICH. L. & ECON. RES. 2-3, 12 (2019) (finding that 18.1% of current workers work under a non-compete restraint and that 38.1% of workers has worked under a non-compete provision at some time in their work history.).

136. See Murray, *Justice's Efforts*, *supra* note 7, at 6-9.

137. White House Council, *supra* note 135, at 2-5.

138. See Suresh Naidu & Eric Posner, *Labor Monopsony and the Limits of the Law* 2-4 (Jan. 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3365374 [hereinafter Labor Monopsony] (Monopsony in labor markets is caused by the high concentration in those markets, the high costs of employees switching careers or jobs, and job differentiation, meaning that “employers with monopsony power, whatever its source, can suppress wages (and degrade working conditions) in order to save labor costs.”); Marinescu & Posner, *supra* note 34, at 6.

139. Antitrust Remedies, *supra* note 134, at 596 (“If a labor market monopsonist uses noncompetes, it can deter other firms from entering the labor market and offering superior wages and working conditions to workers... This calls for antitrust analysis rather than common law analysis.”).

140. See Labor Monopsony, *supra* note 138, at 2-3.

demonstrated that worker wages are 4%-5% higher in states that do not recognize or enforce worker non-compete restraints.¹⁴¹

Most states permit employers to impose non-compete agreements that are intended to constrain job opportunities for employees but, as the courts in states that enforce such restrictions have found, the employer receives more substantial benefits from the imposition of the restraints compared to the employees.¹⁴² However, in recent years, two significant things have changed: First, state legislatures have begun to more carefully examine those restraints and are putting more stringent limits on the scope and enforceability of these covenants.¹⁴³ For example, recent legislation in some states have prohibited the use of non-compete agreements to minimum wage employees who have limited job opportunities and changing jobs is often the only way to improve those workers' wages and salary.¹⁴⁴ Second, the DOJ/FTC Antitrust Guidance states that anti-competitive behavior can be inferred from the circumstances even without an explicit agreement among conspirators.¹⁴⁵ An industry practice of imposing restrictive post-employment covenants and provisions may be evidence of an anticompetitive purpose or used to demonstrate an anticompetitive effect in antitrust litigation concerning restraints of trade or monopolization in employment markets.¹⁴⁶ Robust competition in markets for labor, the very thing that many no-poach and non-compete agreements are intended to constrain, increases the likelihood that worker wages do not stagnate and that there are real opportunities for workers to improve their living conditions and work opportunities.¹⁴⁷

141. Evan Starr, *Consider This: Training, Wages and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LAB. REV. 783, 799 (2019); Natarajan Balasubramanian, et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* 4 (U.S. Census Bureau Ctr. of Econ. Studies, Paper No. CES-WP-17-09, 2018).

142. See Posner, *Antitrust Challenge*, *supra* note 112, at 10-19 (evaluating arguments favoring enforcement of covenants restricting competition and those that are costs to employees, other employers and other third parties incurred due to use of such restrictive practice). The author concludes that "the new evidence, along with the new research about labor market concentration, the evidence of wage stagnation, and the legacy of failed antitrust enforcement—all of this suggests that the courts have failed to give noncompetes sufficient scrutiny." *Id.* at 27.

143. Posner, *Antitrust Challenge*, *supra* note 112, at 2.

144. See *id.* at 8-9.

145. Antitrust Guidance, *supra* note 31, at 4-5.

146. Jeffrey S. Boxer & Alexander G. Malyshev, *The Dangers of Using Illegitimate Means to Protect a Legitimate Interest: When Restrictive Covenants and Antitrust Laws Collide*, CARTER LEDYARD & MILBURN LLP (May 2, 2019), <https://www.clm.com/publication.cfm?ID=5653>.

147. See Posner, *Antitrust Challenge*, *supra* note 112, at 20-21; see also Naidu, Posner & Weyl, *supra* note 134, at 560-69; Jose Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration* (Dec. 10, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3088767.

Third, yet another explanation for lagging antitrust and other economic protections for workers is that unions, which were aggressive in affording protections to workers' salaries and job opportunities, have been declining greatly in the last few decades.¹⁴⁸ The unions were considered to be an important answer to systematic protection of worker interests in dealings with employers on wages, benefits and workplace conditions.¹⁴⁹ Today, a great deal of the U.S. workforce is not represented by collective bargaining groups or agreements and some pro-labor groups are advocating for greater antitrust protections, including enforcement by the government, for workers.¹⁵⁰

Fourth, misguided interpretations of the "consumer welfare" standard in antitrust law and policy have dissuaded more rigorous enforcement of antitrust laws in labor markets. Basically, this standard provides a goal for antitrust law under the Sherman Act and it is one that protects the beneficial effects of competition which are enjoyed by ultimate consumers, intermediate purchasers and suppliers, and others.¹⁵¹ The argument that national competition policy represented by the antitrust laws is advanced by powerful buyers (i.e., employers) suppressing the cost of labor in order to lower prices to consumers is bereft of intellectual coherence and fidelity to the true goals of U.S. antitrust law because monopsony power in labor markets is often the result of high concentration in those markets and this increases the opportunities for uncompetitive practices.¹⁵²

Finally, the fit between current antitrust law and labor policy favoring worker mobility and wage competitiveness is also complicated because of antitrust analytic requirements which present problems in litigating such cases. For example, one major problem in Section 1, Sherman Act labor market cases is defining relevant markets and measuring the effects of restraints on workers as may be required in a rule of reason analysis. There are several reasons for this challenge. Geographic markets for workers tend to be highly local as most workers cannot

148. See Antitrust Remedies, *supra* note 134, at 542-43.

149. See Antitrust Remedies, *supra* note 134, at 542 ("Labor law protected workers who sought to form unions to combat the market power of employers. The theory was that if workers banded together, they could use legally mandated collective bargaining and the threat of strikes to prevent employers from paying them monopsony wages.").

150. See Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, THE HAMILTON PROJECT 6-7, 12-13 (Feb. 2018), https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf.

151. Stutz, *Evolving Antitrust*, *supra* note 104, at 4-5. See also Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2254-56 (2013); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 197-201 (2008).

152. See Stutz, *Evolving Antitrust*, *supra* note 104, at 4-5.

realistically move freely to follow jobs, especially with low wage jobs such as fast food preparation and service. Because many types of employment are catalogued by complex job descriptions and classifications, determining which workers are in the relevant market and which are not is difficult especially in cases brought as class actions.¹⁵³ An added complexity is the recent decision in *Ohio v. American Express Co.* in which the Court held that plaintiffs who allege restraint in a vertical agreement must define the relevant market in which competition is allegedly restrained as an element of their case.¹⁵⁴ While the reach and exact meaning of the Court's language in that footnote is not clear, it does seem likely that plaintiffs (including the government) in no-poach (and similar worker restraint conspiracy) cases may be required to more clearly delineate the market(s) where the restraints harmed competition for workers. This will present a complication for efforts to prosecute restraints on worker markets.

It is equally important to note, as discussed in earlier parts of this article, that antitrust law has been successfully applied to a variety of restraints in markets for labor. So, notwithstanding the foregoing complexities and difficulties, the antitrust laws remain an important instrument in government and private party efforts to foster competition for workers and their wages and job mobility in those markets.

V. CONCLUSION

Strong antitrust enforcement in labor markets fosters the growth of competition for workers and thus increases workers' access to new jobs, higher paying jobs, and more career opportunities. The Silicon Valley no-poach cases were a major catalyst to the Justice Department's current emphasis on promoting antitrust enforcement and protections in labor markets by putting a spotlight on patently anticompetitive conduct by major tech company CEOs. In response, the nation has seen a major commitment by the Justice Department Antitrust Division's to more vigorously enforce the Sherman Act in labor markets. The enforcement to date has been insufficient, however. "Fit" problems remain due to the sparse record of antitrust enforcement in labor-facing and monopsony markets. In addition, the government's enforcement initiatives face

153. For example, in *Ry. Indus.*, 395 F. Supp. 3d at 474-75, the court correctly concluded that the no-poach agreement restraints occurred in the market for lateral hires (experienced and trained employees) and described how recruiting, training and retaining such employees would normally result in higher wages as the group of employers competed for the pool of employees services. The court also noted that this competition had the effect of raising wages in collateral or related categories of workers and therefore wages increased across many categories of workers in those competing firms. The companies' responses include no poach agreements.

154. 138 S. Ct. at 2285 n.7.

challenges because of certain analytic requirements of the rule of reason analysis and because of some uncertainty about the applicability of the ancillary restraint doctrine to cases of restraints on worker competition. Courts should steer away from application of the rule of reason in cases involving no-poach and similar highly restrictive covenants or agreements because such analysis produces greater uncertainty for resulting litigation.¹⁵⁵ In contrast, the clarity enabled by judicial application of the per se and quick-look forms of analysis in Section 1, Sherman Act cases can prevent the most egregious forms of cartel wage suppression such as no-poach and no-hire agreements by providing clear guidance to corporations.

The stakes are high in employment and labor markets and the Justice Department rightly focuses its attention on ensuring that those markets are competitive, worker wages do not stagnate, and employers act fairly within the rules of competition law. While federal antitrust enforcement agencies and courts must refine antitrust analysis to meaningfully regulate anticompetitive conduct in labor markets, states also have a role to play. States must re-examine and improve their laws and policies concerning other forms of restrictive practices such as covenants not to compete and non-solicitation agreements. If the states and antitrust enforcement agencies cannot effectively police employer policies to restrict competition by and between employees, then Congress must enact national legislation to protect workers by ensuring fair competition in labor markets.

155. The Court's recent decision in *Ohio v. Am. Express Co.*, 138 S. Ct at 2284-2286 n.7, suggests that trying a case involving a restraint on worker wages or mobility that is classified as a rule of reason case will become more difficult to plead and prove. Rule of reason cases are difficult to succeed in because of the uncertainty of pleading and proof requirements as well as the considerable expense of trying a case involving proof of defendants' market power. Professor Michael Carrier examined outcomes in rule of reason cases and concluded that defendants won 221 out of 222 rule of reason cases that reached final judgment from 1999-2009. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829-30 (2009). This seeming propensity for the government and some courts to avoid the "quick-look" and per se illegal analysis to no-poach, no-hire and similar restrictive practices in labor markets portends inadequate enforcement of the antitrust laws to those types of restrictive conduct.