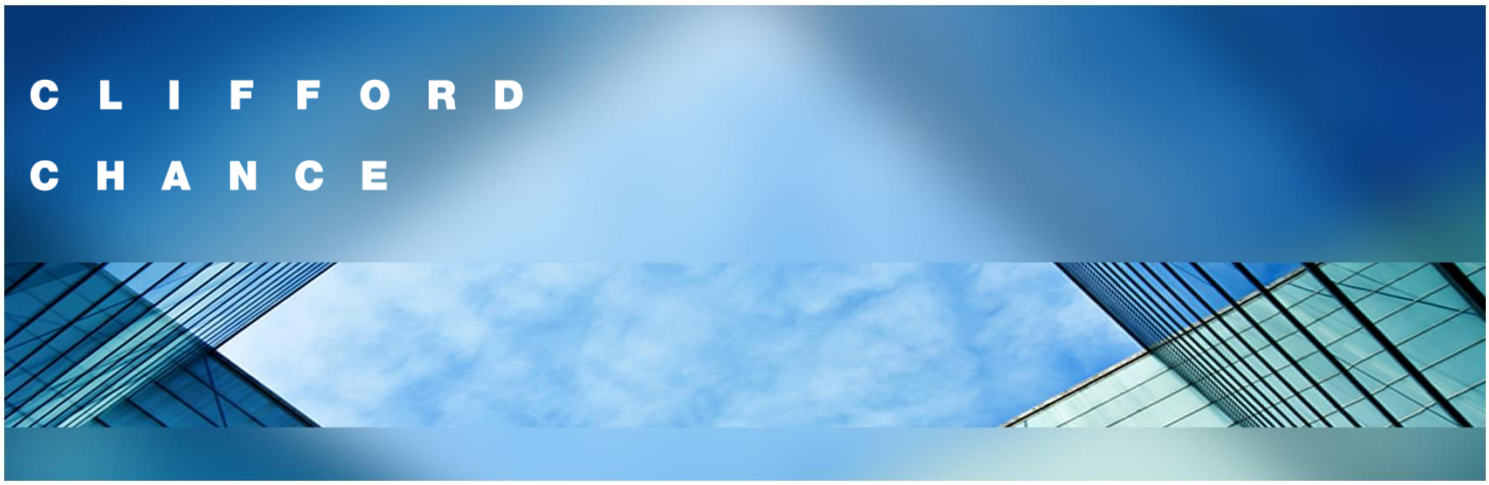

NO-POACH, *PER SE*: DOJ ANTITRUST DIVISION WEIGHS IN TO REITERATE ANTITRUST REVIEW STANDARD TO BE APPLIED TO EMPLOYMENT AGREEMENTS

The Antitrust Division of the U.S. Department of Justice ("DOJ") recently submitted Statements of Interest in several no-poach class actions, in which the plaintiffs alleged that the defendants' agreements not to hire each other's employees violated Section 1 of the Sherman Act.[1] In its Statements of Interests, the DOJ argued that no-poach agreements between horizontal competitors are *per se* Section 1 violations, unless the agreement is ancillary to a legitimate business purpose. The DOJ took the position that, when tied to a franchise agreement, no-poach agreements should be analyzed under the rule of reason. The Statements of Interest and the DOJ's participation in these matters, which come on the heels of the DOJ's investigations into several companies' no-poach practices and the publication of the DOJ and Federal Trade Commission's Antitrust Guidelines for Human Resource Professionals,[2] highlight the importance the DOJ is currently placing on the application of the antitrust laws to the labor market.

The Cases

Railway Employees

The first case, *In re: Railway Industry Employee No-Poach Antitrust Litigation* ("*Railway Employees*") in the Western District of Pennsylvania, is a class action

---

1 Statement of Interest of the United States of America, *In re: Railway Industry Employee No-Poach Antitrust Litigation*, Case No. 18-cv-00798, Doc. 158 (February 8, 2019) (hereinafter "Railway Statement"); Statement of Interest of the United States of America, *Stigar v. Dough Dough, Inc. et al.*, Case No. 18-cv-00244, Doc. 30 (Mar. 7, 2019) (hereinafter "Stigar Statement"); Statement of Interest of the United States of America, *Seaman v. Duke University, et al.*, Case No. 15-cv-00462, Doc. 325 (Mar. 7, 2019) (hereinafter "Duke Statement").

2 *See* U.S. Dept. Justice and Fed. Trade Comm'n, *Antitrust Guidelines for Human Resource Professionals* 1 (Oct. 2016), *available at* https://www.justice.gov/atr/file/903511/download (reiterating that the antitrust laws apply to competition among firms to hire employees and noting that "an agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities").

involving allegations that defendants Knorr-Bremse AG, Westinghouse Air Brake Technologies Corporation, Faiveley Transport S.A. and their subsidiaries entered into agreements to "refrain from soliciting or hiring each other's employees without the consent of the current employer." The class actions followed the DOJ's civil settlements with the defendants, which were announced in April 2018.[3]

In its February 8, 2019 Statement of Interest in the class case, the DOJ took the position that no-poach agreements are horizontal market allocation agreements subject to a *per se* analysis.[4] The DOJ further argued that "defendants are wrong to assert that application of the *per se* rule to no-poach agreements would create a new *per se* category," because no-poach agreements among competitors are 'a classic horizontal market division,' just in an 'employment market' rather than a product market."[5] But if ancillary to a legitimate business purpose, the DOJ clarified, no-poach agreements may be considered under the rule of reason.[6] The DOJ provided the following examples as to when the rule of reason standard may apply to no-poach agreements:

- When, ancillary to an acquisition, the buyer agrees not to hire seller's employees is for limited time period[7]; and
- A franchise agreement prohibiting poaching of employees from the parent, any of its subsidiaries, or any franchises.[8]

The DOJ noted, however, that even ancillary no-poach agreements may be illegal *per se* if they are overbroad.[9]

At oral argument on the defendants' Motion to Dismiss on February 25, 2019, the DOJ once again urged the District Court to reject the defendants' position that the rule of reason should apply, reiterating the DOJ's position that no-poach agreements are "a species of horizontal market allocation" and should therefore be subject to *per se* treatment.[10] The District Court noted during the hearing that, at least at the motion to dismiss stage, the case would likely move forward under the *per se* standard.[11]

Duke University

The second case, *Seaman v. Duke University, et al.* ("*Duke*") before the Middle District of North Carolina, involves class allegations that Duke University and the University of North Carolina ("UNC") entered into an agreement not to hire each other's faculty laterally.[12] Duke filed a Motion for Summary Judgment arguing that

---

3 Railway Statement at 2 (citing Consolidated Class Action Complaint, Doc. 88, at ¶¶ 1-5).
4 *Id.* at 8 ("[C]ourts have held that no-poach agreements among competitors in labor markets are per se unlawful in the same way that customer- and market-allocation agreements in product markets are per se unlawful.") (citing *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013), in which the District Court held that a no poach agreement was "a 'classic' horizontal market division" and "[a]ntitrust law does not treat employment markets differently from other markets in this respect").
5 *Id.* at 13 (quoting *eBay, Inc.*, 968 F. Supp. 2d at 1039-40 (internal quotations omitted)).
6 *Id.* at 1.
7 *Id.* at 11 (citing *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001)).
8 *Id.* at 12 (citing *Deslandes v. McDonald's USA, LLC*, 2018 WL 3105955 (N.D. Ill. June 25, 2018)).
9 *AYA Healthcare Services, Inc. v. AMN Healthcare, Inc.*, 2018 WL 3032552 (S.D. Cal. June 19, 2018) (holding that no-poach restrictions in a subcontractor agreement were *per se* unlawful because they "last[ed] in perpetuity" even after dissolution of the joint venture).
10 Leah Nylen, Knorr, Wabtech no-poach class action likely to move forward as *per se*, judge says, *MLex*, Feb. 25, 2019, http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1068608&siteid=191&rdir=1.
11 *Id.*
12 Duke Statement at 2.

the alleged no-poach agreement should be analyzed under the rule of reason, "because the defendants are 'not for profit academic institutions,'" and "need to 'collaborate and support each other.'"[13]

On March 7, 2019, the DOJ filed a Statement of Interest in the case, again reiterating its position that no-poach agreements between competitors are "*per se* unlawful unless they are reasonably necessary to a separate legitimate business transaction or collaboration between the employers."[14] As to Duke's argument that it could not be subject to antitrust liability because of the institution's not-for-profit status, the DOJ noted that, "the Supreme Court has made clear, '[t]here is no doubt that the sweeping language of [Section 1] applies to nonprofit entities.'"[15] Finally, the DOJ disagreed with Duke's claim that the rule of reason should apply because the no-poach agreement supported the universities' collaboration in preventing free-riding. In its Statement of Interest, the DOJ explained that, for a restraint to be ancillary, "there must be a separate legitimate collaboration that it renders more effective," and it "must be *reasonably necessary* to achieve the benefits of the legitimate collaboration."[16] Because Duke was unable to make either of these showings, the DOJ concluded that, "if the evidence proves that Duke and [UNC] entered into a naked no-poach agreement, the Court should not hesitate to declare it *per se* unlawful."[17]

The District Court heard oral arguments on the Motions for Summary Judgment from the parties and the DOJ on March 12, 2019, during which the District Court questioned Duke's assertion that the alleged no-poach agreement was a justifiable, cost-saving collaboration between the universities, as opposed to a horizontal market allocation to be judged under the rule of reason. The parties subsequently agreed to settle the class action.[18]

Fast Food Franchises

In the final cases, *Stigar v. Dough Dough, Inc. et al.*[19]; *Richmond and Rogers v. Bergey Pullman Inc. et al.*[20]; and *Harris v. CJ Star, LLC et al.*[21], the class plaintiffs are former employees of fast food franchises Auntie Anne's, Arby's, and Carl's Jr. The former employees challenged provisions in the respective franchise agreements prohibiting franchisees from poaching employees from either the franchisor or another franchisee as *per se* violations of U.S. antitrust laws.[22]

In its March 7, 2019 Statement of Interest, the DOJ once again stated its general position that horizontal employment allocation agreements are *per se* unlawful. The DOJ clarified, however, that some no-poach agreements may qualify as

---

13 *Id.* at 4 (quoting Duke Br. On Application of the Rule of Reason Standard at 1). Duke also argued that a state-action exemption should apply, because UNC is a "sovereign representative of the state" and "was acting pursuant to a clearly articulated state policy to displace competition in faculty hiring, compensation, and retention." *Id.* at 3 (quoting Duke Br. for Summ. Judg. on State Action Immunity at 1-2, 4-15) (internal quotations omitted).

14 *Id.* at 19.

15 *Id.* at 27 (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 n.22 (1984)).

16 *Id.* at 28-29.

17 *Id.* at 29.

18 Lean Nylen, Duke University settles no-poach class action over medical faculty, *MLex,* Apr. 9, 2019, http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1081919&siteid=191&rdir=1.

19 Case No. 18-cv-00244 (E.D. Wash.).

20 Case No. 18-cv-00246 (E.D. Wash.).

21 Case No. 18-cv-00247 (E.D. Wash.).

22 Stigar Statement at 3-4.

vertical restraints that should be adjudged under a rule of reason standard, stating:

> The franchise relationship is in many respects a vertical one because the franchisor and the franchisee normally conduct business at different levels of the market structure. Restraints imposed by agreement between the two are usually vertical and thus assessed under the rule of reason.[23]

The DOJ next addressed the plaintiffs' argument that the franchise agreements constitute *per se* hub-and-spoke conspiracies, with the franchisor acting as the hub and the franchisees as the spokes.[24] The DOJ explained that, "the mere fact that one franchisee may enforce no-hire provisions of a vertical franchise agreement against another franchisee does not create an actual agreement among competing franchisees."[25] According to the DOJ, to succeed on a hub-and-spoke theory, the plaintiffs would need to prove a horizontal agreement between the spokes, or franchisees. Seeing no indication that the plaintiffs pleaded the existence of this "rim," the DOJ concluded that the rule of reason should apply in the fast food cases.[26]

The plaintiffs have since settled with Auntie Anne's, Arby's, and Carl's Jr.[27]

New Statements But No New Rules

As Deputy Assistant Attorney General Michael Murray summarized during a March 1, 2019 speech, the DOJ's Statements of Interest on the antitrust standard courts should apply to no-poach agreements say "nothing new."[28] Rather, he noted, the antitrust authorities have been active in the employment space "for at least the past twenty-five years," citing the Antitrust Guidance for Human Resources Professionals.[29] Acknowledging that the joint Guidance "lack[s] . . . detail," Murray went on to "spell out the proper thinking about" no-poach cases, summarized in the following questions:

- First, under the test provided in *Copperweld* and *American Needle*, are "the entities that allegedly entered into a no-poach agreement . . . capable of the 'concerted action' required by Section 1"?[30]
- Second, what is the proper standard of law to apply—the *per se* rule or the rule of reason? The answer depends on "whether the entities that allegedly entered into a no-poach agreement are competitors in the labor market, that is, whether

---

23 *Id.* at 8 (discussing U.S. Dept. Justice and Fed. Trade Comm., Antitrust Guidance for Human Resources Professionals, October 2016, *available at* https://www.justice.gov/atr/file/903511/download).

24 *Id.* at 13.

25 *Id.*

26 *Id.* at 16 (noting that, even if the plaintiffs did provide evidence of a horizontal agreement, "the typical franchise relationship itself is a legitimate business collaboration in which the franchisees operate under the same brand," and therefore, "[n]o-poach agreements would thus qualify as ancillary restraints if they are reasonably necessary to the legitimate franchise collaboration and not overbroad").

27 Order Closing File, *Stigar v. Dough Dough, Inc. et al.*, Case No. 18-cv-00244, Doc. 38 (E.D. Wash. Mar. 18, 2019); Order Closing File, *Richmond and Rogers v. Bergey Pullman Inc. et al.*, Case No. 18-cv-00246, Doc. 49 (E.D. Wash. Mar. 18. 2019); *Harris v. CJ Star, LLC et al.*, Case No. 18-cv-00247, Doc. 42 (E.D. Wash. Mar. 18. 2019).

28 Press Release, U.S. Dept. Justice, Deputy Assistant Attorney General Michael Murray Delivers Remarks at the Santa Clara University School of Law (Mar. 1, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-murray-delivers-remarks-santa-clara-university (internal quotation omitted).

29 *Id.*

30 *Id.* (citing *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)).

there is a horizontal relationship among them with respect to the alleged no-poach agreement."[31]

- Finally, is the agreement "subordinate and collateral to a separate, legitimate transaction, and reasonably necessary to make the main transaction more effective in accomplishing its purpose" such that the ancillary restraints doctrine applies?[32]

While this framework draws on several decades of enforcement action and resulting case law, as Murray recognized, "the answers depend on the facts."[33]

Key Takeaways

Although the DOJ may claim that the standards applied to no-poach agreements are settled, the recent wave of government investigations and the DOJ's participation in civil class actions should be a signal to all employers—be wary when entering into agreements with regard to the hiring or payment of employees. Unless an employment restriction is ancillary to a purchase agreement or is otherwise reasonably necessary to achieve a legitimate collaboration, employers risk being investigated and/or sued for violating the U.S. antitrust laws.

To the extent employers discover they have vertical or horizontal employment agreements currently in place, it would be wise to work with antitrust counsel to closely scrutinize these arrangements. Likewise, as employers consider entering into no-poach agreements in the future, they should consult with antitrust counsel.

As for franchises, while the DOJ has signaled that no-poach agreements such as those in the fast food cases should be analyzed under the rule of reason balancing standard, antitrust authorities and private litigants may continue to push franchises to demonstrate that vertical no-poach agreements are, on balance, procompetitive. Several state attorneys general have done just this, resulting in a new wave of settlements in early 2019 in which fast food chains Arby's, Dunkin' Donuts, Five Guys and Little Caesar agreed to drop no-poach provisions from their franchise agreements.[34] Therefore, even franchises should examine their current employment agreements and consider the risks of keeping or including any provisions that may restrict the free movement of employees from one business to another.

---

31 *Id.*

32 *Id.* (internal quotations omitted).

33 *Id.*

34 Settlement Agreements between Massachusetts, California, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon and Pennsylvania State AGs and Arby's, Dunkin' Donuts, Five Guys and Little Caesar, available at https://oag.ca.gov/system/files/attachments/press-docs/3.12.19-multistatefranchisesettlements.pdf.

CONTACTS

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell
@cliffordchance.com

Brian Concklin
Associate

T +1 202 912 5060
E brian.concklin
@cliffordchance.com

Michaela Spero
Associate

T +1 202 912 5413
E michaela.spero
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 2001 K Street NW, Washington, DC 20006-1001, USA

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.