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Skadden Discusses No-Poach Agreements and Antitrust in Labor Markets

By Boris Bershteyn, Karen Hoffman Lent, Tara L. Reinhart and Zachary C. Siegler September 4, 2019

Comment

Antitrust treatment of no-poach agreements continues to evolve as private cases progress, state attorneys general ramp up enforcement efforts and federal regulators further contemplate the legality of no-poach agreements.

Over the past two years, private plaintiffs have filed class action lawsuits challenging the use of no-poach commitments in franchise agreements, whereby the franchisor and/or franchisees agree not to hire each other's employees. In most cases, plaintiffs have alleged that such provisions are unreasonable restraints of trade that should be evaluated under either the strict *per se* rule or "quick-look" analysis because the provisions at issue are so overwhelmingly anti-competitive that an inquiry into the potential pro-competitive justifications for such provisions — as required under the more permissive rule of reason standard — is unnecessary. More specifically, quick-look analysis involves an abbreviated rule of reason inquiry that relaxes the requirement of pleading anti-competitive effects in a relevant market and generally applies to situations in which an observer with even a basic understanding of economics would conclude that the restraint causes anti-competitive effects. In some recent no-poach cases, courts have held that quick-look analysis should apply, while others have declined to decide on the mode of analysis at the motion-to-dismiss stage, concluding that discovery should be complete before the court chooses the appropriate level of scrutiny.

A recent decision takes a different approach, suggesting that courts must carefully consider the scope of the alleged restraint and determine what level of antitrust scrutiny to apply when evaluating a defendant's motion to dismiss. On July 29, 2019, Judge David M. Lawson of the U.S. District Court for the Eastern District of Michigan granted defendant pizza chain Little Caesars' motion to dismiss in *Ogden v. Little Caesar Enterprises*, holding that the alleged no-poach agreement did not justify the application of either the *per se* rule or "quick-look" mode of antitrust analysis.[1]

The court declined to apply the *per se* rule after explaining that, in the U.S. Court of Appeals for the Sixth Circuit, the *per se* rule only applies to labor market restraints when there is an explicit agreement among competitors to either (1) fix wages or (2) divide the labor market into exclusive territories.

The court did not categorically reject the potential application of a quick-look analysis to no-poach agreements — a position the Department of Justice (DOJ) has advocated after multiple early no-poach decisions concluded that quick-look analysis might apply. Instead, the court concluded that the no-poach provisions in other cases where courts have held that a quick-look analysis might apply were "far more onerous and directly enforced employment restraints." In contrast, with respect to the challenged provisions in Little Caesars' agreements, the court observed: "Ogden does not allege that he tried to obtain employment at another Little Caesar franchise, let alone that he was offered a job for more pay that he had to refuse, or that another employer would hire him but for the no-poaching provision." Because neither *per se* nor quick-look analysis applied and the plaintiff did not plead a claim under the rule of reason, the court granted the motion to dismiss in full.

On the enforcement front, state attorneys general also continue to target no-poach agreements. On August 8, 2019, Washington state Attorney General Bob Ferguson announced legally binding agreements with four more businesses — Aaron's Inc. (a rent-to-own furniture retailer), H&R Block, Mio Sushi and The UPS Store — to end the companies' use of no-poach provisions in their franchise agreements, including provisions that prohibited an individual franchisee from hiring another franchisee's employees without prior consent.[2] Among other terms, the settlement agreements require that each company: (1) no longer include no-poach language in new franchise agreements; (2) stop enforcing no-poach provisions in existing franchise agreements nationwide; and (3) remove the no-poach provision

from all Washington contracts within 120 days. Since launching his no-poach investigation in January 2018, Ferguson has reached similar agreements with 66 franchise-based companies.

Ferguson and his allies have also recently focused their advocacy efforts on federal regulators. On July 15, 2019, Ferguson and 16 other state attorneys general jointly filed a public comment with the Federal Trade Commission (FTC) in response to the FTC's recent series of hearings on competition and consumer protection in the 21st century.[3] In the comment, the attorneys general made two principal recommendations regarding no-poach agreements. First, they argued that the FTC should use its Section 5 enforcement authority to stop the use of no-poach agreements "in many situations," though they failed to identify any specific situations. Second, they urged the FTC to ban all intrafranchise no-poach agreements for low-wage workers, an action they noted the FTC already is considering.

The comment also directly addressed the conflict between the authors' position and the position taken by the DOJ in its recent advocacy efforts, with the DOJ arguing that intrafranchise no-poach agreements generally should be analyzed under the full rule of reason due to their potential pro-competitive benefits. In contrast, the attorneys general argued that their local enforcement activities have not uncovered evidence that the pro-competitive effects of such provisions are equal to or outweigh the broader anti-competitive effects on the labor market. Consequently, the attorneys general concluded that such agreements should continue to be evaluated by courts under *per se* or quick-look antitrust analysis.

The states will soon have the opportunity to make their case directly to the DOJ. Although the DOJ has recently argued that courts should analyze franchise no-poach agreements using the rule of reason, it announced that it will hold a public workshop on September 23, 2019, to discuss the role of antitrust in labor markets. Given the increasingly contrasting positions among several states, district courts and the DOJ, the workshop will surely be closely watched.

ENDNOTES

1 No. 18-12792 (E.D. Mich. July 29, 2019).

2 See Washington state Office of the Attorney General press release "AG Ferguson's Initiative Ends No-Poach Clauses at Four More Corporate Chains Nationwide" (August 8, 2019).

3 See FTC Hearings on Competition and Consumer Protection in the 21st Century, Public Comments of 18 State Attorneys General on Labor Issues in Antitrust (July 15, 2019).

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "As Treatment of No-Poach Agreements Evolves, DOJ To Examine Antitrust in Labor Markets," dated August 19, 2019, and available here.