Notes

The DOJ's Role in the Franchise No-Poach Problem

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In 2016, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued a joint policy statement which notified human resource professionals of antitrust issues that may arise in the context of employee recruitment, hiring, and compensation. Among the various issues that the Agencies addressed was the use of no-poach agreements by employers. The Agencies stated that naked no-poach agreements, agreements between employers at different companies to refuse to solicit or hire one another's employees, are per se illegal under federal antitrust law. Three years later, in a case involving a no-poach agreement, the DOJ filed a statement of interest that departed from the seemingly bright-line rule set forth in its previous joint policy statement. The DOJ took the position that the nature of the franchise system warrants an exception to the general rule—that naked no-poach agreements among employers are per se illegal—and suggested that the rule of reason analysis is the appropriate framework.

Since the DOJ issued its policy statement and subsequent statement of interest, federal district courts have taken varying approaches to franchise no-poach cases. Most have declined to determine the governing standard at the motion to dismiss stage due in part to the lack of agreement between the DOJ and other authorities of antitrust law, including some state attorneys general and the American Antitrust Institute. By adopting the per se standard, courts could easily dispose of franchise no-poach cases and thereby conserve judicial resources and create uniformity for litigants. The use of the per se standard to review franchise no-poach agreements comports with existing antitrust precedent, and the DOJ's contrary arguments mischaracterize the nature of the franchise industry. Courts should decline to follow the DOJ's reasoning in its statement of interest and impose per se liability for franchises that use no-poach agreements. Additionally, under the new administration, the DOJ should revisit the issue to reconcile its position with Sherman Act jurisprudence and its own previous guidance and enforcement actions.

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INTRODUCTION

While antitrust law is not a remedy for resolving every societal ill,[1] it is undoubtedly an important tool for preventing anticompetitive conduct in the labor market. In enacting the Sherman Act, Congress understood the broad implications of corporate power, and Senator John Sherman, the namesake of the law, warned that monopoly power can harm workers.[2] Anticompetitive conduct in the labor market produces the same three "evils" that animate antitrust law: anticompetitive prices, lower quantities, and lower quality.[3]

Although antitrust law generally addresses anticompetitive conduct in product markets, employers can act in ways that restrain trade in labor markets.[4] Even if employers do not compete with one another in the same product market, those same employers may compete with one another for employees in the labor market.[5] When employers enter agreements with one another and those agreements restrain trade in the labor market, employers are subject to liability under section 1 of the Sherman Act.[6]

In the past few years, antitrust enforcers at the federal and state levels have become increasingly concerned with one particular type of agreement among employers: no-poach agreements.[7] No-poach agreements typically involve two or more employers who agree to not hire one another's employees.[8] Although no-poach agreements are similar to non-compete agreements with respect to their potential effects on the labor market, no-poach agreements differ because they are entered into by employers, and employees are not parties to the agreement.[9] In 2016, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued a joint policy statement ("2016 Joint Policy"), directed at human resource professionals, that addressed no-poach agreements.[10] The guidelines established that naked no-poach agreements among employers

1. *Antitrust and Economic Opportunity: Competition in Labor Markets: Hearing Before the Subcomm. on Antitrust, Com., and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 1 (2019) (statement of Doha Mekki, Counsel to the Assistant Att'y Gen., Antitrust Division, United States Department of Justice) [hereinafter Statement of Doha Mekki].

2. *Id.* at 1–2 ("[M]onopoly power . . . commands the price of labor without fear of strikes . . . ." (quoting 21 CONG. REC. 2457 (1890)).

3. State Attorneys General, Comment on Federal Trade Commission Hearings on Competition and Comsumer Protection in the 21st Century 2 (July 15, 2019), https://oag.dc.gov/sites/default/files/2019-07/State_AGs_Comments_to_FTC_on_Labor_Issues_in_Antitrust.pdf.

4. JOSÉ AZAR, IOANA MARINESCU & MARSHALL STEINBAUM, ANTITRUST AND LABOR MARKET POWER 3 (2019), https://econfip.org/wp-content/uploads/2019/05/Antitrust-and-Labor-Market-Power.pdf.

5. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 2012c (4th and 5th eds. 2020).

6. *Id.*

7. *See* Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 SANTA CLARA L. REV. 579, 582 (2020).

8. AREEDA & HOVENKAMP, *supra* note 5, ¶ 2013a.

9. *Id.* ¶ 2013b.

10. *See* DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), https://www.justice.gov/atr/file/903511/download [hereinafter 2016 JOINT POLICY STATEMENT].

constitute per se violations of section 1 of the Sherman Act and may warrant criminal liability.[11] Although the DOJ and FTC's position on no-poach agreements appears clear from their 2016 guidance, an important question has since emerged: whether that position extends to the franchise context.

This question came to the forefront three years after the DOJ's joint statement with the FTC—when the DOJ intervened in a 2019 case challenging a franchise's no-poach agreement ("Statement of Interest").[12] The DOJ argued that, in the franchise sector, courts should evaluate the use of no-poach agreements on a case-by-case basis because they are not necessarily per se illegal.[13] The Statement of Interest appears to depart from the 2016 Joint Policy announced by the DOJ and FTC, the two federal enforcers of antitrust law. Shortly after the DOJ filed its Statement of Interest, another key player in the antitrust arena, the American Antitrust Institute, issued a letter in response.[14] The letter criticized the DOJ's suggestion that franchise no-poach agreements should be subject to the rule of reason and argued that these agreements are anticompetitive, harmful to labor-market competition, and serve no legitimate business purpose.[15] Lacking clear guidance, federal courts in various districts have taken inconsistent approaches in their review of franchise no-poach agreements.[16] Due to the significant number of franchise systems that use no-

11. *Id.* at 3–4.

12. *See* Corrected Statement of Int. of the United States, Stigar v. Dough Dough, Inc., No. 2:18-cv-00244 (E.D Wash. Mar. 8, 2019), Richmond v. Bergey Pullman Inc., No. 218-cv-00246 (E.D. Wash. Mar. 8, 2019), Harris v. CJ Star LLC, No. 218-cv-00247 (E.D. Wash. Mar. 8, 2019), ECF No. 34 [hereinafter DOJ's Statement of Interest].

13. *Id.* at 11–12, 16–17.

14. *See* Letter from Diana Moss, President, Am. Antitrust Inst., and Randy Stutz, Vice President, Am. Antitrust Inst., to Hon. Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., and Michael Murray, Deputy Assistant Att'y Gen., U.S. Dep't of Just. (May 2, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf [hereinafter American Antitrust Institute Letter].

15. *Id.*

16. *See, e.g.*, Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 795 (S.D. Ill. 2018) (holding that the plaintiff stated a claim against the franchisees under the hub-and-spoke theory of violation); Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322, 1332 (S.D. Fla. 2020) (finding that plaintiff failed to state a claim because franchisees are not "separate economic actors for antitrust purposes"); Ogden v. Little Caesar Enters., Inc., 393 F. Supp. 3d 622, 630–35 (E.D. Mich. 2019) (holding that the plaintiff failed to establish that no-poach agreements are per se unreasonable); Blanton v. Domino's Pizza Franchising LLC, No. 18-13207, 2019 WL 2247731, at *4–5 (E.D. Mich. May 24, 2019) (holding that plaintiff successfully pled an antitrust violation but declining to determine the proper approach until further factual development); Fuentes v. Royal Dutch Shell PLC, No. CV 18-5174, 2019 WL 7584654, at *1 (E.D. Pa. Nov. 25, 2019) (denying defendant's motion to dismiss for the Sherman Act claim because the plaintiff plausibly alleged a "horizontal" conspiracy); Robinson v. Jackson Hewitt, Inc., No. 19-9066 (SDW) (LDW), 2019 WL 5617512, at *6–7 (D.N.J. Oct. 31, 2019) (holding that plaintiff stated a claim for a Sherman Act violation but declining to determine the applicable standard of review); *In re* Papa John's Emp. & Franchisee Emp. Antitrust Litig., No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *7–10 (W.D. Ky. Oct. 21, 2019) (denying defendant's motion to dismiss the claims of antitrust violations).

poach agreements,[17] the standard that courts adopt to review these no-poach agreements will inevitably affect millions of workers across the country.[18]

This Note will evaluate the DOJ's arguments against the application of the per se standard to no-poach agreements in the franchise context, illustrate the problems with anticompetitive conduct in the labor market through a case example, and ultimately advocate for courts to reject the DOJ's position as it is articulated in its Statement of Interest. To preserve competition in the labor market and protect workers, courts should decline to follow the DOJ's proposal and instead apply the per se standard to evaluate no-poach provisions in franchise agreements.

Part I of this Note discusses the current dispute regarding the appropriate standard to evaluate no-poach agreements and identifies flaws in the DOJ's arguments in favor of the rule of reason standard. Part II will highlight the Department of Justice's departure from its previous position on the issue and its role in shaping section 1 jurisprudence. Part III concludes this Note by emphasizing important policy considerations underlying the debate regarding the appropriate standard and why sound public policy requires either the per se approach or legislation that bans these agreements entirely.

I. CONFLICTS BETWEEN THE DOJ'S POSITION AND SECTION 1 JURISPRUDENCE

This Part first provides a background of section 1 jurisprudence to both demonstrate how no-poach agreements operate in the franchise context and also, to frame the dispute regarding the appropriate standard under which to review these agreements. This Part will additionally outline the arguments in support of the per se approach to franchise no-poach cases. Lastly, this Part addresses each of the DOJ's arguments in support of the rule of reason approach and highlights the flaws in its reasoning.

A. BACKGROUND

To state a cause of action under section 1 of the Sherman Act,[19] the plaintiff must show: (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade; and (3) the restraint affected interstate commerce.[20] To analyze whether an agreement is an unreasonable restraint of trade, courts analyze the agreement at

17. *See* Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. TIMES (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html.

18. American Antitrust Institute Letter, *supra* note 14, at 1.

19. 15 U.S.C. § 1 (2018).

20. Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996).

issue under one of three standards: per se, quick look,[21] or rule of reason.[22] The rule of reason is the default standard of analysis.[23] Under the rule of reason standard, after a plaintiff satisfies his burden to show the existence of an agreement, market power, and a prima facie anticompetitive restraint on the relevant market, the burden shifts to the defendant to demonstrate the agreement's procompetitive effects.[24] The court then weighs the procompetitive benefits of the agreement against its anticompetitive effects in the relevant geographic and product market.[25] On the other hand, if the agreement at issue is so inherently anticompetitive, courts will depart from the default rule of reason standard and apply the per se approach.[26] If an agreement is deemed per se unreasonable, the court will not consider any of the defendant's purported procompetitive justifications for the agreement.[27]

Both private parties and government enforcement agencies have invoked section 1 of the Sherman Act to address the widespread use of no-poach agreements in the labor market.[28] These agreements involve two or more entities, often competitors, that agree to not hire one another's employees.[29] Although this practice has been implemented in a variety of industries, including technology[30] and healthcare,[31] it has become increasingly widespread in the franchise industry.[32] In this context, no-poach agreements are typically entered into by the franchisor and individual franchisees. Private plaintiffs and state enforcement officials have challenged these franchise agreements as unlawful

21. The quick look analysis is a truncated rule-of-reason analysis. It is appropriate when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999). Because the quick look analysis is a truncated form of the rule of reason, this Note does not separately analyze a quick look approach to franchise no-poach agreements.

22. AREEDA & HOVENKAMP, *supra* note 5, ¶ 1500.

23. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

24. AREEDA & HOVENKAMP, *supra* note 5, ¶ 1914c.

25. *See GTE Sylvania Inc.*, 433 U.S. at 49.

26. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283–84 (2018); *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979) (explaining that courts consider "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output" to determine whether an agreement is per se illegal).

27. *See Broad. Music, Inc.*, 441 U.S. at 7–9.

28. *See* Rochella T. Davis, *Talent Can't Be Allocated: A Labor Economics Justification for No-Poaching Agreement Criminality in Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 279, 302 (2018).

29. *Id.* at 281.

30. *See* Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee [https://perma.cc/Q55X-7AMY].

31. *See* Jeff Miles, *The Nursing Shortage, Wage-Information Sharing Among Competing Hospitals, and the Antitrust Laws: The Nurse Wages Antitrust Litigation*, 7 HOUS. J. HEALTH L. & POL'Y 305 (2007).

32. Abrams, *supra* note 17.

restraints of trade in violation of state antitrust laws[33] and section 1 of the Sherman Act.[34]

However, a dispute has emerged regarding the correct standard under which these agreements should be evaluated. The DOJ argues that the rule of reason standard, which is more favorable to defendants,[35] should apply when no-poach agreements are implemented by franchise systems.[36] Meanwhile, private plaintiffs and state enforcement authorities argue that these arguments ignore important realities about the nature of the franchise sector and the way in which no-poach agreements operate in that context.[37] By demonstrating the similarities between no-poach agreements and other horizontal agreements that antitrust law has long regarded to be per se unlawful, plaintiffs make compelling arguments that the same standard should apply.

B. ARGUMENTS FOR THE PER SE APPROACH TO FRANCHISE NO-POACH AGREEMENTS

Plaintiffs often analogize no-poach agreements to price-fixing agreements. It is well-established in antitrust law that price-fixing agreements are per se violations of section 1.[38] Under antitrust law, buyers, like sellers, can be liable for horizontal agreements that restrain trade.[39] In this context, franchisees are buyers of labor in the labor market, as they pay wages in exchange for labor.[40] Challengers argue that franchisees that participate in these no-poach agreements engage in a form of price-fixing by effectively suppressing wages.[41] Analogous to the way in which a firm may offer discounts to attract buyers to purchase its products rather than a competitor's products, firms may offer higher wages than their competitors to attract employees.[42] In labor markets free from artificial restraints,[43] firms are incentivized to maintain labor relations and employment

33. *See, e.g.*, Complaint at 1, 14–15, Washington v. Jersey Mike's Franchise Sys. Inc., No. 18-2-25822-7SEA (Wash. Super. Ct. Oct. 15, 2018).

34. *See*, *e.g.*, Class Action Complaint at 1, 38–39, Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786 (S.D. Ill. 2018) (No. 3:18-CV-00133).

35. *See* Clayton J. Masterman, Note, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 VAND. L. REV. 1387, 1393–94 (2016).

36. *See* DOJ's Statement of Interest, *supra* note 12.

37. *See*, *e.g.*, Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss at 17, *Butler*, 331 F. Supp. 3d 786 (No. 3:18-CV-00133).

38. AREEDA & HOVENKAMP, *supra* note 5, ¶ 305b.

39. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948) (holding that the purchasers faced antitrust liability even though the sellers were injured, not necessarily the consumers).

40. RANDY M. STUTZ, AM. ANTITRUST INST., THE EVOLVING ANTITRUST TREATMENT OF LABOR-MARKET RESTRAINTS: FROM THEORY TO PRACTICE 2 (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0-1.pdf.

41. Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 9 (Princeton Univ. Indus. Rels. Section, Working Paper No. 614, 2017), https://dataspace.princeton.edu/bitstream/88435/dsp014f16c547g/3/614.pdf.

42. *Id.* at 16.

43. *See* Eichorn v. AT&T Corp., 248 F.3d 131, 140–41 (3d Cir. 2001) (acknowledging that a labor market is a market for antitrust purposes).

practices that attract qualified employees. It is typically undisputed in these cases that in order to provide quality customer service, franchisees seek qualified and capable employees.[44] Due to the lack of geographical exclusivity that is characteristic of a typical franchise arrangement, franchisees compete with one another to obtain these employees.[45] If a qualified individual were to seek employment with a franchisee, he or she may have multiple locations from which to choose within a certain geographical region. The use of no-poach agreements in the labor market eliminates the possibility that employees will leave a firm to seek employment at a similar competing firm, thereby reducing the pressure on firms to offer competitive wages. Challengers of no-poach agreements argue that the use of these restrictive agreements in the franchise industry has restrained competition for labor and thus disincentivized franchisees from implementing practices to attract qualified employees.[46]

Antitrust law has recognized that agreements that restrict the supply of labor in the market constitute a naked restraint on price and output.[47] In *FTC v. Superior Court Trial Lawyers Association*, a group of lawyers agreed to refuse to serve as court-appointed counsel for indigent criminal defendants in order to demand higher wages.[48] The boycott created an artificial restriction on the supply of labor in the legal services market.[49] By reducing output of labor and thus increasing the demand, the price of legal services increased.[50] The U.S. Supreme Court held that the boycott amounted to a horizontal price fixing arrangement because the boycott restrained the output of labor and increased its price in the market.[51] Accordingly, the Court rejected the Court of Appeals' finding that the per se rules did not apply.[52] Plaintiffs typically argue that no-poach agreements between franchisees similarly restrain the output of labor in a given market.[53] By preventing franchisees from hiring employees at other locations within the same franchise system, the agreements restrict employee mobility and thus limit the amount of available labor in the market at any given

44. For example, Jimmy John's noted that franchisee staff are vital to its success and in order to keep customers, Jimmy John's franchisees must maintain a "high level of customer service." Class Action Complaint, *supra* note 34, at 14.

45. *Id.* at 15.

46. *See, e.g.*, ALAN KRUEGER & ERIC POSNER, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 4–5 (2018), https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf.

47. *See* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 422–23 (1990).

48. *Id.* at 414.

49. *Id.* at 423.

50. *Id.*

51. *Id.* at 423.

52. *Id.* at 436.

53. *See, e.g.*, Competitive Impact Statement at 8, United States v. Adobe Sys., Inc., No. 10 CV 1629, 2011 WL 10883994 (D.D.C. Mar. 18, 2011) (No. 1:10-CV-01629).

time.[54] The restriction on labor output resultantly precludes wage negotiation between employers and employees.[55]

The use of no-poach agreements in the franchise sector is also challenged under the theory that the agreements amount to unlawful market-division agreements, which are typically per se illegal.[56] Horizontal market-division agreements are agreements among actual or potential competitors not to compete with one another in certain geographic areas, in offering certain products or services, or in serving certain customers.[57] Like naked horizontal price-fixing agreements, market-division agreements are per-se unlawful under antitrust law because they enable participants to reduce output in a market and increase prices.[58] Antitrust law does not treat employment markets differently from product markets; therefore, "[a]n agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a service division agreement, analogous to a product division agreement."[59] Under this view, by creating an artificial restraint on an employee's ability to seek employment at another franchisee, no-poach agreements allocate available labor among competitors.[60] Rather than allocating customers in a particular market, which is widely recognized as per se illegal,[61] the franchisees are allocating employees.

C. THE DOJ'S ARGUMENTS FOR THE RULE OF REASON APPROACH TO FRANCHISE NO-POACH AGREEMENTS

Defendants in these lawsuits,[62] and more recently, the DOJ,[63] essentially argue that no-poach agreements operate differently in the franchise context and therefore require analysis under the rule of reason. In its Statement of Interest, the DOJ argued that the rule of reason standard should govern no-poach agreements in the franchise context because: (1) the parties to the franchise agreement containing the no-poach provision are the franchisor and the individual franchisee and therefore the agreement is vertical; (2) the franchisor and the franchisee are treated as a single entity; and (3) the no-poach agreement

54. Krueger & Ashenfelter, *supra* note 41, at 9.

55. *No-Poach Approach: Division Update Spring 2019*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach (Sept. 30, 2019).

56. Michael Murray, Deputy Assistant Att'y Gen., U.S. Dep't of Just., Remarks at the Santa Clara University School of Law 12–13 (Mar. 1, 2019), https://www.justice.gov/opa/speech/file/1142111/download.

57. AREEDA & HOVENKAMP, *supra* note 5, ¶ 2013b.

58. *Id.* ¶ 2030a.

59. United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (alteration in original) (quoting AREEDA & HOVENKAMP, *supra* note 5, ¶ 2013b).

60. AREEDA & HOVENKAMP, *supra* note 5, ¶ 2013a–b.

61. *Id.* ¶ 1652b.

62. *See, e.g.*, Defendants' Memorandum in Support of Their Motion to Dismiss Plaintiff's Complaint Under Federal Rules of Civil Procedure 12(B)(1) and 12(B)(6) at 2, Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786 (S.D. Ill. 2018) (No. 3:18-CV-00133) [hereinafter Defendants' Memorandum in Support of Their Motion to Dismiss].

63. *See* DOJ's Statement of Interest, *supra* note 12, at 11–12.

is ancillary to a legitimate and procompetitive joint venture.[64] These arguments, addressed in Subparts 1 through 3, ignore important aspects of franchise systems and should be rejected by courts.

1. Horizontal v. Vertical Restraint

Restraints under section 1 are generally categorized as either "horizontal" or "vertical."[65] Horizontal restraints are agreements made among competitors at the same level in a market.[66] Vertical restraints are made between entities at different levels of a supply chain, such as between a manufacturer and a retailer.[67] In order to successfully demonstrate a horizontal agreement, the plaintiff must show that the parties to the agreement are competitors at the same level in the relevant market.[68] In the franchise sector, franchisees compete with one another for not only customers but for employees.[69] Owners of franchisees generally enter franchise agreements with the understanding that franchisees are not guaranteed exclusive, protected, or territorial rights in the market area of their restaurant location.[70] Franchise no-poach provisions are agreements among competing franchisees to not hire each other's employees and therefore fall within the definition of horizontal agreements under section 1.

Proponents of the rule of reason standard, including the DOJ in its recent Statement of Interest, disagree with challengers' characterization of these agreements. Defendants have attempted to distinguish the use of no-poach agreements in the franchise sector from horizontal restraints of trade by emphasizing that the agreements at issue are vertical.[71] Under this view, because the no-poach provisions are contained within the franchise agreement that is entered into by the parent company franchisor and individual franchisees, the parties to the agreement have a vertical relationship.[72] Vertical agreements that have procompetitive justifications are analyzed under the rule of reason standard.[73]

The DOJ's assertion that no-poach agreements are vertical is premised upon a mischaracterization of the relationship between the franchisor and the franchisee. While the relationship between the franchisor and franchisee is

64. *Id.* at 7, 11–12, 16.

65. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 888 (2007).

66. *See id.*

67. *See id.* at 890.

68. *See* Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 784 (1996).

69. For example, in its franchise agreement, Jimmy John's explicitly informs prospective franchisees that they will not only compete with other sandwich shop chains and fast-food restaurants, but even other Jimmy John's franchisees. *See* Class Action Complaint, *supra* note 34, at 15.

70. *See, e.g.*, *id.*

71. DOJ's Statement of Interest, *supra* note 12, at 11.

72. *Id.* at 12.

73. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882, 884 (2007) (holding that the defendant's minimum resale price policy was vertical because it was an agreement between the manufacturer and a retailer and therefore subject to the rule of reason analysis).

vertical with respect to their product market, the individual franchisees are horizontal competitors for workers in a labor market.[74] The relationship at issue is the relationship between franchisees at the same level in the market because the agreement in question imposes restrictions on the franchisees' labor and not their products or services.[75] Thus, a finding that no-poach agreements are enforced horizontally and between franchisees at the same level in the market cuts against the argument that the rule of reason is the appropriate standard for courts to use. The most problematic aspect of the DOJ's vertical agreement argument is that it assumes that the orientation of the restraint, rather than the *effects* of the restraint, dictates the outcome of which standard to use.[76] Although the distinction between horizontal and vertical agreements may be relevant in identifying anticompetitive effects of the restraints,[77] courts should avoid narrowly focusing on the identities of the parties to an agreement when determining the appropriate standard of review.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* the Supreme Court explained that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." [78] Applying the Court's reasoning in *Leegin*, federal courts have emphasized that when determining whether an agreement is horizontal or vertical, courts must examine the *effects* of the restraint rather than the characters that imposed it.[79] In *United States v. Apple, Inc.*, Apple argued that its price-fixing agreements with publishers were multiple independent vertical agreements and thus should be subject to the rule of reason analysis.[80] The Second Circuit disagreed, finding that the vertical contracts between Apple and the publishers were not the agreements that imposed a restraint of trade.[81] Instead, the restraint of trade was created by the horizontal agreement, among the publishers, that was organized by Apple for the purpose of eliminating competition from another e-book distributor.[82] Finding that the publishers, through vertical agreements with Apple, engaged in a horizontal price-fixing conspiracy, the court applied the per se rule.[83]

Similarly, no-poach agreements involve competing franchisees that engage in a horizontal conspiracy by way of vertical agreements with the parent-company franchisor. The restraint of trade results not from the contracts between

74. *Antitrust and Economic Opportunity: Competition in Labor Markets: Hearing Before the Subcomm. on Antitrust, Com., and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 3 (2019) (statement of Rahul Rao, Assistant Att'y Gen., Off. of the Att'y Gen. of Wash., Antitrust Div.) [hereinafter Statement of Rahul Rao].

75. American Antitrust Institute Letter, *supra* note 14, at 6.

76. *Id.*

77. AREEDA & HOVENKAMP, *supra* note 5, ¶ 1503.

78. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 887 (2007).

79. *See, e.g.*, United States v. Apple, Inc., 791 F.3d 290, 323 (2d Cir. 2015).

80. *Id.* at 321.

81. *Id.* at 325.

82. *Id.* at 321–29.

83. *Id.* at 325.

the franchisor and the franchisee, but from each franchisee's refusal to hire employees from a competing franchisee.[84] The argument to the contrary focuses narrowly on the character of the *parties* to the agreement rather than the *effects* of the agreement. The no-poach provision is only effectuated when two competing franchisees try to hire or retain the same employee.[85] If the agreement was truly vertical in nature, as the DOJ suggests, it would have little practical effect, which would render its existence useless. There is little functional difference between the no-poach agreement entered into by the franchisor and franchisee and a no-poach agreement between the individual franchisees.[86] Because franchise no-poach agreements produce the same anticompetitive effects on the labor market that a direct conspiracy between the franchisees would likely produce, there is a strong argument that the per se rule is appropriate.

Alternatively, the no-poach agreements in the franchise industry could be viewed under the hub-and-spoke theory and thus still warrant per se liability. A hub-and-spoke conspiracy involves a network of vertical agreements that are used to facilitate a horizontal restraint of trade amounting to a horizontal agreement.[87] Hub-and-spoke conspiracies involve "both direct competitors and actors up and down the supply chain," and thus include both horizontal and vertical agreements.[88] If courts are reluctant to characterize some franchise no-poach provisions as purely horizontal agreements, courts should, alternatively, view the use of these provisions as a hub-and-spoke conspiracy. Applying the hub-and-spoke theory to the franchise no-poach context, a franchisee enters into an agreement with its parent-company franchisor and thereby creates a vertical agreement. The no-poach provision, however, does not govern the vertical relationship between those parties. Instead, the provision governs activity among the individual competing franchisees and is enforced horizontally.[89] Even if courts disagree that no-poach agreements are purely horizontal, the horizontal aspects of the no-poach agreements warrant the use of the per se rule.[90]

84. *See* Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 9–12, 17, Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786 (S.D. Ill. 2018) (No. 3:18-CV-00133).

85. Statement of Rahul Rao, *supra* note 74, at 3.

86. Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45, 52 (2019).

87. *In re* Musical Instruments & Equip. Antitrust Litig. v. Nat'l Ass'n of Music Merch., 798 F.3d 1186, 1192 (9th Cir. 2015); *see also* Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 930 (7th Cir. 2000) (finding that the defendant entered into a network of vertical agreements with other manufacturers to restrict distribution to certain warehouse stores).

88. *In re Musical Instruments*, 798 F.3d at 1192.

89. *See* Class Action Complaint, *supra* note 34, at 2 (alleging that each franchisee has independent rights of enforcement of the no-poach provision).

90. *In re Musical Instruments*, 798 F.3d at 1191.

2. Single-Entity Doctrine

Invoking the single-entity theory, the DOJ also suggested that a franchisor and its franchisees may be considered a single entity for the purposes of antitrust.[91] There is no liability under section 1 of the Sherman Act where a parent company and its wholly owned subsidiary have a complete unity of interest and enter an agreement.[92] According to this theory, because the franchisor and franchisee are a single entity, they, by definition, cannot conspire together to restrain trade.[93]

Courts must recognize the weaknesses of the single-entity defense as applied in the franchise context. The theory applies in a narrow set of circumstances; for example, to agreements between parent corporations and their wholly owned subsidiaries.[94] Courts can find guidance in *American Needle, Inc. v. National Football League*, where the Supreme Court held that a joint venture between substantial, independently owned, and independently managed businesses is not immune from section 1 liability under the single-entity defense.[95] A group of National Football League (NFL) teams pooled together their individual trademarks and other intellectual property in order to license their rights through a joint venture.[96] Although the teams participated in a joint venture, the Court found that the teams operated through their own "separate corporate consciousnesses" with individual objectives.[97] The Court found that because the NFL teams were separate economic actors, the single-entity doctrine could not shield them from antitrust liability.[98]

Contrary to the DOJ's argument, the single-entity doctrine is too narrow to encompass the relationship between a franchisor and franchisees. Franchisees are separate economic actors, independent not only from one another, but from the parent company as well.[99] The franchisees are not wholly owned subsidiaries of the franchisor parent company.[100] Franchisees, like the NFL teams in *American Needle*, are independently owned and operated.[101]In their franchise arrangements, many franchisors clarify that their franchisees are neither agents, joint venturers, partners, nor employees of the parent company.[102] Even more

91. DOJ's Statement of Interest, *supra* note 12, at 5–7.

92. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984). However, courts will focus on substance rather than form to determine whether two parties can conspire under section 1. *See id.* at 773 n.21.

93. *Id.* at 777.

94. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

95. *Id.* at 196.

96. *Id.* at 187.

97. *Id.* at 184.

98. *Id.* at 197, 204.

99. *See, e.g.*, Class Action Complaint, *supra* note 34, at 1; *see also* Bus. Franchise Guide (CCH) ¶ 6349(1)(a)(1) (2018) ("[T]he franchisee is an independent businessman . . . .").

100. John A. Capobianco, Note, *In Restraint of Wages: The Implications of "No-Poaching" Agreements*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 436 (2019).

101. Jimmy John's, for example, makes clear to its franchisees that they are responsible for their own day-to-day operations. Class Action Complaint, *supra* note 34, at 13.

102. *See, e.g.*, *id.* at 13.

relevant here is that franchisors often play no role in the employment practices or labor relations of the franchisees.[103] Franchisors do not set or regulate franchisee costs of operation, including wages for employees.[104] In a typical arrangement, franchisors also do not control the hiring of employees, training, promotions, terminations, hours worked, employee benefits, or working conditions within franchisees.[105]

Courts should receive DOJ's single entity argument with skepticism. The argument that the franchisor and its franchisees are so intertwined that they cannot conspire with one another finds little support in reality. Courts should look to the governing agreement between a franchisor and a franchisee and evaluate the extent to which each franchisee is given autonomy and independence in operating its business. Franchisees that retain a significant amount of responsibilities, control, and discretion in the operation of the business should not be immune from antitrust liability for its agreements with its parent company.

3. Ancillary Restraint v. Naked Restraint

Although the DOJ advanced several arguments against the application of the per se rule, the dispute regarding which standard should govern is likely to turn on the issue of whether these restraints are naked or ancillary. Even if the existence of a horizontal agreement between competitors were established, the court would also need to determine whether the restraint on trade is "naked" or "ancillary."[106]

A horizontal agreement is considered a naked restraint on trade if it has the purpose or likely effect of increasing price or decreasing output and is unrelated to joint economic activity between parties.[107] Naked restraints on trade are presumed anticompetitive and are thus per se illegal.[108] Once the court concludes that the restraint at issue is naked, no further inquiry into the merits of a particular restraint is necessary.[109] In its earlier policy statement with the FTC,

103. *See* Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907, 934–36 (2018) (discussing the lack of control that franchisors exercise over franchisees with respect to day-to-day operations and franchisee employees); *see also* Patterson v. Domino's Pizza, LLC, 333 P.3d 723, 740–42 (Cal. 2014) (holding that plaintiff failed to provide sufficient evidence that franchisor Domino's controlled the day-to-day aspects of its franchisee's employment and employee conduct).

104. *See, e.g.*, Class Action Complaint, *supra* note 34, at 17; *see also* Lydia DePillis, *Why Franchises Are Such a Huge Obstacle to Higher Wages*, WASH. POST (Dec. 6, 2013, 11:26 AM), https://www.washingtonpost.com/news/wonk/wp/2013/12/06/why-franchises-are-the-biggest-obstacle-to-higher-wages/ (discussing franchisor's ability to "abdicate responsibility for wages and working conditions" at its franchisee workplaces).

105. *See, e.g.*, Class Action Complaint, *supra* note 34, at 17; Orozco v. Plackis, 757 F.3d 445, 450 (5th Cir. 2014) (finding insufficient evidence to demonstrate that the franchisor supervised or controlled franchisee's employee work schedules or conditions).

106. AREEDA & HOVENKAMP, *supra* note 5, ¶ 1906.

107. *Id.* ¶ 1906a.

108. *Id.* ¶ 1910.

109. *Id.* ¶ 1910b.

the DOJ stated that the per se rule applied where the no-poach agreements were "naked," or "separate from or not reasonably necessary to a larger legitimate collaboration between the employers."[110]

A restraint is ancillary if its objectively intended purpose or likely effect is lower prices, increased output, or is an otherwise profitable or rational decision for the participants.[111] To be ancillary, an agreement must be subordinate or collateral to a separate, legitimate transaction.[112] The agreement must be reasonably necessary to facilitate the main transaction in accomplishing its broader purpose.[113] Although not all ancillary agreements are lawful, there is a strong presumption that they do not violate antitrust law.[114]

Applying the ancillary restraint doctrine, the Supreme Court in *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.* applied the rule of reason standard although the agreements at issue were horizontal.[115] *Broadcast Music* involved a blanket licensing agreement whereby copyright owners of musical compositions licensed their compositions collectively.[116] By purchasing the blanket license, licensees could publicly perform any of the works included in the license rather than negotiate rights individually with each copyright owner.[117] The Court found that the defendants' blanket license was reasonably ancillary to a legitimate business transaction because it increased market efficiencies.[118] The business venture required a certain degree of cooperation between competitors and the restraint was necessary to facilitate that cooperation.[119] Unlike a naked restraint that is presumed to have no procompetitive justifications, ancillary restraints like the license in *Broadcast Music* warrant a more comprehensive rule of reason analysis to determine section 1 liability.[120]

In its Statement of Interest, the DOJ invoked the ancillary restraint doctrine and argued that, like the blanket license in *Broadcast Music*, some franchise no-poach agreements are reasonably necessary to the franchise collaboration and yield legitimate benefits.[121] According to its theory, by limiting *intrabrand* competition, no-poach agreements may actually foster *interbrand* competition.[122] The no-poach agreements can ensure uniformity of the franchise's brand and quality of service, which is necessary for a franchise

110. 2016 JOINT POLICY STATEMENT, *supra* note 10, at 3.
111. AREEDA & HOVENKAMP, *supra* note 5, ¶ 1905.
112. *Id.*
113. *Id.* ¶ 1912.
114. *Id.*
115. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 15 (1979).
116. *Id.* at 5.
117. *Id.*
118. *Id.* at 23.
119. *Id.*
120. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986).
121. DOJ's Statement of Interest, *supra* note 12, at 3.
122. *Id.* at 12.

system's success.[123] Interbrand competition is encouraged because, theoretically, it yields benefits to consumers.[124]

However, the argument that the no-poach agreements are ancillary because they provide potential benefits to consumers overlooks a key issue. The no-poach agreements restrain trade in the *labor* market, not the *product* market that the franchisees serve.[125] By limiting output in the labor market, the no-poach agreements directly affect *employees*, not *consumers*.[126] To determine whether a restraint may offer procompetitive effects, the court should consider procompetitive effects in the market in which the restraint directly occurs.[127] Here, the restraint caused by no-poach agreements directly occurs in the *labor* market, not the product market.[128] Thus, the court should examine the benefits, or lack thereof, of a restraint on *employees* in the labor market. Even if defendants can show that these agreements promote interbrand competition in the product market, this would be an out-of-market benefit that would not excuse the restraint at issue.[129]

Additionally, unlike the cases in which courts applied the ancillary restraint doctrine, franchise no-poach cases do not involve an industry in which restrictions on competition are essential for its existence. For example, courts have recognized that unusual business ventures like group music licensing and sports leagues require cooperation among competitors.[130] The DOJ failed to explain why a restraint on labor market competition is necessary for franchisees to produce their products and services.[131] Franchise defendants have argued that no-poach agreements protect franchisees' investments in providing specific training for its workers. In an industry with a high turnover rate, franchisees use these agreements to ensure that the net returns from training shift in the direction of the employer.[132] This argument fails to prove or explain how the training would be lost to the franchisees without the use of no-poach agreements. If this argument were true, it would essentially concede that franchisees are in fact separate economic actors, cutting against the single-entity theory. If the franchisees were a single entity operating under one brand, as rule of reason

123. *Id.*

124. *Id.*

125. American Antitrust Institute Letter, *supra* note 14, at 3.

126. *Id.*

127. Masterman, *supra* note 35, at 1414.

128. *Id.*

129. American Antitrust Institute Letter, *supra* note 14, at 8.

130. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

131. *See* DOJ's Statement of Interest, *supra* note 12. While the DOJ argued that no-poach agreements could qualify as ancillary restraints if they are reasonably necessary to a legitimate joint activity, it did not explain why these restraints are necessary to the franchise agreement. *See id.* at 13, 16–17.

132. *See* Defendants' Memorandum in Support of Their Motion to Dismiss Plaintiff's First Amended Complaint Under Federal Rules of Civil Procedure 12(B)(1) and 12(B)(6) at 8, 14, Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786 (S.D. Ill. 2018) (No. 3:18-CV-00133) [hereinafter Defendants' Memorandum in Support of Their Motion to Dismiss Plaintiff's First Amended Complaint].

proponents have argued, an employee who benefits from the training provided by one franchisee could transfer those same skills to another franchisee without the risk of the franchise brand losing its investments.

Additionally, no-poach provisions are not ancillary because they are not reasonably necessary to effectuate the broader purpose of the franchise agreement. To constitute an ancillary restraint, the restraint must be reasonably tailored to further pro-competitive justifications.[133] The DOJ failed to demonstrate how no-poach provisions could be considered reasonably tailored to achieve the purported procompetitive benefits. It offered no evidence to suggest that the survival of a franchise system depends upon retaining employees and decreasing turnover. In fact, there is evidence suggesting otherwise. Following a series of investigations and civil settlements, 150 companies in the state of Washington have removed no-poach provisions from their franchise agreements.[134] Additionally, a minority of franchise systems in Washington did not use these no-poach agreements to begin with.[135] If the purported purpose of the no-poach agreements were to maintain brand uniformity and increase interbrand competition, it is likely that the franchise model could achieve this goal without restraining competition in the labor market.[136]

There are more efficient and procompetitive means to protect franchisees' investments in employees. Employers can offer bonuses for employees who stay with the franchisees for a certain amount of time. Additionally, employers can offer competitive wages that attract and retain qualified employees. These are just a few examples of solutions that employers can implement to avoid employee turnover and a loss of investment—the consequences that the no-poach agreements purportedly prevent—and also contribute to a competitive labor market. Just as firms make investments and developments in their products in order to attract consumers and compete in the product market, employers must create and maintain conditions that attract employees in the labor market.

The DOJ's arguments in support of rule of reason are grounded in a mischaracterization of the franchise system and fail to explain why an employer's involvement in a franchise system warrants a departure from existing section 1 precedent. Although the reasoning in its Statement of Interest is subject

133. *See, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 7–8 (2006).

134. Statement of Rahul Rao, *supra* note 74, at 2–3.

135. *Id.*

136. "The economic underpinnings of franchising center around brand names and the public's perception of quality and uniformity associated with those brand names." David J. Kaufmann, Felicia N. Soler, Breton H. Permesly & Dale A. Cohen, *A Franchisor Is Not the Employer of Its Franchisees or Their Employees*, 34 FRANCHISE L.J. 439, 453 (2015). Franchisors can take a variety of measures to ensure that the quality of its goods and services are uniform among franchisees and promote the franchise brand. *See id.* at 454–55. Franchisors can ensure high quality products by prescribing rigorous production standards with which franchisees must comply. Additionally, franchisors can ensure brand uniformity by prescribing standards for a franchisee location's physical appearance, employee uniforms, and use of its trademarks. *See id.*

to criticism, the DOJ provided defendants additional support to use as leverage in recent no-poach cases.

II. THE DOJ'S INCONSISTENT POSITIONS

The DOJ has weighed in on the issue of no-poach agreements twice in the past decade: first in 2016 in its joint policy statement with the FTC,[137] and again in 2019 when the DOJ filed a statement of interest in a no-poach case to which it was not a party.[138] As more no-poach agreements become the subjects of litigation, courts will likely consider the extent to which the DOJ's guidance on the matter should shape the outcome.

A. 2016 DOJ AND FTC JOINT POLICY STATEMENT

The DOJ and FTC are joint enforcers of federal antitrust law.[139] In October 2016, the Antitrust Division of the DOJ and the FTC published a joint policy statement titled Antitrust Guidance for Human Resource Professionals.[140] In this statement, the DOJ and the FTC established important guidelines for antitrust compliance in the labor market. Specifically, the statement established that naked no-poach agreements among employers are per se illegal and may be subject to criminal prosecution under section 1 of the Sherman Act.[141] First stating that firms that compete for employees are considered competitors under antitrust law, the DOJ and the FTC then plainly state that "naked wage-fixing or no-poaching agreements among employers, whether entered into directly or *through a third-party intermediary*, are per se illegal under the antitrust laws."[142] The use of naked no-poach agreements in the franchise sector is the type of conduct the DOJ and FTC appears to condemn in its 2016 Joint Policy statement. Through their policy statement, the DOJ and FTC intended to put firms, like franchise systems, on notice that such agreements are per se illegal.[143]

B. PRIOR ENFORCEMENT ACTIONS BROUGHT BY THE DOJ

Both before and after the DOJ communicated its position in the 2016 Joint Policy, its civil enforcement efforts have utilized the per se approach to challenge no-poach agreements.

Under the Obama Administration, the DOJ investigated the employment and recruitment practices of several technology companies in the Silicon Valley. After concluding that the firms entered agreements that were per se illegal under

137. *See* 2016 JOINT POLICY STATEMENT, *supra* note 10.
138. *See* DOJ's Statement of Interest, *supra* note 12.
139. 2016 JOINT POLICY STATEMENT, *supra* note 10, at 1.
140. *Id.*
141. *Id.* at 3.
142. *Id.* (emphasis added).
143. *See id.* at 3–4.

antitrust law, the DOJ brought a civil suit against the companies in 2010.[144] The competing firms expressly agreed to not solicit current employees of the other firms involved in the bilateral agreement.[145] The DOJ concluded that these agreements were facially anticompetitive and "disrupted the normal price-setting mechanisms that apply in the labor setting."[146] For this reason, the DOJ characterized this agreement as a naked restraint of trade under antitrust law.[147] To settle the matter, the defendant firms agreed to refrain from enforcing or entering into similar no-poach agreements.[148]

In 2019, the DOJ, under the Trump Administration, filed a civil complaint against two rail equipment suppliers for implementing and maintaining a long-running no-poach agreement.[149] The DOJ noted that the agreement technically warranted criminal charges, but, in an exercise of prosecutorial discretion, the Agency decided to pursue only civil violations for no-poach agreements entered into before its 2016 Joint Policy announcements.[150] The DOJ argued that the no-poach agreements were per se illegal because they substantially reduced competition for employees and were not necessary to a legitimate business transaction.[151]

Although the DOJ followed through with its communicated intention to challenge no-poach agreements as per se illegal, the DOJ's warning of criminal enforcement has remained only a warning. The DOJ's 2016 Joint Policy provided that naked no-poach agreements are subject to criminal prosecution.[152] The DOJ further emphasized the potential in 2017 when then-DOJ Antitrust Division chief Makan Delrahim announced that criminal no-poach enforcement was a "high priority" for the department.[153] Despite these announcements, the DOJ has yet to bring a criminal no-poach case.[154] The DOJ's position on no-

144. Complaint at 2, United States v. Adobe Sys., Inc., No. 10 CV 1629, 2011 WL 10883994 (D.D.C. Mar. 18, 2011) (No. 1:10-CV-01629).

145. *Id.* at 4–8.

146. Competitive Impact Statement, *supra* note 53, at 10.

147. *Id.* at 2–3.

148. *Adobe Sys., Inc.*, 2011 WL 10883994, at *1–2.

149. Complaint at 2, United States v. Knorr-Bremse AG, No. 1:18-CV-00747-CKK, 2018 WL 4386565, (D.D.C. July 11, 2018) (No. 1:18-cv-00747).

150. Matthew Perlman, *Employees Sue Knorr, Wabtec After DOJ No-Poach Settlement*, LAW360 (Apr. 16, 2018, 8:34 PM), https://www.law360.com/articles/1033813/employees-sue-knorr-wabtec-after-doj-no-poach-settlement.

151. Complaint, *supra* note 149, at 11.

152. 2016 JOINT POLICY STATEMENT, *supra* note 10, at 2.

153. *See* Bryan Koenig, *Where Are the No-Poach Prosecutions DOJ Promised?*, LAW360 (Oct. 3, 2019, 6:26 PM), https://www.law360.com/articles/1205315.

154. *Id.* As this Note was going to print, the DOJ filed criminal charges against an outpatient medical facility for its alleged use of no-poach agreements. *See* Press Release, U.S. Dep't of Just., Health Care Company Indicted for Labor Market Collusion (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion. This is the first and only time that the DOJ has brought criminal charges related to no-poach agreements. Matthew Perlman, *DOJ Targets UnitedHealth Unit for Criminal No-Poach Pacts*, LAW360 (Jan. 7, 2021, 5:56 PM), https://www.law360.com/articles/1342573/doj-targets-unitedhealth-unit-for-criminal-no-poach-pacts. Although this case does not arise in the franchise context, its outcome may shed light on how the DOJ, under new leadership, may approach franchise no-poach agreements in the future.

poach agreements, as articulated in policy statements and public announcements, now appears less emphatic due to the lack of criminal prosecutions and its 2019 Statement of Interest.

C. IMPACT OF THE DOJ'S STATEMENT OF INTEREST

In tension with its previous civil enforcements and official policy statements, the DOJ recently argued that some well-established antitrust principles regarding the use of no-poach agreements do not apply in the franchise sector.[155] This position, albeit flawed, now forms one of the bases of the franchise defendants' arguments in no-poach litigation.[156] In 2016, the DOJ seemed to clearly articulate its position regarding enforcement of no-poach agreements in the labor market.[157] Three years later, in three private civil cases, the DOJ filed a statement of interest in which it advocated for a different approach to examine no-poach agreements when they are used in the franchise sector.[158] In its Statement of Interest, the DOJ argued that a court must examine each franchisor-franchisee relationship on a case-by-case basis in order to determine which legal standard should apply.[159] The DOJ's argument relies upon the ancillary restraint doctrine, which, as previously discussed, should not apply to the use of no-poach agreements in the franchise sector.

The DOJ's Statement of Interest received the attention and criticism of other key players in antitrust law, signaling a disagreement regarding the appropriate standard under which franchise no-poach agreements should be analyzed. Due in part to this disagreement in the antitrust community, courts have relucted to issue broad pronouncements regarding the appropriate standard of review for franchise no-poach agreements.

1. Responses to the DOJ's Statement of Interest

In response to the DOJ's Statement of Interest, the American Antitrust Institute expressed its concern that the DOJ's position will misguide district courts and discourage antitrust plaintiffs from challenging these no-poach agreements.[160] It communicated its position that no-poach agreements in the franchise industry will inevitably harm labor market competition and have no identifiable efficiencies that would warrant the application of the rule of reason standard.[161]

155. *See* DOJ's Statement of Interest, *supra* note 12, at 11.

156. *See, e.g.*, Bryan Koenig, *Jimmy John's Cites DOJ's No-Poach Ammo in Dismissal Bid*, LAW360 (Mar. 15, 2019, 10:23 PM), https://www.law360.com/articles/1139458/jimmy-john-s-cites-doj-s-no-poach-ammo-in-dismissal-bid.

157. 2016 JOINT POLICY STATEMENT, *supra* note 10, at 3.

158. *See* DOJ's Statement of Interest, *supra* note 12.

159. *Id.*

160. American Antitrust Institute Letter, *supra* note 14, at 1.

161. *Id.* at 2.

The DOJ's statement also prompted criticism from the antitrust subcommittee of the United States House of Representatives. In a letter sent to Makan Delrahim, then-chief of the DOJ's Antitrust Division, subcommittee chairman Representative David Cicilline expressed concern regarding the division's increased involvement, by way of amicus briefs and statements of interests, in cases where the United States is not a party.[162] The letter noted that the "Division's decision to intervene has risked undermining enforcement efforts by state attorneys general and the Federal Trade Commission, raising serious questions about the Division's motives and judgment."[163] The letter singled out the DOJ's Statement of Interest with regard to no-poach agreements in franchising contracts and cited to "numerous experts and scholars" who have rejected the DOJ's position, while also acknowledging its contradiction with previous statements the DOJ made regarding labor market restraints.[164] Finally, the subcommittee argued that the DOJ's "decision to interfere in order to win greater protection for corporate franchisors that restrict labor market competition . . . reflects grossly misshapen priorities."[165]

2. Case Example: Jimmy John's

The shift in the DOJ's position on no-poach agreements has left courts reluctant to determine which standard is appropriate when reviewing no-poach agreements and has provided support to defendants in these actions.[166] A recent case, *Butler v. Jimmy John's Franchise, LLC*, illustrates the nature of no-poach agreements and their implications in the franchise sector.[167] This case, still ongoing in district court, is emblematic not only of a typical no-poach provision in a franchise agreement but also of the lack of clarity regarding the appropriate standard of review for these agreements.

Jimmy John's Franchise, LLC ("Jimmy John's") is the franchisor of the Jimmy John's system.[168] Jimmy John's is a sandwich store chain with over 2,700 locations in over forty states.[169] The franchise restaurants employ tens of

162. Letter from David N. Cicilline, Chairman, Subcomm. on Antitrust, Com., & Admin. Law, U.S. House of Reps., to Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just. 1 (May 22, 2019), https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/DOJ_05222019.pdf.

163. *Id.*

164. *Id.* at 2–3.

165. *Id.* at 4.

166. In several franchise no-poach cases, the courts have declined to decide, at the motion to dismiss stage, the appropriate standard of review to apply in the case. *See, e.g.*, Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018); Blanton v. Domino's Pizza Franchising LLC, No. 18-13207, 2019 WL 2247731, at *1 (E.D. Mich. May 24, 2019); Fuentes v. Royal Dutch Shell PLC, No. CV 18-5174, 2019 WL 7584654, at *1 (E.D. Pa. Nov. 25, 2019); Robinson v. Jackson Hewitt, Inc., No. 19-9066 (SDW) (LDW), 2019 WL 5617512, at *7 (D.N.J. Oct. 31, 2019); *In re* Papa John's Emp. & Franchisee Emp. Antitrust Litig., No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *9 (W.D. Ky. Oct. 21, 2019).

167. *See Butler*, 331 F. Supp. 3d 786.

168. Class Action Complaint, *supra* note 34, at 1.

169. *Id.*

thousands of workers across the United States.[170] Jimmy John's enters into franchise agreements with franchise owners, and each franchise is an independently owned and operated business.[171]

Franchise restaurants are responsible for their own day-to-day operations, including all employment practices.[172] In its franchise agreement, Jimmy John's specifically clarifies that it plays no role in the franchisees' employment practices or labor relations.[173] Beginning no later than 2012, and likely back to at least 2007, the Jimmy John's franchise agreement contained a provision that required each franchisee to agree to not "hire as an employee" any person who currently is, or within the preceding twelve months was, employed by another Jimmy John's franchisee.[174] Additionally, franchisee *employees* were restricted, "as a condition of their employment," from hiring employees from other Jimmy John's franchisee restaurants.[175] Franchise agreements executed in 2015, 2016, and 2017 contained a provision prohibiting franchisees from soliciting or initiating recruitment of other franchisees' employees.[176] These contracts also explicitly indicate that the franchisees are "third party beneficiaries" of the agreement and have independent rights of enforcement.[177] When entering into the franchise agreements, franchisees agreed to pay $50,000 for each violation of the no-poach provision.[178] Additionally, Jimmy John's reserved the right to terminate a franchise agreement entirely for violation of the no-poach provision.[179]

The plaintiff in this case, Sylas Butler, was a part-time employee at a Jimmy John's restaurant location in Illinois.[180] During his time working at the restaurant, Butler was paid minimum wage.[181] In January 2017, after Butler's supervising manager reduced his hours per week, Butler quit his job at that particular restaurant in order to obtain employment at a different location that could offer him more hours.[182] Butler was not eligible for hire at any other Jimmy John's location because of the existing no-poach agreements among franchise locations.[183]

In January of 2018, Butler filed a class action lawsuit against Jimmy John's in Illinois federal district court.[184] He alleged that Jimmy John's no-poach

170. *Id.* at 11.
171. *Id.* at 12.
172. *Id.* at 13.
173. *Id.* at 16.
174. *Id.* at 20.
175. *Id.* at 21–22.
176. *Id.* at 4.
177. *Id.*
178. *Id.* at 3, 5.
179. *Id.*
180. *Id.* at 34.
181. *Id.*
182. *Id.*
183. *Id.*
184. *See id.* at 1.

agreements violate section 1 of the Sherman Act and that he suffered suppressed wages and diminished employment opportunities as a result of the defendant's anticompetitive conduct.[185]

Jimmy John's moved to dismiss the plaintiff's complaint, arguing that the plaintiff lacked standing to bring the suit, and, alternatively, that he failed to state a plausible section 1 claim.[186] It argued that intrabrand no-hire agreements are not per se unlawful and are instead subject to the rule of reason analysis.[187] Jimmy John's reasoned that because the franchise agreements are between Jimmy John's—the franchisor —and its franchisees, the agreements are vertical and are thus not subject to per se liability under section 1 of the Sherman Act.[188]

Jimmy John's argued that even if the plaintiff's claim could proceed under the rule of reason test, it would ultimately fail.[189] Under Jimmy John's theory, procompetitive justifications for no-poach agreements outweigh any alleged potential harm.[190] According to its argument, franchisees invest significant resources in hiring, training, and retaining employees.[191] Preventing employees from "free-riding" at the franchise level within the Jimmy John's system protects these investments and promotes Jimmy John's products, thereby encouraging interbrand competition with other fast-food franchises outside of the Jimmy John's brand.[192]

The district court rejected Jimmy John's argument that the plaintiff lacked standing to bring the suit and allowed the case to proceed.[193] However, the court declined to decide which standard of review should apply because it was too early to decide.[194] The judge noted that plaintiffs would have to provide "Herculean" evidence of franchise independence to invoke the per se standard.[195] In a second attempt to dismiss the lawsuit, Jimmy John's relied upon the DOJ Statement of Interest which advocated for the rule of reason approach.[196] With a new judge presiding, the court once again denied Jimmy John's motion to dismiss and declined to conclude the appropriate standard of review, noting that "the legal questions here are in their infancy, and this battle looks like one that will make its way through the courts for years to come. This

185. *Id.* at 34–35.
186. Defendants' Memorandum in Support of Their Motion to Dismiss, *supra* note 62, at 1.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 1–2.
191. *Id.*
192. *Id.*
193. Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 793, 795 (S.D. Ill. 2018).
194. *Id.* at 797.
195. *Id.*
196. Defendants' Memorandum in Support of Their Motion to Dismiss Plaintiff's First Amended Complaint, *supra* note 132, at 2.

case in particular may end up being the vanguard in that battle."[197] The litigation involving Jimmy John's is still ongoing in district court.

As articulated by the judge in *Butler v. Jimmy John's*, courts appear reluctant to determine the appropriate standard at the motion to dismiss stage as they grapple with the unresolved issue.[198] The DOJ's recent Statement of Interest, and its apparent departure from its previous guidance and enforcement efforts, likely contributed to the lack of clarity on that point.

3. Varied Approaches to No-Poach Litigation

The disagreement among key players in the world of antitrust law signals uncertainty for the future of no-poach agreements in the franchise industry. This uncertainty is reflected in recent cases in which federal district courts across the nation grappled with the issue. Six courts, including the court in *Butler v. Jimmy John's*, concluded that the plaintiffs had plausibly alleged horizontal restraints of trade but nevertheless declined to resolve the issue of the appropriate standard at the motion to dismiss stage.[199] A federal district court in Michigan, however, agreed with the defendant and applied the rule of reason standard at the motion to dismiss stage, where it ultimately dismissed the plaintiff's complaint for failure to sufficiently allege an unreasonable restraint.[200] Another court dismissed the plaintiff's complaint after holding that the single-entity doctrine applied and thus precluded section 1 liability.[201]

The extent to which the DOJ's positions on the issue influenced the courts' analyses in these franchise no-poach cases is unclear. In many of these cases, the plaintiffs relied upon the DOJ and FTC 2016 Joint Policy to support their contention that the per se rule should apply to their claims. The DOJ's 2019 Statement of Interest provided defendants with a tool to not only undermine the plaintiff's use of the 2016 guidance but also advance their arguments that the rule of reason is the appropriate standard.[202] Although the DOJ's statements in the 2016 Joint Policy and its subsequent 2019 Statement of Interest are not binding on courts, the DOJ's guidance on antitrust law is considered persuasive authority.

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197. Conrad v. Jimmy John's Franchise, LLC, No. 318CV00133NJRRJD, 2019 WL 2754864, at *3 (S.D. Ill. May 21, 2019).

198. *See supra* note 166.

199. *See Butler*, 331 F. Supp. 3d at 797.; Blanton v. Domino's Pizza Franchising LLC, No. 18-13207, 2019 WL 2247731, at *1 (E.D. Mich. May 24, 2019); Fuentes v. Royal Dutch Shell PLC, No. CV 18-5174, 2019 WL 7584654, at *1 (E.D. Pa. Nov. 25, 2019); Robinson v. Jackson Hewitt, Inc., No. 19-9066 (SDW) (LDW), 2019 WL 5617512, at *7 (D.N.J. Oct. 31, 2019); *In re* Papa John's Emp. & Franchisee Emp. Antitrust Litig., No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *9 (W.D. Ky. Oct. 21, 2019).

200. *See* Ogden v. Little Caeser Enterprises, Inc., 393 F. Supp. 3d 622, 634–40 (E.D. Mich. 2019).

201. *See* Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322, 1331–32 (S.D. Fl. 2020).

202. *See, e.g.*, Defendants' Memorandum in Support of Their Motion to Dismiss Plaintiff's First Amended Complaint, *supra* note 132, at 1–2, 7–9; Defendant Jiffy Lube Int'l, Inc.'s Memorandum of Law in Support of Its Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6) at 9, *Fuentes*, 2019 WL 7584654 (No. 18-5174).

Litigants and courts value guidance from the DOJ's Antitrust Division, one of the federal antitrust enforcement arms, due in part to the nuanced economic and market analysis involved in antitrust law.[203] For example, although the DOJ's merger guidelines do not bind courts' review of proposed mergers, courts have viewed the guidelines as a helpful framework for their own analyses.[204] A 2019 analysis examined thirty-two filings, including amicus briefs and statements of interest, filed by the DOJ under the leadership of then-Assistant Attorney General for Antitrust, Makan Delrahim.[205] Delrahim explained that the purpose of the filings is to "address developments in the case law earlier and more frequently, offering [the DOJ] the opportunity to have an outsized impact with [the DOJ's] resources."[206] Of nineteen cases that had been resolved at the time of the analysis, the courts agreed with the DOJ's position in eight and disagreed with the DOJ's position in five.[207]

The DOJ's position on franchise no-poach agreements, as asserted in its Statement of Interest, does not bind the courts.[208] Courts should reject the DOJ's position that not all franchise no-poach agreements are per se illegal because of the flawed reasoning that underlies that argument. The application of the per se standard to franchise no-poach agreements is not only supported by section 1 precedent, but it is also supported by policy considerations.

III. THE FUTURE OF FRANCHISE NO-POACH AGREEMENTS

Although the dispute regarding the appropriate standard of review for no-poach agreements may seem like a mere nuance in antitrust law, the resolution of the dispute has important implications for workers in the United States. Courts must consider the ways in which the use of no-poach agreements in the franchise

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203. *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 772, 780 (2006); *see also* Leah Brannon & Kathleen Bradish, *The Revised Horizontal Merger Guidelines: Can the Courts Be Persuaded?*, ANTITRUST SOURCE, Oct. 2010, at 1, 1–2.

204. *See, e.g.*, United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017) ("Although, as the Justice Department acknowledges, the court is not bound by, and owes no particular deference to, the [Merger] Guidelines, this court considers them a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing proposed mergers.").

205. *DOJ Weighs in on More Antitrust Cases, With Mixed Success*, MLEX (Oct. 1, 2019, 12:00 AM), https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/antitrust/doj-weighs-in-on-more-antitrust-cases-with-mixed-success#:~:text=The%20Justice%20Department%20has%20been,according%20to%20an%20MLex%20analysis. In the other six cases, the court neither adopted nor rejected the DOJ's position. *Id*.

206. *Id.*

207. *Id.*

208. *See* Conrad v. Jimmy John's Franchise, LLC, No. 318CV00133NJRRJD, 2019 WL 2754864, at *3 (S.D. Ill. May 21, 2019) ("The DOJ's Antitrust Division is certainly a titan in this arena and carries a considerable burden in interpreting open questions in antitrust jurisprudence—that is without question. But DOJ is not the ultimate authority on the subject . . . ."); *In re* Papa John's Emp. & Franchisee Emp. Antitrust Litig., No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *5 (W.D. Ky. Oct. 21, 2019) ("The Court will 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.").

industry yields tangible effects on American workers and the economy in general. The courts are equipped to resolve the franchise no-poach problem; however, other non-judicial solutions may provide more immediate and effective results.

A. POLICY CONSIDERATIONS

When determining the appropriate standard under which franchise no-poach agreements should be reviewed, courts should account for the public policy implications of their decisions. The no-poach agreements at issue here harm employees by effectively suppressing wages, reducing their bargaining power, and restricting their mobility.[209] Although protecting employees in the labor market is not the sole purpose of antitrust law, antitrust law is an important tool for ensuring healthy competition for American workers.[210] Antitrust law aims to encourage free markets with procompetitive benefits to both consumers and employees.[211] Its ultimate goal is to not only retroactively punish antitrust violations but to prevent them altogether.[212] Using the per se standard to analyze no-poach agreements will prevent franchisors from using these agreements altogether and thus encourage robust competition in the labor market.

No-poach agreements expand the already existing problem with labor mobility in America. Over the past few decades, American employees were less likely "to move to new places and start new jobs."[213] One explanation for a lack of mobility in the labor market is a lack of competition.[214] When employees have more options for employment, employers will compete more effectively for their labor.[215]

No-poach agreements harm employees by tending to deprive them of better job growth or mobility opportunities.[216] A franchisee employee may choose to seek employment at a different franchisee location for a variety of reasons. An employee may wish to move to a franchisee location at which he or she is scheduled to work more hours per week, is given a more flexible schedule, or

209. *See* KRUEGER & POSNER, *supra* note 46, at 6–7.

210. Statement of Doha Mekki, *supra* note 1, at 1.

211. *Id.*

212. *See id.* at 5–6 ("[The 2016 Joint Policy Statement] affirms that workers are entitled to the benefits of a competitive market for their labor, and also encourages strong compliance programs and safeguards to prevent antitrust violations. The Guidance was intended to reach an audience that is broader than just antitrust practitioners and in order to increase deterrence, which helps preserve resources.").

213. *Antitrust and Economic Opportunity: Competition in Labor Markets: Hearing Before the Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 2 (2019) (statement of Noah Phillips, Comm'r, Fed. Trade Comm'n).

214. Letter from Rohit Chopra, Comm'r, Fed. Trade Comm'n, to Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just. 1–3 (Sept. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf.

215. *Id.* at 1.

216. KRUEGER & POSNER, *supra* note 46, at 6.

offered promotional opportunities.[217] Additionally, depending on external factors, employees may need to work at a franchisee location that is geographically more convenient. The no-poach agreements restrict workers' outside options and thus limit their job growth and opportunities.[218]

A lack of worker mobility is a contributing factor to the long-term macroeconomic trend of stagnant wages and rising inequality across the country.[219] In 2017, the national unemployment rate reached a sixteen-year low and the number of available jobs reached an all-time high; however, wage growth has remained fairly stagnant.[220] When labor is "perfectly" mobile, the labor supply is elastic and thus low wages will prompt employee migration.[221] In a normal labor market without restraints like no-poach agreements, employees seeking higher wages will either solicit a raise from their employer or seek employment elsewhere.[222] The use of no-poach agreements, however, has distorted the price-setting mechanisms that would otherwise apply in a normal labor market.[223] Analogous to the way that price-fixing agreements produce higher prices for consumers, no-poach agreements produce lower wages for employees.[224] Just as decreased competition in a product market enables firms to raise prices without a decrease in demand, restricted competition in a labor market enables employers to suppress workers' wages without fear of them leaving.[225]

No-poach agreements are especially problematic because they pose potential wage suppression for individuals who are already paid low wages. No-poach agreements are common in the fast-food industry.[226] The average fast-food worker earns $300 per week before taxes.[227] According to a 2014 study, 12% of workers earning less than $40,000 annually with below-college-level

217. *See, e.g.*, Amended Class Action Complaint at 16–17, Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) (No. 1:17-cv-04857). Plaintiff alleged that she began training courses to become eligible for the general manager position. *Id.* at 16. After her employer found out that she was pregnant, the employer cancelled the training. *Id.* When Plaintiff sought employment at another McDonald's restaurant location that offered higher wages, a corporate employee informed her that the franchisee could not even interview her for the position because of the no-poach agreement in effect. *Id.* at 17.

218. KRUEGER & POSNER, *supra* note 46, at 6.

219. *See* Abrams, *supra* note 17; *see also* COUNCIL OF ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 1 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf [hereinafter COUNCIL OF ECON. ADVISERS ISSUE BRIEF].

220. Abrams*, supra* note 17.

221. Krueger & Ashenfelter, *supra* note 41, at 9–10.

222. *See* COUNCIL OF ECON. ADVISERS ISSUE BRIEF, *supra* note 219, at 2.

223. *Id.*

224. *Id.* at 3.

225. *Id.* at 2.

226. Catherine E. Schaefer, Note, *Disagreeing Over Agreements: A Cross-Sectional Analysis of No-Poaching Agreements in the Franchise Sector*, 87 FORDHAM L. REV. 2285, 2287 (2019).

227. Abrams, *supra* note 17.

education were restricted by non-compete or no-poach covenants.[228] No-poach agreements between franchisees also threaten wages by facilitating opportunities for additional collusion.[229] When no-poach agreements are in place, franchisees are in a stronger position to expressly fix wages.[230]

In an already unequal power dynamic between an employer and employee,[231] no-poach agreements provide unfair bargaining power to employers at the expense of the employees.[232] In a labor market free from restraints, employees are generally free to seek new employment opportunities if they are dissatisfied at a current workplace.[233] If their wages are suppressed, employees can seek work with a higher-paying employer.[234] If their hours are cut or if they are not offered adequate benefits, employees can seek work with an employer who offers a more attractive benefits package and a flexible schedule.[235] However, these no-poach agreements limit employees' ability to respond to inadequacies or changes in their workplace. Employers have unfair leverage over their employees because employees implicated by these provisions cannot easily transfer to a different location within the same franchise system.[236] The employers experience less pressure to offer competitive wages, benefits, or work schedules because the risk of losing a significant number of employees is low.[237] The no-poach agreements allow employers to keep labor costs low at the expense of their employees.[238] Additionally, forces that impede labor mobility can contribute to the market power that some of the firms already have.[239]

Furthermore, the individuals who are directly inhibited by these agreements, the employees themselves, are often unaware that these provisions even exist.[240] Most employees never see the no-poach provisions and thus are not aware of them until they are actually restricted by them, because these provisions are contained within the franchise agreements.[241] The lack of transparency regarding the no-poach agreements further distorts the bargaining power between the employee and employer.

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228. Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 545 (2018).

229. Krueger & Ashenfelter, *supra* note 41, at 13.

230. *Id.*

231. COUNCIL OF ECON. ADVISERS ISSUE BRIEF, *supra* note 219, at 1, 4.

232. *Id*.

233. American Antitrust Institute Letter, *supra* note 14, at 10.

234. Krueger & Ashenfelter, *supra* note 41, at 14.

235. *See, e.g.*, Class Action Complaint, *supra* note 34, at 6–7.

236. *See* Naidu et al., *supra* note 228, at 545, 553.

237. COUNCIL OF ECON. ADVISERS ISSUE BRIEF, *supra* note 219, at 5.

238. *Id.*

239. *Id.* at 1, 4.

240. Statement of Rahul Rao, *supra* note 74, at 2.

241. *Id.*; *see also* Amended Class Action Complaint, *supra* note 217, at 17. Plaintiff was unaware that she could not seek employment at another McDonald's franchise and only found out once she tried to apply for a position at a different location. *Id.*

B. PROPOSED SOLUTIONS

Without an effective solution, the use of no-poach agreements will continue to harm employees and perpetuate economic inequality. The treatment of no-poach agreements in antitrust law will likely continue to develop in court, inviting different theories on the correct approaches that courts should take. The nature of the franchisor-franchisee relationship itself has prompted various defensive arguments which attempt to shield, and in some cases have successfully shielded, these entities from liability. Solutions to this problem are available through each of the three branches of the federal government—the courts, the executive branch through the DOJ, and the legislature. States can also address the problem through legislation or effective enforcement efforts.

First, courts should reject the DOJ's position and decline to apply the rule of reason standard to franchise no-poach agreements. Given the prevalence of these no-poach agreements in the franchise sector and other industries[242] and their harmful effects, litigation will likely continue. If courts apply the rule of reason as the uniform standard under which no-poach agreements must be analyzed, plaintiffs are unlikely to receive any meaningful remedy for their injuries. One of the most influential economists and jurists Richard Posner once described the rule of reason as "little more than a euphemism for nonliability."[243] Ninety-seven percent of all antitrust cases examined under the rule of reason standard are dismissed at the pleading stage, largely due to the high burden of proof that plaintiffs must meet.[244]

The per se rule allows courts and victims to preserve resources and avoid complicated and expensive litigation. When the per se rule applies, plaintiffs do not have to conduct a costly economic investigation into the industry in order to demonstrate that a particular restraint is unreasonable.[245] The per se standard achieves a judicial economy by allowing courts, drawing on their experience, to predict with confidence that the restraint will produce anticompetitive effects.[246] If the courts take a clear stance on the issue of franchise no-poach agreements, franchise systems can modify their franchise agreements and practices accordingly.

Second, the DOJ should reconsider the position it articulated in its Statement of Interest in light of existing section 1 jurisprudence, successful enforcement efforts by state attorneys general, and important policy objectives. If the DOJ were to adopt a clear stance on this issue and advocate for the per se rule, courts may be less reluctant to determine the appropriate standard of review. A revised position on the issue would also allow the DOJ to reconcile

242. KRUEGER & POSNER, *supra* note 46, at 7–8.

243. Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision,* 45 U. CHI. L. REV. 1, 14 (1977).

244. Masterman, *supra* note 35, at 1394.

245. *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343–45 (1982) (explaining that the policy behind the per se standard is to achieve judicial economy).

246. *Id.*

the tension between its franchise no-poach position and its previous 2016 Joint Policy with the FTC.

Lastly, legislation is likely the most effective means to eliminate the use of no-poach agreements and adequately address the exploitation of buyer power in labor markets. In 2018, Senators Elizabeth Warren and Cory Booker attempted to do so by introducing legislation titled the "End Employer Collusion Act."[247] The bill prohibits no-poach agreements entirely, providing a private right of action and giving the FTC enforcement authority.[248] The bill was reintroduced to the Senate in July of 2019, but further action has yet to be taken.[249] If enacted, this legislation could enable federal enforcement that could supplement enforcement efforts at the state level.

Even if efforts at legislation fail at the federal level, states could also raise standards for franchise workers by banning no-poach agreements. While no state has adopted such a law, action by even some states could incentivize franchise systems to eliminate the use of these agreements entirely. Although state laws could differ in scope and conflict with those of other states, franchise systems may likely remove no-poach provisions from their agreements to avoid no-poach litigation entirely. As demonstrated by the large number of franchise systems that have already agreed to end their use of no-poach agreements in connection with settlements with state enforcement authorities,[250] legislation at either the state or federal level could likely curb the use of these no-poach provisions entirely.

CONCLUSION

Although no-poach agreements have been in use for decades, their future in antitrust law remains uncertain. In developing antitrust jurisprudence, courts can seek guidance from the agencies that are responsible for enforcing antitrust laws. However, when the major authorities in the world of antitrust law disagree, courts are left to analyze a complex issue with conflicting guidance. The courts' approaches to franchise no-poach cases will have far-reaching implications that significantly impact workers. Although the DOJ is an important actor in antitrust

247. End Employer Collusion Act, S. 2480, 115th Cong. (2018); *see also* Press Release, Off. of U.S. Sen. Cory Booker, Booker, Warren Introduce Bill to Crack Down on Collusive "No Poach" Agreements (Feb. 28, 2018), https://www.booker.senate.gov/news/press/booker-warren-introduce-bill-to-crack-down-on-collusive-and-quotno-poach-and-quot-agreements.

248. S. 2480.

249. End Employer Collusion Act, S. 2215, 116th Cong. (2019); *see also Actions Overview: S.2215—116th Congress (2019–2020)*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/2215/actions?KWICView=false (last visited May 21, 2021).

250. *See* Press Release, Wash. State Off. of the Att'y Gen., AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers; Press Release, Wash. State Off. of the Att'y Gen., AG Ferguson's Initiative to End No-Poach Clauses Nationwide Secures End to Provisions at Seven More Corporate Chains (Feb. 15, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-secures-end-provisions-0.

law and enforcement, its recent position on the issue overlooks key features of the franchise industry and has bolstered the franchisors' defenses in no-poach litigation. If implemented, the DOJ's proposed standard could insulate violators of antitrust laws designed to protect against the dangers of corporate power.

Courts should reject the DOJ's position that the nature of the franchise industry warrants a departure from the rule that no-poach agreements are per se illegal under section 1 of the Sherman Act. The DOJ should revisit its position in its Statement of Interest and advocate for a bright-line per se rule for all no-poach agreements, including those implemented by franchise systems. Alternatively, legislation at the state or federal level could eliminate any ambiguity by conclusively prohibiting no-poach agreements in the franchise industry.

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