DOJ Wades Deeper Into No-Poach Advocacy

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In early February 2019, the Department of Justice (DOJ) announced its intent to file statements of interest in multiple ongoing private lawsuits to clarify how "no-poach" agreements should be evaluated under the federal antitrust laws. But the brief notices the DOJ filed then only previewed what arguments it intended to make. Now that the DOJ has filed full statements of interest, the nuances in the DOJ's positions are becoming increasingly clear. At the same time, various states' attorneys general have directly challenged the DOJ's position, particularly in the context of franchise-based no-poach agreements.

In its first full statement of interest filed on February 8, 2019, in *In re: Railway Industry Employee No-Poach Antitrust Litigation* (W.D. Pa.) — a private follow-on litigation that followed a DOJ investigation and subsequent settlement with several companies in the railway equipment industry — the DOJ emphatically rejected the defendants' argument that their alleged no-poach agreements should be evaluated under the rule of reason because no court had previously treated no-poach agreements as *per se* unlawful. In response, the DOJ argued that naked no-poach agreements (*i.e.*, blanket agreements between horizontal competitors not to hire each other's employees) are akin to market-allocation agreements that have long been held to be *per se* unlawful. The DOJ also cited multiple decisions denying motions to dismiss on the basis that plaintiffs plausibly alleged that no-poach agreements were *per se* unlawful (though those cases were ultimately settled before the rule was applied). Citing its own complaint against the railway defendants, the DOJ concluded by arguing that the plaintiffs adequately alleged naked no-poach agreements, and such agreements should be subject to *per se* treatment.

The DOJ filed its second statement of interest on March 7, 2019, in *Seaman v. Duke University, et al*. (M.D.N.C.), a case involving an alleged agreement between Duke University and the University of North Carolina at Chapel Hill (UNC) not to hire each other's medical school faculty. There, the DOJ clarified when a no-poach agreement by firms involved in a collaboration should be evaluated under the rule of reason pursuant to the ancillary restraints doctrine. While defendant Duke denied that it entered into any no-poach agreement, it nevertheless argued that a potential no-poach agreement between itself and UNC should be evaluated under the rule of reason because the "schools collaborate and support each other" and the agreement could help prevent "free-riding" on the schools' investment in their faculty. In its statement, the DOJ disagreed, arguing that, for a restraint to be ancillary, it must be (i) implemented pursuant to a separate legitimate collaboration, and (ii) reasonably necessary to achieve the benefits of the legitimate collaboration. The DOJ argued that neither showing had been made because Duke had not identified any specific collaboration between it and UNC to which the restraint would have been ancillary, and that, having denied the restraint's existence, Duke could not show that the restraint was reasonably necessary to achieve the benefits of any specific collaboration. Absent such a showing, the DOJ argued that the alleged restraint should be analyzed as *per se* unlawful.

Beyond its statements of interest, the DOJ has also indicated that it will continue to take an active advocacy role in ongoing no-poach cases. In a March 1, 2019, speech on antitrust in labor markets at Santa Clara University School of Law, Deputy Assistant Attorney General for the Antitrust Division Michael Murray highlighted many of the arguments in the DOJ's filings and other recent advocacy efforts, described the historical interaction between labor markets and antitrust law, and summarized the framework under which the DOJ will evaluate alleged no-poach agreements going forward. He concluded that "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."

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Advocacy in Franchise No-Poach Cases: The DOJ Versus Washington State

In the DOJ's third statement of interest filed on March 7, 2019, in three related fast-food franchise no-poach cases in the U.S. District Court for the Eastern District of Washington — *Stigar v. Dough Dough*, *Richmond v. Bergey Pullman* and *Harris v. CJ Star* — the DOJ argued that, in general, a no-poach agreement between a franchisor and an individual franchisee is a vertical restraint that should be evaluated under the rule of reason. The DOJ reasoned that the entities typically operate at different levels of the market, and the restraint could produce a significant pro-competitive benefit of promoting interbrand competition. The DOJ did note, however, that if the franchisor and franchisee compete for labor in a given geographic market — which is possible given that some major fast-food franchisors operate company-owned stores — the restraint should be characterized as a horizontal restraint and subject to the *per se r*ule unless it is ancillary to any legitimate and otherwise pro-competitive joint venture between the parties.

In response to claims that a franchisor-franchisee no-poach agreement constitutes a hub-and-spoke conspiracy, the DOJ argued that no-poach agreements entered into by multiple franchisees and the franchisor should not be viewed as a hub-and-spoke conspiracy unless a plaintiff alleges evidence that individual franchisees agreed with each other to enforce the agreement. Finally, the DOJ rejected the notion that such restraints should be evaluated under quick-look analysis because, if the restraint is ancillary to the franchise joint venture, it "may indeed provide procompetitive benefits and promote interbrand competition" and should thus only be evaluated under the full rule of reason.

While the DOJ's statements in the Washington franchise cases might help the defendants' chances in securing a dismissal of the federal antitrust claims, another interested party is intervening in support of the plaintiffs' claims brought under Washington's antitrust law (Consumer Protection Act or CPA). On March 11, 2019, Washington State Attorney General Bob Ferguson's office filed its own statement of interest in the franchise cases. Ferguson has been on the forefront of the fight to eliminate franchise no-poach agreements nationwide. Since its investigation opened in early 2018, Washington has reached binding settlements with 57 different national franchise chains to eliminate such agreements. Ferguson's office already has survived a motion to dismiss in the state court no-poach lawsuit it brought under the CPA against franchise chain Jersey Mike's Subs.

Ferguson's statement of interest made three primary arguments that, if credited by the court, could both support plaintiffs' claims in the instant cases and potentially inspire additional state law-based no-poach lawsuits going forward. First, while courts' application of the CPA is often influenced by the federal antitrust laws, federal precedent is not binding, and courts may deviate from it when evaluating whether alleged anti-competitive conduct violates the CPA. Second, many franchise no-poach agreements involve both vertical and horizontal restraints (*e.g.*, when franchisor-owned stores compete directly with franchisee stores), and if there is such a horizontal element the agreement should be subject to *per se* treatment. Third, arguments regarding the possible pro-competitive justifications for franchise no-poach agreements — including whether such agreements are reasonably necessary to larger legitimate collaboration between franchisors and franchisees — are questions of fact, and over the course of investigating more than 100 different franchise agreements, Ferguson's office has yet to find evidence that such agreements are "reasonably necessary" to the success of franchise-based businesses. The statement concluded by arguing that franchisor defendants should face a heavy burden in demonstrating that their no-poach restraints are indeed reasonably necessary to the franchisor-franchisee joint venture.

Ferguson has arguably become the leader of the movement to eliminate the widespread use of franchise no-poach agreements, but other states' attorneys general are not standing on the sidelines. In July 2018, a coalition of attorneys general from 10 states — New York, California, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania and Rhode Island — and the District of Columbia opened an investigation into the alleged use of such agreements by eight national franchise-based fast-food chains (some of which also reached settlements with Ferguson). On March 12, 2019, the coalition, which has since expanded to include attorneys general of Iowa, North Carolina and Vermont, announced that it reached an agreement with four of the chains under investigation to remove no-poach provisions from their U.S. franchise agreements. Three chains remain under investigation, while the eighth confirmed that it never used no-poach provisions in its contracts with franchisees.

Conclusion

As the DOJ's and various states' recent advocacy efforts suggest, scrutiny of no-poach agreements remains a top priority for federal and state antitrust enforcers. Development of the relevant antitrust doctrine in private cases also remains a critical battlefield — one that antitrust and human resources professionals should continue to monitor closely. Should courts applying federal law follow the DOJ's guidance by dismissing *per se* and/or quick-look claims brought by franchise employees, it is possible that state attorneys general — as well as private plaintiffs — will take an increasingly active role in challenging no-poach agreements under state antitrust laws.