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No-Poach Antitrust Litigation in the United States

Eric A. Posner

Sarah Hammond Roberts

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Abstract. In recent years, U.S. courts have heard numerous antitrust lawsuits challenging agreements among employers not to poach one another's employees. The major issues so far involve labor market definition, the doctrine of ancillary restraints, the role of cross-market balancing, and the scope of the per se rule in the labor market context. The recent Seventh Circuit case of *Deslandes v. McDonald's* has clarified some of these issues and will likely boost this form of litigation. But many questions remain unanswered.

No-poach (or, sometimes, "anti-poach" or "no-hire") agreements are agreements between firms not to hire away each other's employees. They are typically agreements between labor-market competitors; they often appear as clauses in franchise agreements. In the last several years, no-poach agreements have been challenged in criminal and civil antitrust cases. These cases raise new questions about the operation of antitrust law in labor market disputes.

While the application of antitrust to labor markets has long been settled in U.S. law,[2] the recent wave of no-poach cases can be traced back to the 2010 Department of Justice lawsuit against Apple, Google, and other major Silicon Valley companies, which were accused of agreeing not to poach one another's software engineers.[3] The egregious behavior of leading executives of the tech companies, which would today likely have spurred criminal indictments, led the DOJ and the Federal Trade Commission to issue a Human Resource Guidance in 2016 that warned employers that no-poach agreements would thenceforth be prosecuted criminally as well as civilly.[4]

"No-poach" is an umbrella term that refers to a variety of restraints on hiring. The Silicon Valley companies agreed not to cold call competitors' employees but apparently allowed cartel members to hire workers who took the initiative to apply for a job at a competing firm. Such agreements may also be called "non-solicitation" agreements. Firms can also agree not to compete at the entry level. A related but distinct employment restraint is the covenant not to compete, which is an agreement between the employer and the employee that forbids the employee from obtaining a job with a competitor for a period of time after leaving the employer. Noncompetes are vertical agreements but they operate similarly to no-poach agreements if competing firms agree to require their employees to sign noncompetes.

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[1] Kirkland & Ellis Distinguished Service Professor, University of Chicago Law School; J.D. 2024, University of Chicago Law School.

[2] Anderson v. Shipowners' Ass'n, 272 U.S. 359 (1927). The Supreme Court recently reaffirmed the law in National Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

[3] Complaint, U.S. v. Adobe Systems, Inc., No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010).

[4] U.S. Dep't Of Justice, Antitrust Div. & Fed. Trade Comm'n, *Antitrust Guidance For Human Resource Professionals* (2016), https://www.justice.gov/atr/file/903511/download.

The recent wave of no-poach cases can be divided into two broad categories: "naked" horizontal agreements between unrelated competing employers who agree not to poach each other's employees, and more complex relationships between employers who belong to a common franchise or other venture in which a no-poach agreement composes a part. We take each category in turn.

A. Naked No-Poach Agreements

In the Silicon Valley litigation, the DOJ alleged that agreements restricting firms from recruiting one another's employees were per se unreasonable, based on settled doctrine that the per se rule applies to naked horizontal restraints.[5] While the parties reached a consent decree on the same day the DOJ filed its complaint, a subsequent class action led to a judicial opinion.[6] A court in the Northern District of California rejected various defenses and recognized the basic antitrust logic of a no-poach claim. Sufficient overlap in the agreements and board membership of the defendants established a plausible allegation of conspiracy. By preventing salaries from increasing and restricting mobility in the labor market, the no-poach agreements inflicted the type of injury that the antitrust laws were aimed at remedying. The class action plaintiffs eventually settled. A similar set of issues was resolved in the same way in *United States v. eBay, Inc.*[7]

As the court recognized, the "naked" no-poach agreement fits easily in antitrust doctrine despite the rarity of prior cases involving labor market cartelization. Labor markets operate through competition among employers for workers. In the absence of competition, employers would pay workers below their marginal revenue product, resulting in allocative inefficiency as workers who would be willing to work for a wage less than the value that they contribute will not be hired. Through the competitive process, employers bid up wages to the marginal revenue product, drawing workers into the labor market. A no-poach agreement blocks competition at the lateral level, preventing workers from moving to firms where they are more valued and reducing their bargaining power in the firms where they remain employed. While competition continues at the entry level, workers' productivity varies with time, resulting in separate employment markets at different levels of tenure.

The criminal investigations of no-poach agreements led to several indictments and trials. For example, *United States v. Manahe* involved no-poach agreements as well as wage-fixing in the home healthcare market,[8] and *United States v. Patel* involved no-poach agreements between an aerospace design company and its suppliers.[9] The courts recognized that parties who entered no-poach agreements could be held criminally liable and rejected defendants' motions to dismiss. But the government was ultimately unsuccessful on its antitrust claims in all three cases, and related cases as well, because of adverse jury verdicts or, in the case of *Manahe*, a judgment for the defendant on a motion for acquittal.

The *Manahe* court relied on an older case, *Bogan v. Hodgkins*, which conditioned antitrust liability on a horizontal market allocation having a "meaningful" impact on competition in the

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[5] Complaint, *supra* note 3, at 5.

[6] *In re* High-Tech Emp. Antitrust Litig., 856 F.Supp.2d 1103 (N.D. Cal. 2012).

[7] U.S. v. eBay, Inc., 968 F.Supp.2d 1030 (N.D. Cal. 2013).

[8] U.S. v. Manahe, No. 2:22-CR-00013, 2022 WL 3161781 (D. Me. Aug. 8, 2022).

[9] U.S. v. Patel, No. 3:21-CR-220, 2022 WL 17404509 (D. Conn. Dec. 2, 2022).

relevant market.[10] The court in Manahe held that employers allowed workers to transfer from time to the time, the court found that there was no meaningful cessation of competition.[11]

Bogan v. Hodgkins involved an insurance company, which hired independent contractors through a hierarchical structure.[12] Agents at the top of the structure entered into no-poach agreements—which eventually became company policy—with one another; subordinates could transfer between those controlling agents only with their consent. The district court granted summary judgement, finding that the agreements would enhance interfirm competition, but the plaintiff in *Bogan* appealed on the grounds that the restraint was per se illegal, or illegal under quick look review, which is applied when restraints are suspect. The Second Circuit held that only "established" per se categories of conduct, like price-fixing were subject to the per se rule. The agreements in *Bogan* permitted transfers with consent of the agent; while they imposed constraints on employee mobility, the court found partial constraints insufficient to trigger per se analysis. The court noted that even an interfirm agreement of this form would have been subject to rule of reason analysis because the "anticompetitive effect on the market [was] not obvious," in part due to plaintiff's failure to plead a relevant market.[13] The holding of *Bogan*, which paradoxically appears to require plaintiffs to prove market power in order to obtain per se review, has been a stumbling block in other no-poach cases as well.[14] There is, however, no theoretical basis for denying per se treatment to no-poach agreements that are less than complete; that is not the rule in product market cases, where it has long been understood that any direct, naked restraint on competition, even if partial, is per se illegal. The *Bogan* court did not explain why labor markets should be treated differently from product markets.

Another criminal case was *United States v. DaVita Inc.*, where the defendant and his dialysis provision company were alleged to have entered into no-poach agreements with a competitor.[15] Echoing *Bogan*, the court refused to categorize no-poach agreements as a new category of per se violation. It argued that no-hire agreements had not been consistently found anticompetitive; without judicial experience and a showing of consistent anticompetitive effects, there was no justification to create a new per se category. The only grounds for per se treatment was through analogy, not through creating a new category of per se violation; and thus, the plaintiffs must prove a meaningful constraint, which may require showing an anticompetitive effect. While plaintiffs succeeded on the motion to dismiss, the defendants were acquitted by a jury.

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[10] *Id.* at *5 (citing Bogan v. Hodgkins, 166 F.3d 509, 515 (2d Cir. 1999)).

[11] *Id.* at *10. A class action was also brought based on the facts in *Patel*, which survived the motion to dismiss stage. Borozny v. Raytheon Tech. Corp., No. 3:21-CV-1657, 2023 WL 348323 (D. Conn. Jan. 20, 2023). There, cessation of competition was satisfied due to the lack of available jobs for plaintiffs. *Id.* at *8.

[12] Bogan v. Hodgkins, 166 F.3d 509, 511 (2d Cir. 1999).

[13] *Id.* The court also denied a quick look analysis because the defendant sufficiently alleged that the agreement was not a naked restriction. *Id.* at 514 n.6.

[14] *See, e.g.,* U.S. v. DaVita Inc., No. 1:21-CR-00229-RBJ, 2022 WL 266759 (D. Colo. Jan. 28, 2022); U.S. v. Patel, No. 3:21-CR-220, 2022 WL 17404509 (D. Conn. Dec. 2, 2022); Borozny v. Raytheon Tech. Corp., No. 3:21-CV-1657, 2023 WL 348323 (D. Conn. Jan. 20, 2023); Giordano v. Saks Inc., 2023 WL 1451534 (E.D.N.Y. Feb. 1, 2023).

[15] U.S. v. DaVita Inc., No. 1:21-CR-00229-RBJ, 2022 WL 266759 (D. Colo. Jan. 28, 2022).

Another court applied the per se rule to naked no-poach agreements in *Markson v. CRST International, Inc.*[16] Plaintiffs were truck drivers who worked for defendants' trucking company, which was alleged to have entered into no-poach agreements with competing trucking companies. Any employee who had completed CRST's driver training program was subject to the no-poach agreement, which, according to the plaintiffs, reduced wages and employment mobility. The court held that plaintiffs had adequately alleged facts to support per se treatment of the agreements at issue; namely, showing horizontal market allocation agreements which were "generally treated as per se antitrust violations."[17]

In *Giordano v. Saks Incorporated*, retail conglomerate Saks and a number of luxury brands ("brand defendants") entered into no-poach agreements, where brand defendants were forbidden to poach Saks employees unless their current managers consented or the employee had left Saks at least six months prior.[18] The court held that a no-poach agreement could give rise to an allegation of conspiracy. However, the court refused to view the agreement as a naked market allocation subject to per se analysis, finding instead that it was ancillary to a procompetitive venture. The court apparently believed that Saks would not train employees to sell the brands if the brand defendants could hire away those employees. However, it should have put the burden on the defendants to prove this argument. The court also rejected quick look analysis, holding that there was insufficient judicial experience with no-hire agreements to justify a quick look standard.[19] The court lastly turned to the question of rule of reason analysis, and dismissed the claim because the plaintiff did not allege an adequate market.

In *Hunter v. Booz Allen Hamilton, Inc.*, contracted workers brought a complaint against their employers, contracting companies who worked for the Defense Intelligence Agency.[20] The Agency hires contractors to provide intelligence reports to the Department of Defense. Defendants, jointly located on a British air force base, had a history of competing for skilled contractors in the area. However, they entered into no-poach agreements with each other which prevented hiring contractors who worked for a competitor located on the air force base. Plaintiffs alleged that these agreements reduced job mobility for workers, and suppressed wages. While the court denied defendants' motion to dismiss on the grounds that plaintiffs had adequately alleged an agreement which substantially reduced competition for labor, it also declined to take a stance on what the appropriate standard to evaluate the alleged violation would be. This case ended in settlement.[21]

The cases involving naked no-poach agreements show the courts struggling over the question whether no-poach agreements should be subject to the usual per se rule or a qualified version that requires plaintiffs to show not only that the employers had agreed not to poach workers, but had successfully reduced transfers and wages. The latter approach has no basis in traditional antitrust doctrine, which requires proof of agreement only in the case of naked horizontal agreements. Nor have the courts that have adopted this approach explained why a weaker standard is appropriate for labor markets. As the tradition in antitrust law is to treat all markets the same, and

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[16] Markson v. CRST Int'l, Inc., No. 5:17-CV-01261-SB-SP, 2021 WL 1156863 (C.D. Cal. Feb. 10, 2021).

[17] *Id.*

[18] Giordano v. Saks Inc., No. 20-CV-833 (MKB), 2023 WL 1451534 (E.D.N.Y. Feb. 1, 2023).

[19] *Id.* The court also referred to the procompetitive justification in finding quick look inappropriate.

[20] Hunter v. Booz Allen Hamilton, Inc., 418 F.Supp.3d 214, 218 (S.D. Ohio 2019).

[21] Hunter v. Booz Allen Hamilton Inc., No. 2:19-CV-00411, 2023 WL 3204684 (S.D. Ohio May 2, 2023)

there is no theoretical or economic basis for treating labor and product markets differently,[22] the latter approach is wrong.

B. Franchise No-Poach Agreements

A group of cases against franchise no-poach agreements was inspired by an academic study by Alan Krueger and Orley Ashenfelter, which was first circulated in 2017.[23] Krueger and Ashenfelter discovered that 90 out of a sample of 156 franchise contracts used by large companies contained a no-poach clause. Their study led to lawsuits by the state governments, which most franchises settled by dropping the clauses, and private litigation, which is ongoing. Follow-on academic research indicates that the elimination of clauses resulted in higher wages, implying that the clauses were indeed anticompetitive in effect.[24]

Franchise cases and related cases in which a no-poach agreement advances a larger cooperative venture are more complex than cases involving naked restraints. Defendants typically argue that the restraint is necessary to protect investments in training or benefits for consumers—echoing arguments made in traditional joint venture cases.[25] For example, in *Deslandes v. McDonald's USA, LLC*, a class action lawsuit involving no-poach clauses in McDonald's franchise agreements, the defendant argued that the restraints encouraged franchisees to invest in training restaurant workers and to improve service for customers.[26] Antitrust theory and law have traditionally permitted such arguments only when the benefit is enjoyed by those in the market in which the restraint operates—workers, not consumers. That rules out the argument that restraints might result in better service. In principle, the restraints could be defended on the ground that they protect investments in training, in which case they should result in higher, rather than lower, wages for employees.

The lead plaintiff in this class action was an employee of a McDonald's franchise who sought employment at a higher-paying McDonald's restaurant. Her application was initially accepted on the merits, but then rejected on account of the no-poach agreement. The district court dismissed the complaint, holding that the rule of reason applied because the restraint was ancillary to the franchise and the plaintiffs failed to allege a plausible labor market. The problem facing the plaintiff was that substitute occupations involving the same skills and similar tasks were difficult to identify, and a market consisting of only McDonald's employees was regarded as implausibly narrow by the court. The Seventh Circuit Court of Appeals reversed in an opinion that is likely to be influential in further franchise litigation.[27]

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[22] See Eric A. Posner, The New Labor Antitrust (Sept. 2023), https://ssrn.com/abstract=4575258, for a discussion.

[23] Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. Hum. Res. S324 (2022).

[24] Francine Lafontaine, Saattvic & Margaret Slade, No-Poaching Clauses in Franchise Contracts, Anticompetitive or Efficiency Enhancing? (Mar. 2023), https://papers.ssrn.com/abstract=4404155; Brian Callaci, Matthew Gibson, Sergio Pinto, Marshall Steinbaum, & Matthew Walsh, The Effect of Franchise No-poaching Restrictions on Worker Earnings (July 2023), https://ssrn.com/abstract=4155577.

[25] See, e.g., Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

[26] Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. Jun. 25, 2018).

[27] Deslandes v. McDonald's USA, LLC, 81 F.4th 699 (7th Cir. 2023).

First, the court held that the district court properly rejected the complaint's allegation that McDonald's workers could compose a relevant market given that McDonald's workers could switch among other fast-food restaurants within a few miles of the plaintiffs' homes. The court apparently believed that it was not plausible under prevailing standards for a motion to dismiss to argue that workers acquired franchise-specific skills or relationships that raised switching costs. In future litigation, plaintiffs' lawyers would do well to educate courts on the difficulty that many workers face in switching jobs or commuting even short distances.[28]

Second, the court held that the restraint was horizontal because it applied to relationships between franchisees and restaurants directly owned by McDonald's. The court did not reach the question of whether restraints that run only from a franchisor that does not operate restaurants, to franchisees, is subject to the per se rule on a "hub-and-spoke" theory. That question has been the subject of litigation elsewhere and likely will continue to be a matter of dispute.[29]

Third, the court held that the district court erred by finding that the restraint was ancillary because it appeared in a franchise contract that may have expanded the output of restaurant meals. This was an important error: labor markets and product markets are different markets, and, as noted above, antitrust law prohibits cross-market balancing. This approach "treats benefits to consumers (increasing output) as justifying detriments to workers (monopsony pricing). That's not right; it is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs, and *Alston* establishes otherwise."[30] The court further noted that the restraint would not necessarily increase output.

Fourth, the court acknowledged that a no-poach clause could be lawful as an ancillary restraint if it was necessary to protect investments in training. Presumably, this is true only in the context of a franchise, where the restaurants share "layout, tasks, and so on."[31] But then the district should not have required the plaintiffs to plead market power and should not have dismissed the complaint because plaintiffs did not. The allegations made out a plausible theory of naked collusion; a defense that showed that the no-poach clauses were subordinate and reasonably necessary to protect procompetitive training investment would have to await trial, and the defendants would bear the burden of proof.[32]

Despite its first holding, the Seventh Circuit's opinion squarely endorses labor market antitrust, in tension with the qualified endorsement in *Bogan*.

Another Court of Appeals slapped down a district court's labor market skepticism. In *Arrington v. Burger King Worldwide, Inc*,[33] defendants participated in a franchise structure similar to

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[28] See, e.g., Tyler Ransom, Labor Market Frictions and Moving Costs of the Employed and Unemployed, 57 J. Hum. Res. S137 (2022).

[29] *Compare* Butler v. Jimmy John's Franchise, LLC, 331 F.Supp.3d 786, 789 (S.D. Ill. 2018) (recognizing hub-and-spoke theory), *with* Ogden v. Little Caesar Enterprises, Inc., 393 F.Supp.3d 622 (E.D. Mich. 2019) (rejecting hub-and-spoke theory).

[30] Deslandes, *supra* note 33, at 703. The reference is to National Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021), which reaffirmed that antitrust law applies to labor markets.

[31] *Id.* at 704.

[32] As the concurrence emphasizes, and which seems to be the view of the majority opinion, which questions the national scope and lengthy duration of the no-poach clauses.

[33] Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247 (11th Cir. 2022).

McDonald's: franchisees were asked to sign agreements restricting the hiring of any Burger King employee for at least six months after leaving another Burger King restaurant, franchise or standalone. The district court granted defendants' motion to dismiss on the grounds that a franchise structure was a single entity, and thus could not engage in the concerted action Section 1 requires. The Eleventh Circuit rejected this argument. Burger King and its franchisees had different economic interests: in hiring employees, the companies would compete by offering different compensation and benefits packages. Because the no-poach agreement involved concerted activity, they could give rise to liability.

An important ancillary-restraints case that occurred outside the franchise context is *Aya Healthcare Services, Inc. v. AMN Healthcare Inc.*[34] The parties were healthcare staffing agencies who placed travel nurses in hospitals. When AMN was unable to satisfy its clients' demand, it subcontracted requests for nurses to Aya. As part of the subcontracting agreement, Aya entered into a non-solicitation provision under which it could not poach travel nurses from AMN. Aya later violated the provision, AMN terminated the contract, and Aya brought suit alleging a Section 1 violation. While the court agreed that the restraints were horizontal, it found them to be ancillary rather than naked and thus subject to the rule of reason. A horizontal restraint must meet two requirements to be ancillary: first, it must be subordinate to a separate and legitimate transaction; second, it must be at least reasonably necessary to achieve the transaction's procompetitive purpose. Aya argued that the no-poach provision was unnecessary to the subcontracting agreements and that its duration extended beyond the joint collaboration. The court disagreed, holding that the provision protected AMN's workforce and would encourage AMN to continue subcontracting, which would stimulate competition in the healthcare staffing industry. The court's rejection of the duration argument was unpersuasive and in tension with holdings in other ancillary restraint cases. Applying the rule of reason, the court held that plaintiffs failed to show harm to competition in the relevant market—that of hospitals competing for labor.

Horizontal no-poach provisions among parties were also challenged in *State by Raoul v. Elite Staffing, Inc.*[35] Three staffing agencies who provided workers to a construction contractor agreed not to poach one another's employees. The contractor coordinated enforcement of the agreements by informing staffing agencies if their employees switched jobs. The court held that the per se rule applied: coordination of a horizontal restraint by a vertical party does not transform the restraint into a vertical one. Unlike the facts in Aya, the restraint did not advance a procompetitive venture.

C. Conclusion

No-poach litigation is just one type of case in the recent wave of labor-related antitrust litigation in the United States. The broader litigation trend reflects academic research and methodological advances that have established that labor market imperfections are widespread rather than (as previously believed) rate. It also reflects worries about growing income inequality and exploitation of workers.[36] Alongside the no-poach cases, plaintiffs have sued employers for fixing wages under section 1,[37] and for maintaining labor market power by using exclusionary labor

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[34] Aya Healthcare Servs. Inc. v. AMN Healthcare Inc., 9 F.4th 1102, 1105 (9th Cir. 2021).

[35] State by Raoul v. Elite Staffing, Inc., 210 N.E.3d 188, 191 (Ill. App. 1 Dist. 2022). The state also brought a claim alleging wage-fixing agreements.

[36] See Eric A. Posner, How Antitrust Failed Workers (2021).

[37] Jien v. Perdue Farms, Inc., No. 1:19-CV-2521-SAG, 2020 WL 5544183 (D. Md. Sep. 16, 2020).

contracts (for example, noncompetes) under section 2.[38] The DOJ also brought a criminal action against a defendant for wage-fixing, alleging that he had conspired with the owners of therapist staffing companies to lower the wages paid to their contractors, though its antitrust claim was rejected by a jury.[39] The Justice Department recently blocked a merger between commercial publishers based on its labor market effects,[40] and the Federal Trade Commission filed an objection to a merger between hospitals because of its impact on labor markets.[41] The two agencies have recently issued draft merger guidelines that include a new section that addresses the labor market impacts of mergers.[42] Labor-antitrust is on its way to becoming an established practice within antitrust enforcement.

[38] Le v. Zuffa, LLC, No. 2:15-cv-01045-RFB-BNW, 2023 WL 5085064 (D. Nev. Aug. 9, 2023).

[39] U.S. v. Jindal, No. 4:20-cr-00358, 2021 WL 5578687, at *1-2 (E.D. Tex. 2021).

[40] U.S. v. Bertelsmann SE & Co. KGaA, No. 21-2886-FYP, 2022 WL 16949715 (D.D.C. Nov. 15, 2022).

[41] FTC, Staff Submission to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System 37 (Sept. 11, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/09/ftc-staff-submits-public-comment-texas-opposing-certificate-public-advantage-applications.

[42] U.S. Dep't Of Justice & Fed. Trade Comm'n,, Draft Merger Guidelines for Public Comment (Jul. 18, 2023), https://www.regulations.gov/document/FTC-2023-0043-0001.