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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Boris Bershteyn

Partner / New York
212.735.3834
boris.bershteyn@skadden.com

Karen M. Lent

Partner / New York
212.735.3276
karen.lent@skadden.com

Tara L. Reinhart

Partner / Washington, D.C.
202.371.7630
tara.reinhart@skadden.com

Zachary C. Siegler

Associate / New York
212.735.3547
zachary.siegler@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

1440 New York Avenue, N.W.
Washington, D.C. 20005
202.371.7000

Federal district courts around the country continue to grapple with how to analyze “no-poach” agreements — whereby two or more companies agree not to hire or recruit each other’s workers — under the antitrust laws. Beginning in 2017, private plaintiffs and government agencies have increasingly targeted no-poach agreements, particularly in franchise-based industries. Plaintiffs typically allege that agreements governing the franchisor-franchisee relationship contain no-poach provisions that limit franchisees’ ability to hire current or recent employees of other franchisees or, in some cases, franchisor-owned stores. The earliest decisions analyzing these claims were divided over which antitrust mode of analysis — the strict *per se* rule, intermediate “quick-look” analysis, or more permissive “rule of reason” — should apply to franchise no-poach provisions.

Over the past six months, courts overseeing no-poach lawsuits have coalesced around two different approaches when ruling on defendants’ motions to dismiss. Most courts have denied such motions, but declined to announce which mode of antitrust analysis should apply, concluding that discovery is needed before that determination can be made. At least one court has reached a significantly different conclusion by holding that a franchisor and franchisees are a single economic entity incapable of conspiring in violation of Section 1 of the Sherman Act. Although the Department of Justice (DOJ) has generally supported applying the rule of reason to franchise no-poach agreements, courts have not embraced that guidance thus far.

In light of these decisions, companies should carefully analyze their no-poach arrangements and evaluate the risks of civil litigation and enforcement actions. The recent experience of franchise-based companies suggests that civil antitrust challenges to such agreements will likely proceed to discovery.

Approach #1: Discovery Is Necessary To Determine the Appropriate Standard

A majority of recent decisions suggest that courts are reluctant to answer key questions regarding the appropriate mode of antitrust analysis for no-poach agreements at the motion to dismiss stage. For example, in *In re Papa John’s Employee and Franchisee Employ Antitrust Litigation*,¹ the plaintiffs, employees of the Papa John’s pizza chain, alleged that the franchise no-poach provisions at issue were unlawful under any of the three antitrust standards of review. The court largely denied the restaurant chain’s motion to dismiss, concluding that the plaintiffs plausibly alleged that the franchise no-poach provisions imposed horizontal restraints of trade that could be found unlawful not only under the *per se* rule or quick-look analysis, but also under the rule of reason. Importantly, the court did not require plaintiffs to allege a relevant product or geographic market, concluding that allegations of direct evidence of anticompetitive effects — suppressed wages and decreased job mobility — sufficiently pleaded a rule-of-reason claim.

Similarly, in *Robinson v. Jackson Hewitt, Inc.*, the court held that plaintiff employees of the Jackson Hewitt tax preparation company plausibly alleged that the no-poach agreements between Jackson Hewitt and its franchisees were unlawful horizontal restraints of trade because the franchisor and franchisees were separate economic actors competing in the market for tax preparation employees.² The court declined to resolve the applicable mode of analysis because “[t]o do so would be premature and more factual information is required.” In another recent case, *Fuentes v. Royal Dutch Shell PLC*,

¹ *In re Papa John’s Employee & Franchisee Employee Antitrust Litig.*, No. 3:18-CV-00825-JHM, 2019 WL 5386484 (W.D. Ky. Oct. 21, 2019).

² *Robinson v. Jackson Hewitt, Inc.*, No. 19-9066 (SDW) (LDW), 2019 WL 5617512 (D.N.J. Oct. 31, 2019).

Recent Trends in No-Poach Litigation

the court followed the *Papa John's* holding, concluding that the plaintiff employees of franchise-based car repair company Jiffy Lube plausibly alleged that the no-poach provision in the Jiffy Lube franchise agreement was an unreasonable horizontal restraint of trade. As in *Papa John's* and *Robinson*, the court declined to decide which antitrust standard would apply.³

At least one court adopted a similar approach to no-poach agreements outside the franchise context. In a case involving an alleged no-poach agreement among three U.S. defense contractors operating out of an overseas military operations center,⁴ the plaintiff employees claimed they were notified about the no-poach agreements by both their employer and the competing defense contractors where they interviewed. The plaintiffs challenged the alleged agreements under all three modes of antitrust analysis, and the court denied defendants' motion to dismiss without deciding which mode should apply.

Approach #2: Franchisors and Franchisees Are Incapable of Conspiring

One case in which the court took a different approach than the most recent no-poach decisions is *Arrington v. Burger King Worldwide Inc.*⁵ After reviewing the various "key requirements" that Burger King imposed upon its franchisees in terms of store operations (e.g., uniform menus, standardized equipment, payment toward joint advertising), the court concluded that the franchisor and franchisee were not separate economic actors capable of conspiring in violation of Section 1 of the Sherman Act. Instead, the franchisees' relationship to Burger King was "totally derivative," because "in the absence of uniformity guaranteed by the Burger King franchise agreement, there would be no franchise and hence, no independent source of economic power." The court also concluded that the franchisees' "residual economic autonomy with respect to employment decisions is insufficient to convert it into a separate economic actor," and consequently granted Burger King's motion to dismiss.

Approach #3: DOJ's Structural Review

Notably, none of the recent no-poach decisions have followed the suggested modes of analysis recommended by the DOJ. In March 2019, the DOJ filed statements of interest in an earlier set of fast food franchise cases in order to clarify how franchise no-poach provisions should be evaluated under the antitrust

laws.⁶ In the statements, the DOJ made three principal arguments: (i) in general, a no-poach agreement between a franchisor and franchisee is a vertical restraint that should be evaluated under the rule of reason; (ii) no-poach agreements entered into by the franchisor and multiple franchisees should not be viewed as a hub-and-spoke conspiracy unless there is evidence that individual franchisees agreed with each other to enforce the agreement; and (iii) franchise no-poach agreements should not be evaluated under quick-look analysis, but instead under the full rule of reason, because they likely are ancillary to the franchise joint venture and potentially provide procompetitive benefits.

The DOJ's positions have yet to gain traction among courts at the motion to dismiss stage. For example, in *Papa John's*, the court took judicial notice of the statements in connection with the defendants' motion to dismiss, but warned that it would "not, however, 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."

Further, the DOJ's approach to no-poach agreements has come under attack from other quarters. In a recent interview, Washington State Assistant Attorney General Rahul Rao called the DOJ's approach to franchise no-poach agreements "somewhat misguided." He reasoned that the DOJ is wrong to analyze no-poach provisions as ancillary restraints because they do not have procompetitive justifications, nor are they essential to the franchise agreements in which they are contained. Rao's office, led by Washington State Attorney General Bob Ferguson, has undertaken an aggressive campaign against franchise no-poach agreements over the past two years, securing 225 legally binding settlements with franchise-based chains to eliminate the use of no-poach provisions. Members of Congress have also increasingly criticized the DOJ's failure to bring any criminal no-poach cases despite years of foreshadowing that such charges are forthcoming.

Conclusion

The majority of district courts have allowed antitrust lawsuits challenging no-poach agreements in the franchise context to proceed to discovery without resolving which mode of antitrust analysis governs those agreements. Although the DOJ has generally advocated analyzing franchise no-poach agreements under the rule of reason, courts have yet to embrace that conclusion. Whether companies operate a franchise or not, they should scrutinize their no-poach arrangements and carefully assess the risk of enforcement actions or civil litigation. The experience of franchise-based companies suggests that civil antitrust challenges to such agreements will likely proceed to discovery, which can be protracted and costly.

³ *Fuentes v. Royal Dutch Shell PLC*, No. CV 18-5174, 2019 WL 7584654 (E.D. Pa. Nov. 25, 2019).

⁴ 418 F. Supp. 3d 214 (S.D. Ohio 2019).

⁵ *Arrington v. Burger King Worldwide, Inc.*, No. 18-cv-24128-JEM (S.D. Fl. Mar. 24, 2020).

⁶ *Stigar v. Dough* (E.D. Wash.); *Richmond v. Bergey Pullman* (E.D. Wash.); *Harris v. CJ Star* (E.D. Wash.).