THE 'MEANINGLESS' LITIGATION OF NO-POACH AGREEMENTS

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No-poach and wage-fixing agreements have an immense impact on American Workers by limiting and restricting job mobility. With the issuance of the 2016 HR Guidelines, however, the DOJ promised to deliver economic justice for the American People by criminally prosecuting individuals and companies for taking part in no-poach and wage-fixing agreements in violation of Section 1 of the Sherman Act. Still, despite the DOJ's commitment, courts have struggled to apply a consistent standard, resulting in a series of loses for the DOJ. As these losses continue to mount, the DOJ's ability to successfully prosecute no-poach and wage-fixing cases is undermined. Moreover, this losing streak does little to deter individuals and companies from entering into these agreements.

As litigation in this area continues, courts remain unsettled as to what standard under antitrust laws applies: the rule of reason or per se standard. In addition, recent decisions have set a higher and more demanding burden, requiring proof of meaningful cessation of market allocation—not merely that a no-poach constrains or restricts an employee's mobility. This meaningfulness standard, however, is an imprecise and unreasonable burden for prosecutors and plaintiffs to overcome. Thus, administrability under antitrust laws becomes difficult and inconsistent, suggesting that antitrust laws are not the proper enforcement mechanism if the DOJ truly seeks to deter players from entering into these types of agreements.

INTRODUCTION

Generally, it is illegal for a group of businesses to agree to suppress wages or not to compete for each other's employees—even if they are partly motivated by a compelling business purpose like reducing labor costs. According to federal guidelines, these so-called naked no-poach and wage-fixing agreements are per se violations of Section 1 of the Sherman Act and subject to criminal prosecutions.[1] Yet, despite great effort, as of December of 2023, the Department of Justice ("DOJ") has been unable to secure a single conviction.[2]

Since the issuance of the HR Guidelines in 2016—which announce that companies and individuals can be criminally prosecuted for

1. *Antitrust Guidance for Human Resource Professionals,* U.S. DEP'T OF JUST. ANTITRUST DIV. AND FED. TRADE COMM'N (Oct. 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf [hereinafter *Antitrust Guidance*].

2. *See* James H Mutchnik, John Johnson & Charles Fields, *The Evolution of DOJ's Views on No-Poach Litigation*, ANTITRUST, Sep. 9, 2022, https://www.americanbar.org/groups/antitrust_law/resources/magazine/2022-summer/evolution-doj-views-no-poach-litigation/.

entering no-poach and wage-fixing agreements—the DOJ has secured only one guilty plea—despite having charged over four companies and sixteen individuals criminally. Thus, this area of litigation continues to be unsettled at best. Specifically, courts have struggled with whether antitrust's per se or the rule of reason standard applies. Still, with the support of the Biden administration, the DOJ remains determined to continue prosecuting these agreements that harm workers despite these steady losses.[3] But, continuing to prosecute cases to no avail undermines the DOJ's ability to prosecute these cases successfully in the future and risks diluting the very purpose of antitrust laws. Ultimately, these considerations probe the question of whether antitrust law is the proper framework for monitoring and enforcing no-poach agreements.

This paper endeavors to answer this question and undertakes a comprehensive survey of the current state of no-poach litigation. Ultimately, this paper proffers two solutions: first, if antitrust laws apply, courts should adopt the rule of reason in all contexts even though the per se standard is functionally more straightforward to satisfy; second, if the DOJ seeks to deter this conduct, then antitrust laws are not the proper enforcement mechanism.

This paper proceeds in four parts. Part I begins with a discussion of the risks and consequences of no-poach agreements and their effects on the labor market. Part II then presents the relevant law and background, including a review of prominent antitrust litigation that led to mounting losses. Part II also addresses how the courts have since applied the Sherman Act following the 2016 HR Guidelines and will break down the applicable analysis in two contexts: horizontal and vertical agreements. Part III then assesses the strengths and weaknesses of the court's approach to no-poach agreements in these contexts, concluding with a discussion on where the courts are getting it wrong, considering the guiding principles of administrability, efficiency, and consistency. Finally, with this foundation, Part IV concludes that if antitrust law cannot sufficiently condemn this

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3. No-poach agreements have been an increasing feature of the US antitrust landscape over the past several years and have attracted the attention of the Biden administration, which has taken unprecedented steps to challenge no-poach agreements as part of a broader effort to increase competitiveness and mobility in the US labor market. Exec. Order. No. 14036, 86 Fed. Reg. 36987 (July 9, 2021). *See* Press Release, Fed. Trade Comm'n, FTC Marks One-Year Anniversary of Government-Wide initiative to Promote Competition the American Economy (July 11, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-marks-one-year-anniversary-government-wide-initiative-promote-competition-american-economy ("The President's Executive Order on Promoting Competition in the American Economy recognizes the whole-of-government approach needed to urgently tackle unhealthy concentration and unfair methods of competition across the economy.").

flagrantly anti-competitive conduct, then perhaps it is not the proper enforcement mechanism for labor markets.

PART I: THE RISKS AND CONSEQUENCES OF NO-POACH AGREEMENTS

The landscape of the labor market has changed as we know it. While this change has not been sudden, regulatory initiatives over the last year have made it clear that both the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ or Department) are not backing down from their mission to "deliver economic justice for the American People."[4] As former Supreme Court Justice Thurgood Marshall once said, antitrust laws are the "Magna Carta of free enterprise" because they "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[5] Earlier this year, Assistant Attorney General for the Antitrust Division Jonathan Kanter echoed this sentiment, asserting that the Department "is the only cabinet agency with a moral ideal in its name," and pledged to continue fighting for "everyone to have a fair opportunity" in the market for our labor and our ideas.[6] Therefore, although federal antitrust laws were designed to protect consumers, both the FTC and DOJ remain adamant that they extend to labor markets to ensure the protection of workers.[7]

Clearly, the DOJ intends to keep this solemn oath to protect the American people in their role as consumers and workers. With this commitment, however, has come increased enforcement and regulatory change. For example, in January 2023, the FTC issued a proposed rule that would effectively ban and invalidate certain non-

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4. *See* Jonathan Kanter, *Enforcers Roundtable*, U.S. DEP'T. OF JUST. (Mar. 31, 2023) https://www.justice.gov/opa/video/assistant-attorney-general-antitrust-division-jonathan-kanter-speaks-enforcers-roundtable ("We're going to continue to bring the cases. We're not backing down.").

5. United States v. Topco Associates, 405 U.S. 596, 610 (1972).

6. Jonathan Kanter, Assistant Att'y General, Remarks at Howard Law School (Jan. 12, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-howard-law.

7. Donald J. Polden, *Restraint on Worker's Wages and Mobility: No Poach Agreements and the Antitrust Laws*, 59 SANTA CLARA L. REV. 579, 587 (2020); *see Antitrust Guidance*, *supra* note 1, at 3; *see* Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 235–36 (1948) ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . the Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

competes as "unfair methods of competition,"[8] leading many states to follow suit and reshape the standards under which they review and enforce non-compete agreements.[9] Still, despite criticism, this trend in our labor markets is likely here to stay. [10] While non-competes have historically been justified as an essential component of protecting trade secrets and other forms of privileged information,[11] the FTC remains adamant that "non-competes harm competition in U.S. labor markets by blocking workers from pursuing better opportunities and by preventing employers from hiring the best available talent."[12] In fact, according to a 2019 study, workers who report having trade secrets are roughly 35% more likely to have a non-compete.[13] However, workers subject to a non-compete are not always privy to trade secrets,[14] and several studies show that non-competes are most

8. Notably, the rule would apply only to "workers," where "workers" is defined as a natural person who provides paid or unpaid work for the business. As such, the rule would not apply to any person restricted by a non-compete clause that is not defined as a "worker." The rule also provides for a limited exception for non-compete agreements between buyers and sellers, where the party restricted by the non-compete clause is an owner of at least 25%. Still, careful reading of the rule suggests that an individual not defined as a "worker," and holding less than 25% interest, could still be subject to a non-compete clause. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 5, 2023).

9. *See* Faw, Casson & Co., v. Frank W. Cranston, 375 A.2d 463, 465 (Del. Ch. 1977); Kodiak Bldg. Partners, LLC v. Adams, 2022 Del. Ch. LEXIS 288, *7–*8 (Del. Ch. Oct. 6, 2022); Intertek Testing Services NA, Inc. v. Eastman, 2023 Del Ch. LEXIS 66, *3 (Del. Ch. Mar. 16, 2023);; *see also* Abraham Skoff, *Look Past Delaware for 'Sale of Business' Non-Compete Enforcement*, BLOOMBERG LAW (Oct. 4, 2023), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X1819HI8000000?bna_news_filter=us-law-week#jcite (discussing a shift in the Delaware courts to enforce "sale of business" non-competes and refusal to "blue pencil" and modify or limit contractual language).

10. Sen. 1278, 2023-2024 Reg., Sess. (N.Y. 2023) (although New York has consistently been protective of the purchaser, a bill that would ban all forms of non-competition restrictions recently passed both houses and now is with Gov. Kathy Hochul to sign into law); Maysoon Khan, *New York may ban noncompete employment agreements and Wall Street is not happy*, ASSOCIATED PRESS (Nov. 16, 2023), https://fortune.com/2023/11/16/new-york-may-ban-noncompete-employment-agreements-wall-street-not-happy-kathy-hochul/.

11. Critics of the FTC's proposed rule argue that non-competes help to improve products and services, and essential component to protecting trade secrets and other privileged information—which can be the difference between success and failure. *See* Kodiak Bldg. Partners, 2022 Del. Ch. LEXIS at *14.

12. Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

13. Evan Starr, et. al, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & ECONOMICS 53, 64 (2021).

14. *Id.*

prevalent among workers with low pay and educational attainment or for whom trade secrets are less likely to be relevant.[15] Furthermore, evidence shows that non-competes disproportionately harm women and people of color.[16] Thus, the FTC's initiative to ban non-competes seems justified—especially where evidence proves that banning non-competes would result in better working environments and higher wages for underrepresented groups.[17]

The DOJ and the FTC have similarly stated their intention to crack down on illegal no-poach hiring agreements. Like a non-compete, a no-poach agreement restricts workers' mobility in the labor markets. No-poach agreements are arrangements between companies—either horizontally or vertically—not to hire, solicit, or otherwise recruit each other's employees.[18] While justifications for no-poach and non-compete agreements are similar—that they are needed to protect firm investment in trade secrets and goodwill—one crucial distinction is that no-poach agreements are bilateral, organization-level agreements.[19] That is, while a non-compete is between an employer and an employee, a no-poach is between companies competing for employees. Therefore, while non-competes are at least written into the worker's employment contract (such that workers are compensated for giving up their freedom), workers privy to no-poach agreements are often unaware that they exist.[20] No-poach agreements more severely strip workers of their agency and their ability to seek gainful employment opportunities in the labor market.

Enforcement of no-poach agreements first made headlines in 2010 when the DOJ brought a series of enforcement actions against Silicon

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15. *Id.*

16. *See generally* Marx, Matt, *Employee Non-compete Agreements, Gender, and Entrepreneurship*, 35 ORG. SCIENCE 1756 (2022) (discussing how these agreements have chilling effects on women and people of color, who historically face disadvantages in the workplace and are less likely to negotiate or violate non-compete agreements than their white counterparts).

17. Orly Lobel, THE EQUALITY MACHINE: HARNESSING DIGITAL TECHNOLOGY FOR A BRIGHTER, MORE INCLUSIVE FUTURE (2022).

18. Michael Iadevaia, *Poach-No-More: Antitrust Considerations of Intra-franchise No-Poach Agreements*, 35 ABA J. LAB. & EMP. L. 151, 152 (2020).

19. Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues in Labor Markets,* 26 ANTITRUST, Summer 2012, at 75; Note, *Disagreeing Over Agreements: A Cross-Sectional Analysis of No-Poaching Agreements in the Franchise Sector*, 87 FORDHAM L. REV. 2286, 2299 (2019).

20. Evan Starr, *The Ties that Bind Workers to Firms: No-Poach Agreements, Noncompetes, and Other Ways Firms Create and Exercise Labor Market Power*, PROMARKET (Jan. 3, 2022), https://www.promarket.org/2022/01/03/workers-poaching-noncompete-employers-labor-antitrust/.

Valley's biggest tech companies.[21] Here, the allegations suggested that Apple's CEO, Steve Jobs, and Google's CEO, Eric Schmidt, spearheaded agreements with leading technology companies not to solicit, recruit, or hire each other's employees.[22] Specifically, these "Do Not Cold Call" agreements restricted these companies from recruiting and cold-calling employees of the other company.[23] Here, although the agreements were primarily oral, email exchanges provided compelling evidence that these executives were, in fact, colluding to reduce operating costs and retain specialized personnel by agreeing not to compete in the labor markets.[24]

Although this enforcement action ended with a "quiet handshake,"[25] this was just the beginning for these large corporate players. Later, in 2013, a class of more than 64,000 high-tech employees brought allegations against these tech giants, claiming that these bilateral "no call" agreements limited their ability to move from one company to another and deprived them of the opportunity for higher salaries and better benefits.[26] While this case again resulted in settlement,[27] the aftermath of this litigation not only put

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21. These companies included Adobe, Apple, Google, Intel, Intuit, and Pixar. *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1108 (N.D. Cal. 2012).

22. As a matter of background, the DOJ opened their investigation in 2009 upon receiving reports that several leading technology companies in Silicon Valley were colluding to harm their employees by shutting off employment opportunities at each other's companies to reduce operating costs and retain critical personnel. In addition, the indictment also alleged that the companies also secretly shared salary information and agreed to stop recruiting each other's employees. The DOJ ultimately found and proffered evidence that each agreement originated with Steve Jobs, who pressured other CEOs to join the conspiracy. *See* Polden, *supra* note 7, at 584 ("Jobs' response to the challenges of keeping key talent within the company was to ask other Silicon Valley technology companies' CEOs, many of whom served on Apple's Board of Directors, to refrain from hiring Apple's engineers and, in exchange, Jobs promised that Apple would not hire their talent.").

23. *High-Tech Emp.*, 865 F. Supp.2d at 1110.

24. *Id.;* Polden, *supra* note 7, at 581.

25. *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, 282 (2018); *see also* Polden*, supra* note 7, at 585 ("Each of these agreements included a consent decree and final judgment wherein defendants did not admit any violations of law and further specified that the judgment would not have a conclusive effect in any subsequent private actions. The consent decree was beneficial to the companies, but it made it more difficult for the plaintiffs who were harmed by the conspiracy to prove their case of conspiracy to suppress competition in worker salaries and mobility.").

26. *High-Tech Emp.*, 865 F. Supp.2d at 1112.

27 .Settlement Agreement, High-Tech Emp., No. 11-CV-2509-LHK (N.D. Cal. Jan. 7, 2015) (No.1033-1), http://www.hightechemployeelawsuit.com/media/264425/redacted_settlement_agreement.pdf (a settlement of $415,000,000 was entered, however, payment to individual class members amounted to merely $5,500 per employee).

the industry on notice that antitrust laws applied to the labor markets but also showed that the industry needed greater consequences to effectively deter corporate players from entering into no-poach agreements.[28]

Since this first action, the DOJ has remained true to this goal, bringing its first criminal prosecution in 2021 against *Surgical Care Affiliates* ("SCA"), a unit of United Health Care Group. In the first ever no-poach criminal indictment, the DOJ alleged that SCA "engaged in a conspiracy to suppress competition between them [and two other companies] for the services of senior-level employees by agreeing not to solicit each other's senior-level employees."[29] The DOJ continued this momentum, bringing four similar indictments over the past three years: *United States v. Hee,* which has two defendants: Ryan Hee, a former regional manager, and VDA OC LLC, a healthcare staffing agency;[30] *United States v. DaVita,* an outpatient medical facility that conspired with SCA and two other companies not to hire DaVita's senior employees;[31] *United States v. Patel,* charging six executives of a jet-engine manufacturer and several outsourced engineering providers for agreeing not to solicit each other's engineers;[32] and *United States v. Manahe,* indicting four managers of home healthcare agencies for agreeing to fix rates and not solicit personal support specialists.[33]

As illustrated above, no-poach agreements have historically been common in industries with highly specialized labor, like staffing agencies and engineers. No-poach agreements, however, can and do have real consequences for real people. For example, in a recent case against McDonald's, Ms. Deslandes alleged that she was blocked from

28. Although the settlement prohibited the companies from entering into these agreements, they were favorable to the companies and constituted a mere slap on the wrist for these tech giants. *When Rules Don't Apply,* FILMMAKERS COLLABORATIVE SF, https://www.whenrulesdontapply.com; *see* Polden, *supra* note 7, at 585; *see also* Exec. Order No. 13725, 81 Fed. Reg. 23417 (Apr. 15, 2016) (The Obama administration issued an executive order for enforcement of antitrust laws in markets for employees, especially with respect to the market for specialized employees).

29. Indictment at 3, United States v. Surgical Care Affiliates, LLC, No. 3:21-cr-0011-L (N.D. Tex. Jan. 5, 2021).

30. Indictment, United States v. Hee, No. 2-21-cr00098-RFB-BNW (D. Nev. Mar. 26, 2021).

31. Indictment, United States v. DaVita, Inc., No. 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022).

32. Indictment, United States v. Patel, No. 3:21-cr-220-VHB-RAR (D. Conn. Dec. 15, 2021).

33. Indictment, United States v. Manahe, No. 2:22-cr-00013-JAW (D. Me. Jan. 28, 2022).

better pay by a no-poach agreement by her franchise employer.[34] Here, Ms. Deslandes started as a fry cook, worked up to a management position, and applied for a management position at a competing McDonald's franchise. McDonald's and its franchisees, however, had agreed that the franchisees would not hire each other's workers, so Ms. Deslandes could not accept the new management role for better hours and pay. Thus, while Ms. Deslandes had earned a promotion, she was deprived of this opportunity because a no-poach agreement said so.

In a similar case brought against Burger King, employees of a Burger King asserted that a no-hire agreement prevented them from being able to obtain employment at another Burger King restaurant and as a result, "caused them to be paid artificially depressed wages, suffer decreased benefits, and be deprived of job mobility."[35] Here, one employee, Jarvis Arrington, desired to earn more pay and attempted to move from the Burger King in Dolton, Illinois, to a Burger King in Chicago.[36] His employer in Dolton, however, refused to grant the transfer pursuant to the no-hire provision of its franchise agreement, depriving Mr. Arrington of this opportunity.

As the stories of Ms. Deslandes and Mr. Arington demonstrate, the damage of no-poach agreements is palpable and cannot continue. As discussed, these agreements restrict job mobility not only of highly specialized workers but also at all levels of the labor market, including employees of franchisees. Still, despite the DOJ's worthy intensions, all disputes have resulted in settlement or acquittal. So, while it is clear that no-poach agreements cannot continue, what does this mean for the successful prosecution of these cases? Where is the DOJ getting it wrong, and why are plaintiffs losing? Is there anything we can do to establish a path to victory for workers who have been deprived of opportunity and harmed by the effects of a no-poach? And what can we do to ensure that workers are protected moving forward?

34. Class Action Complaint at 3, Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260 (N.D. Ill. Jun. 25, 2018) (No. 1:17-cv-04857); *see* Brief for the United States of America and the Federal Trade Commission as Amici Curiae in Support of Neither Party, Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260 (N.D. Ill. 2018) (No. 22-2333), https://www.ftc.gov/system/files/ftc_gov/pdf/2022-11-09-Deslandes-v.-McDonald%27s-USA-Amicus-Brief-FINAL.pdf.

35. Arrington et al., v. Burger King Worldwide, Inc., 2022 U.S. App. LEXIS 24628, *10 (11th Cir. 2022).

36. Class Action Complaint at 2–3, Arrington v. Burger King Worldwide, Inc., 448 F. Supp.3d 1322 (S.D. Fla. Mar. 20, 2020).

PART II: NO-POACH LITIGATION IN TWO CONTEXTS

In October 2016, the DOJ announced its commitment to hold companies criminally responsible for entering into no-poach agreements.[37] In this joint statement with the FTC, the DOJ warned firms of the severe consequences of entering "naked agreements" not to hire each other's employees. Specifically, the Guidelines announce the intent to impose criminal liability where companies have entered into unlawful wage-fixing and no-poach agreements.[38] While enforcement prior to the Guidelines was brought under civil liability, the Guidelines have since prompted the DOJ to bring a number of criminal prosecutions, attracting greater attention to the anti-competitive effects of no-poach agreements.[39]

Under the Guidelines, no-poach and wage-fixing agreements are considered a form of price-fixing or market allocation and are therefore subject to Section 1 of the Sherman Act.[40] Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade or commerce in an area of the economy, like a market or industry.[41] Although the Act itself does not define "restraint of trade," the courts have identified certain practices and activities that are so inherently anti-competitive that they constitute per se violations.[42] Under antitrust law, per se violations of the Sherman Act arise where the nature and necessary effects of the agreements are "so plainly anti-competitive that no elaborate study of

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37. *Antitrust Guidance*, *supra* note 1, at 4.

38. Wage fixing agreements, although not within the scope of this paper, are inter or intra company agreements to set salaries at a certain level or within a certain range and often work in tandem with no-poach agreements and are therefore important to note. *Id.*

39. *Expect More DOJ Labor Market Enforcement, Despite Losses*, LAW 360 (Aug. 12, 2022).

40. While the Sherman Act was used in its early days to prevent workers from forming collective bargaining groups, there is a general lack of judicial history which pertains to wage suppression and no-poach agreements. Still, government enforcement of antitrust laws in labor markets is not new. *See* Polden, *supra* note 7, at 612 ("[A]ntitrust law has been successfully applied to a variety of restraint in markets for labor.").

41. 15 U.S.C.S. § 1 (1890).

42. Historically, courts have treated horizontal price-fixing, horizontal market allocations, and other concerted actions as per se illegal and in violation of § 1 of the Sherman Act. *See* United States v. Socony-Vaccum Oil Co., 310 U.S. 150, 216 (1940) (price fixing); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 246 (1899) (market allocation); *The Antitrust Laws*, FED. TRADE COMM'S, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Dec. 12, 2023).

the industry is needed to establish their illegality."[43] Typically, "only 'horizontal' restraints—restraints imposed by agreement between competitors—qualify as unreasonable per se." [44] However, whether this is always the case regarding no-poach agreements has yet to be seen.

A. *The "Easy" Case: Naked, Horizontal No-Poach Agreements and the Per Se Standard*

Since the DOJ first announced in 2016 its intention to begin criminally prosecuting no-poach agreements, the Department has secured zero convictions in all contested cases. In all, the DOJ has charged four companies and sixteen individuals criminally for entering no-poach and wage-fixing agreements.[45] The Department, however, has gone to trial in only three of those cases and has secured only one guilty plead.[46] Yet, despite criticism that these losses undermine the Department's ability to prosecute no-poach agreements successfully, the DOJ shows little sign of backing off.[47]

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43. *In re* Outpatient Med. Ctr. Emp. Antitrust Litig., 2022 U.S. Dist. LEXIS 173925, at *31 (N.D.Ill Sep. 26, 2022) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

44. *Id.* at *32 (quoting Ohio v. American Express Co., 138 S.Ct. 2274, 2283-84 (1988)).

45. Of the four indicted cases, two have been wage-fixing cases and two have been no-poach cases. The first wage fixing charges were brought in *United States v. Jindal* in December 2020, which proceeded to trial in April 2022. At trial the DOJ failed to convince the jury that defendant's, two employees of the healthcare staffing company, were guilty of conspiring with a competing staffing company to decrease therapists pay, although the DOJ secured a conviction for obstruction of justice. The second wage fixing jury trial, *United States v. Manahe*, ended in March 2023, when a Main federal jury acquitted four home healthcare agency managers for colluding to fix caretaker's wages during the COVID-19 pandemic. In fact, the only conviction the DOJ has secured on wage fixing charges was in n the case VDA OC, LLC, which charged a healthcare staffing agency with conspiracy to allocate school nurses and came from a pair of plea deals which resulted in no jail time or guilty plea. Mutchnik, *supra* note 2; Carsten Reichel, *Labor Pains; Taking Stock of Criminal Antitrust Enforcement Against Wage-Fixing and No-Poach Agreements*, ANTITRUST, July 15, 2023, https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2023/summer/labor-pains-taking-stock-criminal-antitrust-enforcement-against-wagefixing-and-nopoach-agreements/.

46. On October 27, 2022, the DOJ announced its first win in a no-poach case brought against VDA OC, LLC for conspiring with a competitor to allocate nurses and fix nurses wages. Press Release, U.S. Dep't. of Just., Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses (Oct. 27, 2022), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

47. *See Expect More DOJ Labor Market Enforcement, Despite Losses*, LAW 360 (Aug. 12, 2022); *DaVita and its form CEO acquitted of U.S. antitrust charges,* REUTERS

President Biden has echoed this effort, signing an Executive Order encouraging the FTC and DOJ to revise the 2016 Guidelines to strengthen employee protection, suggesting that the prosecution of no-poach and wage-fixing cases is a White House priority and runs parallel to DOJ's criminal enforcement.[48]

Agreements "separate from or not reasonably necessary to the larger legitimate collaboration between the employers" are generally "deemed illegal without any inquiry into its competitive effects."[49] That is, the agreement is per se illegal as a naked restraint on competition. Thus, courts have found it logical to apply the per se rule in horizontal agreements that impose an obvious inter-company restriction not to poach.[50] Under this approach, courts have drawn the connection to market allocation agreements—which have long been held as per se illegal under antitrust laws[51]—holding that no-poach agreements that allocate employees rather than territories, products, or customers are just market allocation agreements and are therefore per se unlawful.[52]

In January 2021—five years after the release of the Guidelines—the DOJ prosecuted its first no-poach hiring case against Surgical Health Care Affiliates on a theory of market allocation in violation of Section 1 of the Sherman Act. The first time the DOJ successfully proceeded to trial on no-poach charges, however, was not until April 2022 in the case *United States v. DaVita Inc*, which charged a kidney dialysis company and its former CEO with a horizontal conspiracy not to hire employees at competing companies—including coincidentally,

(Apr. 18, 2022) ("Wyn Hornbuckle, a spokesperson for the U.S. Justice Department said in a statement that he was disappointed in the outcome [in DaVita], and respects the jury's decision, but remains committed to enforcing antitrust laws in the labor markets.").

48. Exec. Order. No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

49. *Antitrust Guidance*, *supra* note 1, at 3.

50. In the labor markets, courts underscore that it legally makes no difference the company divide employees as opposed to "territories, customers, or products." *In re* Outpatient Med. Ctr. Emp. Antitrust Litig., 2022 U.S. Dist. LEXIS 173925, at **34-36 (N.D.Ill Sep. 26, 2022). *See* Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 188-89 (7th Cir. 1985) ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote.").

51. United States v. Topco Assocs., 405 U.S. 596, 608 (1972) ("One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.").

52. If the only effect of the agreement is the "stifling of competition," then it is a naked restraint that is per se unlawful. Outpatient Med. Ctr. Emp., 2022 U.S. Dist. LEXIS 173925, at *34. *See* United States v. DaVita Inc., 2022 U.S. Dist. LEXIS 16188, *23 (D. Colo. Jan. 28, 2022) ("[N]o-hire agreements that allocate the market have been considered per se unreasonable as horizontal market allocation agreements.").

Surgical Health Care Affiliates.[53] As discussed, in *Surgical Health Care Affiliates,* the Department indicted SCA in violation of the Sherman Act for entering and engaging in two separate bilateral conspiracies with other health care companies—including DaVita—to suppress competition for the services of senior-level employees.[54] In a two-count indictment, the Department alleged that from May 2010 until at least July 2017, SCA conspired with a Texas and a Colorado competitor to allocate senior-level employees by agreeing not to solicit each other's top executives. Specifically, the DOJ alleged that SCA enforced its no-poach by instructing recruiters not to recruit senior-level employees and requiring these employees to notify their managers when they were seeking employment elsewhere.[55] Here, although the DOJ survived the defendant's motion to dismiss, the DOJ ultimately dropped its charges against SCA without any explanation in November 2023.[56] Likewise, while the court in *DaVita* found that the per se standard applies,[57] the jurors ultimately remained unconvinced that the no-poach agreement amounted to criminal liability.[58]

The DOJ again suffered a consequential defeat to the theory of per se liability in *United States v. Patel.* Here, the Government alleged a hub-and-spoke conspiracy, charging six executives for allegedly orchestrating agreements among executives of engineering service providers not to solicit each other's engineers. [59] Although the defendants argued that the agreement had a legitimate business purpose and was ancillary to the legitimate collaboration, the DOJ proceeded under the per se standard, proffering evidence that the defendants pursued these unlawful horizontal agreements to keep wage and labor costs low by trapping engineers in their jobs and

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53. Indictment, United States v. DaVita, Inc., 2022 U.S. Dist. LEXIS 54544 (D. Colo. Mar. 25, 2022) (No. 1:21-cr-00229-RBJ) (alleging that DaVita had entered into agreements not only with SCA, but also with two other companies: Hazel Health Inc., and Radiology Partners).

54. Indictment, United States v. Surgical Care Affiliates, LLC et. al., No. 3:21-cr-0011-L (N.D. Tex. Jan. 5, 2021).

55. *Id.* at 3-5.

56. Bryan Koenig, *DOJ Abandons Last Remaining No-Poach Prosecution*, LAW360 (Nov. 14, 2023).

57. United States v. DaVita, Inc., 2022 U.S. Dist. LEXIS 54544, at *15 ("[I]t would be impressible to introduce evidence to justify the market allocation agreement. Per se rules cut through the rule of reason—if defendants entered into an agreement that violates the Sherman Act per se, it is immaterial whether such an agreement was actually good for the company or even good for the market as a whole.").

58. *DaVita and its form CEO acquitted of U.S. antitrust charges,* REUTERS (Apr. 18, 2022))"The jury acquitted the company and its former CEO on all three counts.").

59. United States v. Patel, 2023 U.S. Dist. LEXIS 51304, at *21–*22 (D. Conn. Mar. 27, 2023).

depriving them of gainful employment opportunities.[60] Ultimately, although the judge found the indictment sufficiently alleged facts to proceed under the per se standard, the charges were thrown out upon a finding that no reasonable juror could find the defendants guilty based on the evidence presented.[61] That is, the poor evidentiary showing by the prosecution[62] meant "this case [did] not involve a market allocation under the per se rule."[63] Therefore, *Patel* confirms that an alleged no-poach agreement is not per se unlawful if it merely constrains or restricts employee movement.[64]

On the heels of *Patel* acquittal, the DOJ's most recent decision to drop charges against SCA makes sense.[65] In effect, there is no need to waste judicial and party resources preparing for and conducting trial before applying the most recent developments, and the DOJ seems to agree. Therefore, while the DOJ has successfully established that the per se standard *can* apply, this might not be enough.[66]

B. *The "Harder" Cases: Vertical Agreements and The Rule of Reason and Quick Look Standards*

In the absence of a naked agreement, the path is less defined, and courts have grappled with whether the per se standard should apply—often refusing to answer the question outright.[67] It is well established that a restraint may escape per se treatment if the restraint is ancillary to the success of a cooperative venture and promises greater

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60. *Patel*, 2023 U.S. Dist. LEXIS 51304, at *44.

61. Ruling and Order on Def.'s Motion for Judgment of Acquittal, United States v. Patel, 2023 U.S. Dist. LEXIS 74104, at *27 (D. Conn. Apr. 28, 2023) ("[N]o reasonable juror could conclude that there was a 'cessation of meaningful competition' in the allocated market'") (quoting *DaVita*, 2022 U.S. Dist. LEXIS 54544, at *3).

62. The Judge admonished the government for "try[ing] to expand the common and accepted definition of market allocation in a way not clearly used before," since the naked agreement was not followed at all times. *Id.* at *27 n.7.

63. *Id.* at *16.

64. *Patel*, 2023 U.S. Dist. LEXIS 51304, at *44.

65. United States Motion to Dismiss, United States v. Surgical Affiliates, LLC, No. 3:21-cr-0011-L (N.D. Tex. Nov. 13, 2023); Koenig, *supra* note 56.

66. *See* United States v. Jindal, 2021 U.S. Dist. LEXIS 227474, at *21 (E.D. Tex. 2021) (demonstrating the court's willingness to accept a *per se* standard in horizontal no-poach agreement, finding that "just because this is the first time the Government has prosecuted for this type of offense does not mean that the conduct at issue has not been illegal until now.").

67. Polden, *supra* note 7, at 605; Note, *Avoiding No Poach Liability: Making Reasonable Choices to Qualify for the Rule of Reason*, 63 ARIZ. L. REV. 1111, 1121 (2022) (discussing that courts struggle to reach a decision for a particular set of facts when they are too far out of their comfort zones and area of expertise).

productivity and output.[68] For example, where the parties create a legitimate joint venture—and such restraints are necessary to that venture—then the restraint may be ancillary and escape per se liability.[69] In such cases, the rule of reason applies, which weighs the harmful anti-competitive effects against the pro-competitive justifications.[70]

Unlike the per se standard, the rule of reason requires the court to conduct a rigorous analysis and investigation of the relevant product and geographic markets, the market power of the defendants within those markets, and the existence of anti-competitive effects.[71] In conducting its analysis, the court considers several factors, including the intent and purpose of adopting the restriction, the competitive position of the defendants before and after the restraint,[72] the competitive conditions of the relevant market,[73] barriers to entry, and whether it was justified by a legitimate business purpose.[74] Therefore, while this standard allows the defendants to show pro-competitive justifications, the plaintiff has a significantly higher burden than under the per se standard.

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68. *In re* Outpatient Med. Ctr. Emp. Antitrust Litig., 2022 U.S. Dist. LEXIS 173925, at *33 (N.D. Ill. Sep. 26, 2022).

69. Courts agree that reasonable restraints ancillary to a legitimate joint venture escape per se liability, and generally do not constitute violations of § 1. *Id.* at **32 (citing Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985). Here, given that the ancillary restraint doctrine has yet to succeed on the merits in the context of no-poach litigation, it remains outside the scope of this paper. *See also* Andrew Finch, Principal Deputy Assistant Att'y Gen., Remarks at the ABA Antitrust in Asia Conference (May 31, 2018), www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-remarks-aba-antitrust. ("Of course, that does not mean that the Division will bring criminal charges against agreements between competitors that are ancillary to joint ventures or other legitimate collaborations. Those have been, and will continue to be, analyzed under the rule of reason, consistent with the civil doctrine of ancillary restraints.").

70. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911) (introducing the "rule of reason" to Sherman Act jurisprudence); *see also* Nat'l Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679, 691 (1978) (explaining that the "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition").

71. *See id.*; Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977); *see also* Iadevaia, *Poach-No-More*, *supra* note 18, at 159 (citing State Oil Co. v. Khan, 522 U.S. 3, 10–18 (1997) (Courts consider "specific information about the relevant business, it's condition before and after the restraint was imposed, and the restraint's history, nature, and effect.").

72. Bus. Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla, 468 U.S. 85, 109 (1984).

73. *State Oil Co.,* 522 U.S. at 10.

74. Leegin Creative Leather Prods. Inc., v. PSKS Inc., 551 U.S. 877, 890 (2007) (holding that the rule of reason applies to vertical restraints because they stimulated interbrand competition by reducing intrabrand competition).

1. Vertical Agreements Generally

Where the per se rule does not apply, courts employ either the rule of reason or the quick look. Specifically, in vertical arrangements, courts tend to agree that the rule of reason or the quick look approach applies.[75] Although this largely remains unsettled, courts have been most compromising where the agreement does not form a hub-and-spoke conspiracy [76] or where the agreement promotes the productivity of the enterprise at the time it was adopted.[77] Significantly, the DOJ has endorsed the position that the rule of reason should apply to no-poach agreements among vertical competitors like the franchisee-franchisor relationships,[78] given that antitrust law has long recognized the pro-competitive effects of vertical restraints.[79]

In the vertical franchisee-franchisor relationship, no-poach provisions impose "limitations of each franchiser's ability to solicit or hire employees of another franchisee or store operating under the same banner."[80] The challenge with franchise no-poaching provisions, however, is that in addition to their vertical relationship, there are often compelling pro-competitive arguments that tend to make the per

75. *See* Blanton v. Domino's Pizza Franchising LLC, 2019 U.S. Dist. LEXIS 87737, at *12 (E.D. Mich. May 24, 2019) (plaintiffs plausibly alleged an illegal horizontal restraint under both per se and quick-look analysis); Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260, at *20–*21(N.D. Ill. Jun. 25, 2018) (the District Court agreed that the complaint could go forward on a "quick look.").

76. Corrected Statement of Interest of the United States of America at 11-12, Joseph Stigar v. Dough Dough Inc., et al., No. 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019), https://www.justice.gov/atr/case-document/file/1141731/download.

77. *In re* Outpatient Med. Ctr. Emp. Antitrust Litig., 2022 U.S. Dist. LEXIS 173925, at *34 (N.D. Ill. Sep. 26, 2022) (citing Polk Bros. Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985)).

78. In the same year the DOJ announced it would treat horizontal no-poach agreements as criminal conduct, the DOJ filed Statements of Interest supporting a rule of reason approach to vertical no-poach agreements in three private antitrust class-actions brought by former employees of fast-food franchisors. *See* Corrected Statement of Interest of United States of America, Stigar v. Dough Dough, Inc, No. 2:18-cv-002440SAB, at 16 (E.D. Wash. Mar. 8, 2019), Richmond v. Bergey Pullman Inc., No. 18-CV-00246-SAB (E.D. Wash. Mar. 8, 2019), Harris v. CJ Star, LLC, No. 18-CV-00247-TOR (E.D. Wash. Mar. 8, 2019), https://www.justice.gov/atr/case-document/file/1141731/download.

79. Bus. Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 724-25 (1988) (emphasizing that non-price vertical restraints have "real potential to stimulate Interbrand competition").

80. Note, Michael A. Lindsay, *McDonald's and Medicine: Developments in the Law of No-Poaching and Wage-Fixing Agreements*, 33 ANTITRUST 18, 22 (2019); *see* Josh M. Piper, *Employee "No-Poaching" Clauses in Franchise Agreements: An Assessment in Light of Recent Developments*, 38 FRANCHISE L.J. 185, 186 (2018).

se rule inapplicable.[81] However, vertical agreements have also been subject to the per se standard, making this path even less defined and leaving us wondering which standard applies.[82]

2. A Closer Look at Franchise No-Poach Agreements

Since the Guidelines, the DOJ has expanded its views on the appropriate analysis of no-poaching agreements within the franchise context. While such restraints are typically judged as vertical allocations, it is possible that the restraint is between two interrelated entities where the franchisor and the franchisee compete in the same market in which the employees are hired.[83] Thus, such restraints would be horizontal, and where they are naked, would be scrutinized under the per se rule. Still, as noted, the franchise may escape per se liability where the restraint was ancillary to a pro-competitive joint venture. For example, in *Deslandes v. McDonald's USA, LLC*, the court had "no trouble concluding that a naked horizontal no-hire agreement would be a per se violation of the antitrust laws" where the franchise agreement constrained competition between franchisees and corporate-operated stores.[84] The court, however, refused to apply the per se rule in this case because the horizontal restraint was ancillary to the franchise agreement because it was "output enhancing."[85] Thus, given that the typical franchise relationship is in and of itself a legitimate business collaboration, a no-poach would qualify as ancillary if they are reasonably necessary to a legitimate franchise collaboration.

The per se standard may nevertheless apply where a hub-and-spoke conspiracy is plausibly alleged among vertical franchise competitors. For example, in *Butler v. Jimmy Johns Franchise, LLC,* the Southern District Court of Illinois concluded that "while the

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81. For example, many franchisors argue that no-poach provisions are essential to fostering a strong brand and shared interest across the franchisees which can benefit from having skilled employees trained in that particular branch's business model. *Deslandes*, 2021 U.S. Dist. LEXIS 140735, at *15–*16 ("Each time McDonald's entered a franchise agreement, it increased output of burgers and fries, which is to say the agreement was output enhancing and thus procompetitive.").

82. State v. Jersey Mike's Franchise Sys. Inc., No. 18-2-2582207 (King Cty. Super. Ct. Wash. 2018) (allowing the case to move forward under the per se standard).

83. *See* Deslandes, 2021 U.S. Dist. LEXIS 140735, at *15–*16 ("The Court agrees that the restraint has vertical elements, but the agreement is also a horizontal restraint.").

84. *Id.* at *18.

85. *Id.* at *19–20 (refusing to apply the per se rule in this case because the horizontal restraint was ancillary to the franchise agreement because it "increased output of burgers and fries").

contract in question may have been vertical, the effects are felt strictly at the horizontal level" and if after discovery, "the evidence of franchisee independence is Herculean, then the per se rule might apply."[86] In this case, the franchise agreement imposed a no-hire provision, which provided the independent right to enforce it against other franchisees, thereby alleging that Jimmy John's had orchestrated a hub-and-spoke conspiracy among franchisees.[87]

Not all courts agree, however, that conspiracies within the franchisor-franchisee relationship are possible. In *Arrington v. Burger King Worldwide, Inc.,* for example, the Southern District of Florida concluded that franchisors and franchisees cannot conspire because they comprise a single corporate enterprise.[88] Here, the court found evidence of a joint advertising budget, uniform menu, and payment of royalties to the franchisor to support their conclusion that the relationship resembled a symbiotic relationship of a corporation organized into branches (or that of a parent-subsidiary) rather than a relationship between competitors.[89] In *Ogden v. Little Caesar Enterprises*, the Eastern District of Michigan also dismissed the no-poach claim under the per se standard because the plaintiff failed to allege any naked agreement to divide the labor market adequately.[90] Altogether, while the outcome has yet to be determined, the DOJ has helped to clarify this point, stating that for the no-poach agreement to be per se illegal under a hub-and-spoke conspiracy, the plaintiff would have to show an actual agreement among the franchisees—not just parallel conduct which would be subject to the rule of reason.[91] It follows that if the franchisor does not operate any corporate stores, and the agreement is between a franchisor and a franchisee, it is a purely vertical arrangement and would be evaluated (as with any other vertical arrangement) under the rule of reason.[92]

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86. 331 F.Supp. 3d 786, 795, 797 (S.D. Ill. 2018).

87. *Id.*

88. 448 F.Supp.3d 1322, 1332 (S.D. Fl 2020) (citing Williams v. I.B. Fischer Nevada, 999 F.2d 445. 447 (9th Cir. 1993) ("the no switching agreement did not violate Section 1 of the Sherman Act because the franchisor was incapable of conspiring with the franchisee.").

89. *Id.* at 1330-1331.

90. 393 F. Supp. 3d 622, 632–36 (E.D Mich. 2019) (holding that merely alleging a horizontal restraint via a hub and spoke conspiracy did not warrant *per se* treatment).

91. Corrected Statement of Interest of the United States, Stirgar v. Dough Dough, Inc., No. 2:18-cv-00244-SAB, 21 (E.D. Wash. Mar. 8, 2019) (citing Dickson v. Microsoft Corp., 309 F.3d 193, 205–06 (4th Cir. 2002); Kotteakos v. United States, 328 U.S. 750, 755 (1946) ("Parallel but independent vertical agreements are not per se unlawful; they are subject to the rule of reason.").

92. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) ("[L]ike nearly every other vertical restraint, the [] provision should be assessed under the rule of reason.").

Since the Guidelines, these decisions tend to suggest that no-poach provisions, which are either ancillary to the franchise's legitimate joint venture or vertically oriented such that they are unlikely to pose a threat to competition categorically, are subject to the rule of reason.[93] In fact, antitrust enforcers have been clear that the rule of reason applies to no-poaching agreements in these cases.[94] For example, in *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.,* a federal appellate court affirmed the application of the rule of reason to a no-poach arrangement ancillary to otherwise pro-competitive collaborations. Here, one staffing company contracted with another to provide additional labor, which contained a non-solicitation clause. The Ninth Circuit determined that the provision was ancillary and "reasonably necessary to the parties' pro-competitive collaboration" because it allowed the defendant to give spillover assignments to the plaintiff without endangering its established network of recruiters, travel nurses, vendors, and hospital customers.[95] Therefore, the provision was reasonably necessary to protect the defendant's staffing business while enabling it to collaborate with another healthcare staffing agency (the plaintiff) and did not violate Section 1.

Outside of these clear cases, however, courts have grappled with how (and whether) to apply the rule of reason, often declining to commit to any standard of review at all.[96] For example, some courts have only stated that the rule of reason *could* apply. In *Butler v. Jimmy Johns*, the franchise agreement provided that each franchisee

93. *See Ogden*, 393 F. Supp. 3d at 633 (rejecting the per se standard and explaining that there is "an automatic presumption in favor of the rule of reason" because the per se standard "is reserved only for those infrequent occasions of clear-cut cases in which trade restraint is unquestionably anticompetitive" and therefore present straightforward questions for the court, and a vertical agreement ancillary to the franchise agreement is not such a question).

94. Finch, *supra* note 69; *see* Lindsay, *supra* note 80 (citing Statement of Interest of the United States at 4, *In re* Railway Industry Employees No-Poach Antitrust Litig., Civil No. 2:18-MC-00798-JFC (W.D.Pa. Feb. 8, 2019)) ("More recently, the DOJ stated plainly and concisely that "no-poach agreements among competing employers are per se unlawful unless they are reasonably necessary to a separate legitimate business transaction or collaboration among the employers, in which case the rule of reason applies.").

95. 2020 U.S. Dist. LEXIS 139286, at *14 (S.D. Cal. May 20, 2020).

96. *See In re* Papa John's Empl. & Franchisee Empl. Antitrust Litig., 2019 U.S. Dist. LEXIS 181298, at *30 (W.D. Ky. Oct. 21, 2019) (declining to announce rule of analysis because "[p]laintiffs did not tether viability of their claim to any one rule [and] . . . more factual development is necessary before a standard of review is selected."); Blanton v. Domino's Pizza Franchising LLC, 2019 U.S. Dist. LEXIS 87737, at *12-13 (E.D. Mich. May 24, 2019) (finding plaintiff plausibly alleged *per se* and quick look no-hire claims but to determine which standard applied required additional factual development).

would not "solicit or initiate recruitment of any person then employed, or who was employed within the preceding twelve months" by Jimmy Johns or any of its affiliates or franchised restaurants and provided restrictions under which franchisees agreed to restrict their own employees.[97] Here, although the court refused to decide which standard to apply, the court found the rule of reason could "rear its head and burn this case to the ground" . . . "if the evidence of franchisee independence is weak, or if Jimmy John's carries its burden."[98] The DOJ has also echoed this point, providing that "when a no-poach restriction within a franchise system warrants a rule of reason analysis, [it] warrants a full rule of reason analysis, not a 'quick look.'"[99]

3. A Quick Look at the Quick Look

Although the DOJ contends that the "quick look should not be used under any circumstances,"[100] courts have justified this standard where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets."[101] The quick look review provides a pseudo middle ground, which presumes the conduct has anti-competitive effects and places the burden on defendants to offer pro-competitive justifications.[102] Like the per se standard, the quick look is plaintiff-friendly because the court immediately recognizes the agreements' anti-competitive nature.[103] Notably, however, even though the quick look may provide a better standard for plaintiffs, it is not clear when exactly it is applied by the courts, making it difficult to administer.[104] For example, even naked

97. Butler v. Jimmy John's Franchise, LLC, 331 F.Supp. 3d 786, 790 (S.D. Ill. 2018).

98. *Id.* at 797.

99. Corrected Statement of Interest of United States of America, Stigar v. Dough Dough, Inc, No. 2:18-cv-002440SAB, at 21 (E.D. Wash. Mar. 8, 2019).

100. Lindsay, *McDonald's and Medicine, supra* note 80, at 24 (explaining that the DOJ stated that the quick look doctrine applies only in rare cases and no-poaching provisions in franchise agreements are not one of those rare cases because they may indeed provide procompetitive justifications).

101. Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260, at *14–*15 (N.D. Ill. Jun. 25, 2018) (citing Agnew v. NCAA, 683 F.3d 328, 336 (7th Cir. 2012).

102. United States v. Brown Univ. 5 F.3d 658, 669 (3d Cir. 1993) (describing the quick look as an "intermediate" between the rule of reason and per se condemnation).

103. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1214–16 (2008); Note, Iadevaia, *Poach-No-More*, *supra* note 18, at 161.

104. Nat'l Collegiate Athletic Ass'n, 468 U.S. at 109 n. 39 ("the rule of reason can sometimes be applied in the twinkling of an eye."); Cal. Dental. Ass'n v. FTC, 526 U.S.

restraints may trigger a quick look where there are "potential pro-competitive effects that prevent[] per se condemnation"[105] and some level of cooperation is necessary for the productivity or success of the business itself.[106] Still, a quick look "requires an equivalent amount of obviousness" as the per se standard and often "requires more in-depth analysis[,]" especially where the agreements display both vertical and horizontal components.[107]

For example, in *Deslandes v. McDonald's*, the court proceeded under the quick look theory, finding that "a horizontal agreement not to hire competitors' employees is, in essence, a market division."[108] Here, the court found that the per se rule was inappropriate despite the horizontal arrangement because the no-poaching clause was ancillary to the franchise agreement.[109] However, the quick look was warranted because the plaintiff had sufficiently pled anti-competitive effects. Further, although the court noted that the plaintiff could have proceeded under the rule of reason, it was not surprising that the plaintiff chose not to do so given the difficulty of proving a defendant's market power in the relevant market.[110]

Still, the quick look poses challenges. For example, in *United States v. Brown University*, although the court applied the quick look, the case was ultimately remanded for consideration under a full rule

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756, 770 (1999) (holding that the courts should apply the quick look test when "an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers in the markets.").

105. Eric H. Grush and Clair M. Jorenblit, *American Needle and a "Positive" Quick Look Approach in Challenges to Joint Ventures*, 25 ANTITRUST 55, 55 (2011).

106. *Id.; see* Nat'l Collegiate Athletic Ass'n, 468 U.S. at 117 ("Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.").

107. Ogden v. Little Caesar Enters., 393 F. Supp. 3d 622, 636 (E.D Mich. Jul. 29, 2019).

108. Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260, at *17-*18 (N.D. Ill. Jun. 25, 2018).

109. Piper, *supra* note 80, at 191-192 ("[T]he franchise agreements, by creating the opportunity for private companies to open restaurants under the McDonald's brand (and consistent with the McDonald's format), increased output and competition by allowing a new location to operate. But the court ruled that the plaintiff had done enough to plead a claim under a "quick look" analysis, meaning that the plaintiff would be allowed to seek discovery and present evidence that McDonald's lacks any legitimate justification for facially anticompetitive behavior, potentially allowing the court, without resort to analysis of market power, to "condemn the practice without ado.").

110. *Id.* at 192, n. 30.

of reason analysis.[111] Therefore, despite the court's decision in *Deslandes*, which tends to leave the door open for the court to conclude that a no-poaching clause is unlawful without extensive market analysis, *Brown* informs us that the quick look may simply be a circuitous path of getting back to the per se or rule of reason approach. Thus, the DOJ may be correct in condemning its application.

C. *Where Does This Leave No-Poach Prosecutions?*

At this point, you may be confused with the state of no-poach litigation and what standards the courts apply in different contexts. To summarize, although states have differed in their approach, most states agree that despite sustained losses, no-poach and wage-fixing agreements will continue to be prosecuted as unlawful restraints in violation of Section 1 of the Sherman Act. In fact, despite two back-to-back jury acquittals—*United States v. Jindal,* a wage-fixing case, and *DaVita*—Assistant Attorney General Jonathan Kanter has remained adamant that no-poach and wage-fixing prosecutions are "righteous cases that do real harm."[112] U.S. Attorney Erin Nealy Cox for the Northern District of Texas has echoed this sentiment and has pushed for enforcement of antitrust law under the per se standard stating, "companies competing for top-level talent is the bedrock of the American labor market."[113] Likewise, Attorney General Bob Ferguson of Washington has been one of the most aggressive governmental enforcers of vertical no-poach agreements, who has targeted fast food franchises specifically.[114] Some states have similarly remained

111. United States v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993) ("Accordingly, we remand this case to the district court with instructions to evaluate overlap using the full-scale rule of reason analysis.").

112. Bryan Koenig, *DOJ Antitrust Head Calls No-Poach Prosecutions 'Righteous*,' LAW360 (Mar. 31, 2023), https://www.law360.com/articles/1592488.

113. 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#:~:text="Companies%20competing%20for%20top%2Dlevel,to%20prosecute%20Sherman%20Act%20violations.".

114. *See* Press Release, Wash. State, Office 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#:~:text=SEATTLE%20—%20Attorney%20General%20Bob%20Ferguson,moving%20among%20the%20chains%27%20franchise; Press Release, Wash. State, Office of the Att'y Gen., AG Ferguson's Initiative to End No-Poach Clauses Nationwide Secures End to Provisions at 50 Corporate Chains (Jan. 14, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-secures-end-provisions; *see also* Press Release, Wash. State, Office of the Att'y Gen., Lasting impact: Study finds

dedicated to the fact that vertical no-poach agreements are flagrantly anti-competitive and thus constitute per se violations.[115] Other states, however, have argued that the rule of reason or quick look should apply.[116] Notably, although the courts don't necessarily agree, the DOJ has clarified that while it would treat naked horizontal no-poach agreements as per se violations, vertical franchise no-poach provisions should be subject to a rule of reason analysis.[117]

Therefore, while states do not agree on what standard should apply to vertical agreements, states generally agree that horizontal agreements will proceed under the per se standard. Still, despite the DOJ's success in establishing that horizontal naked no-poach agreements are per se violations, the DOJ has yet to win a single jury conviction under this standard. Although they came close in both *DaVita* and *Manahe*, jurors ultimately remained unconvinced that the no-poach agreement amounted to criminal harm.[118]Although the Department reported its first "win" in *United States v. VDA OC, LLC*, the case settled before trial, resulting in a not-guilty plea and no jail time.[119] Significantly, the DOJ recently moved to drop its last no-

AG Ferguson's no-poach initiative boosted income for low-wage workers nationwide (Jul. 25, 2022), https://www.atg.wa.gov/news/news-releases/lasting-impact-study-finds-ag-ferguson-s-no-poach-initiative-boosted-income-low#:~:text=Ferguson%27s%20No%2DPoach%20Initiative%20was,Anytime%20Fitness%20and%20Jiffy%20Lube ("In order to avoid lawsuit from the Attorney General's Office, hundreds [a total of 237] of corporations entered into legally enforceable agreements to end the use of no-poach clauses nationwide.")

115. Lindsay, *supra* note 80, at 23 (citing Max Fillion & Joshua Sisco, Franchise No-Poach Agreements Likely per se Antitrust Violations in California, State Official Says, MLEX (Mar. 28, 2019)) ("California AG's antitrust chief Kathleen Foote publicly stated that no-poaching provisions in franchise agreements are probably per se violations of California's state antitrust law. She said that it is "extremely unlikely that a state court would find no-poach agreements in the vertical context should be treated any differently than the ones in the horizontal context.").

116. *See e.g.*, Butler v. Jimmy John's Franchise, LLC, 331 F.Supp. 3d 786, 793 (S.D. Ill. 2018); Blanton v. Domino's Pizza Franchising LLC, 2019 U.S. Dist. LEXIS 87737, at *12 (E.D. Mich. May 24, 2019); Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260, at *20–*21(N.D. Ill. Jun. 25, 2018); State v. Jersey Mike's Franchise Sys. Inc. et. al., No. 18-2-2582207 (King Cty. Super. Ct. Wash. 2018).

117. Andrew Finch, Principal Deputy Assistant Att'y Gen., Trump Antitrust Policy After One Year (Jan. 23, 2018), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-c-finch-delivers-remarks-heritage (remarking that the [DOJ Antitrust] Division expects to pursue criminal charges for agreements that began after October 2016, as well as for agreements that began before but continued after that date); *see supra* note 84 and accompanying text; Polden, *supra* note 7, at 594, n. 68 (describing the Department's prosecution of and intervention in cases of naked no-poach agreements and its argument that such vertical restraints are subject to the per se rule).

118. Reichel, *supra* note 45.

119. This case settled prior to trial, resulting in the healthcare staffing company paying a criminal fine and entering into a pretrial diversion agreement to avoid jail

poach case against SCA. Although this dismissal came without much explanation, and the DOJ has declined to comment, this is likely the result of the court's most recent decision in *Patel*, which raised the Government's standard of proof. As will be discussed in Part III, the court in *Patel* required the Government to prove that the no-poach meaningfully allocated the labor market, holding that prosecutors cannot make out a case of per se anti-competitive conduct if a no-poach merely constrains or restricts employee movement.[120]

In effect, the court's decision in *Patel* dismantles the per se inquiry as we know it and blurs any distinction between the rule of reason and per se analysis. While this may be "the final push to motivate the DOJ to change its aggressive approach,"[121] in the meantime, it further confuses what standard should apply to police the anti-competitive effects of no-poach agreements. This is especially unfortunate "in a market where many workers don't have the luxury of being jobless."[122]

PART III: STRENGTHS AND WEAKNESSES OF THE COURT'S APPROACH

Against this murky backdrop, a few things are clear. First, the DOJ has yet to garner a successful track record—as in, secure convictions and presumably jail time—in the criminal prosecution of no-poach agreements. Second, despite a consensus that the per se standard applies to naked no-poach agreements, and the rule of reason applies to ancillary ventures, courts have yet to establish a clear path forward when it comes to which standard to apply to

time for the former executive. Plea Agreement, United States v. VDA OC, LLC, No. 2:21-cr-00098 (D. Nev. Oct. 27, 2022) (VDA was sentenced to pay a criminal fine of $62,000, and restitution of $72,000 to the affected nurses); *see* Press Release, U.S. Dep't of Just., Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses (Oct. 27, 2022), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

120. United States v. Patel, 2023 U.S. Dist. LEXIS 51304, at *44 (D. Conn. Mar. 23, 2023).

121. Robert Anello, *Are DOJ's No-Poach Prosecutions Getting Poached?,* FORBES (May 10, 2023), https://www.forbes.com/sites/insider/2023/05/10/are-dojs-no-poach-prosecutions-getting-poached/?sh=5bb1d1351646 ("The *Patel* ruling effectively may have raised the bar for the government's standard of proof in *per se* cases, requiring that aside from the existence of a conspiracy, the government's evidence must demonstrate that the alleged agreement allocated the market to such a "meaningful extent" that the conduct rose to the level of *per se* criminal anticompetitive behavior. Judge Bolden's Rule 29 acquittal, in the eyes of some observers, also perhaps reflects poorly on DOJ's judgment to even pursue criminal charges against the six executives in the first place.").

122. ERIC POSNER, HOW ANTITRUST FAILED WORKERS 57 (2021).

horizontal and vertical restraints which are neither naked restraints nor ancillary to a legitimate joint venture. It follows that the DOJ has been criticized for its seemingly futile efforts to deter no-poach agreements.[123] But do the DOJ's losses suggest that their efforts are futile?

As a preliminary matter, the DOJ's inability to secure convictions raises a few noteworthy concerns. First, it raises the issue of whether the per se standard is working. Second, if the per se rule is not functioning as the DOJ intends, is there an alternative better suited for the successful prosecution and litigation of these cases? If so, should different standards apply in different contexts, or should the DOJ and courts move toward a more unified approach? Finally, are there policy and societal concerns that may suggest that monitoring no-poach agreements under antitrust law does little to deter this behavior and thus suggest that antitrust laws may not be suited for labor markets?

A. *Is the Per Se Standard Working?*

In answering this question, it is first necessary to determine whether the DOJ is *actually* losing on the merits of the per se rule. If not, the question becomes whether a larger evidentiary or administrative concern is leading parties to settle long before the case goes to trial.

As discussed, the per se standard condemns a business practice as a matter of law without further consideration of pro-competitive benefits.[124] Because the per se rule forecloses inquiry into any pro-competitive justifications, the Supreme Court has strictly limited its application to conduct that is manifestly anti-competitive on its face "after considerable experience with [the] business relationship" and lacking any redeeming virtue.[125] Still, as we've seen, antitrust scrutiny of no-poach agreements under the per se standard is nothing

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123. Note, Noelle Mack, *No-Poach, No Precedent: How DOJ's Aggressive Stance on Criminalizing Labor Market Agreements Runs Counter to Antitrust* Jurisprudence, 87 MO. L. REV. 591, 592 (2022); Jamie Chen, " *No-Poach" Agreements as Sherman Act Violations: How We Got Here and Where We're Going*, 28 COMPETITION J. 82, 93 (2018); Dina Hoffer & Elizabeth Prewitt, *To Hire or Not to Hire: U.S. Cartel Enforcement Targeting Employment Practices*, CONCURRENCES (Sep. 2018), 3 CONCURRENCES COMPETITION L.J. 78, 81 (Sept. 2018), https://www.lw.com/thoughtLeadership/to-hire-or-not-to-hire-us-cartel-enforcement-targeting-employment-practices [https://perma.cc/QGN7-US4H].

124. *See supra* Part II.

125. United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972) ("[A] new per se rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restrain challenged.").

new. Even prior to the Guidelines, the DOJ established in *In re High Tech Workers* that the naked no-poach agreement at play represented the same kind of market allocation agreements that are per se unlawful under the Sherman Act.[126] Because the case eventually settled, however, the court never reached the issue of whether the per se rule applies. In 2012, the DOJ filed a similar complaint against eBay.[127] Here, the court also noted that the agreement constituted a horizontal market allocation agreement, which is generally a per se violation. Still, although the court denied the defendant's motion to dismiss, the court likewise refused to decide on the appropriate analytical standard to apply with the parties settling before trial.[128]

1. Horizontal Agreements and Per Se Liability

In 2018, the Government brought its first post-Guidelines civil enforcement in *United States v. Knorr-Bremse AG*, alleging that the railroad companies had unlawfully entered into no-poach agreements not to hire each other's employees in a manner indistinguishable from market allocation agreements. [129] Here too, however, the DOJ settled without the court concluding as to the appropriate standard. Later, in *Seaman v. Duke University*, the DOJ again settled without determining the appropriate standard where the plaintiffs alleged a naked no-poach agreement between Duke and UNC medical schools that prohibited faculty from moving between the two university hospitals.[130]

As discussed, it wasn't until January 2021 that the DOJ brought its first criminal indictment, which coincidentally also seems to close the book on the DOJ's prosecution of no-poach agreements. That is, in *Surgical Care Affiliates*, despite having survived the motion to dismiss, the DOJ recently dropped the charges against SCA, seemingly in the wake of the court's acquittal in *Patel* earlier this

126. *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1108 (N.D. Cal. 2012).

127. United States v. eBay Inc., 968 F.Supp.2d 1020, 1040 (N.D. Cal. 2013).

128. *Id.;* Press Release, U.S. Dep't of Just., Justice Department Requires eBay to End Anticompetitive "No Poach" Hiring Agreements (May. 1, 2014), https://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements#:~:text="No%20Poach"%20Hiring%20Agreements,-Thursday%2C%20May%201&text=The%20Department%20of%20Justice%20announced,restraining%20employee%20recruitment%20and%20hiring.

129. 2018 U.S. Dist. LEXIS 142125 (D.D.C. July 11, 2018) (alleging that the no-poach agreements restrained competition to recruit workers by limiting employee mobility and depriving employees of competitive information they could have used to negotiate better employment terms).

130. 2019 U.S. Dist. LEXIS 163811 (M.D.N.C. Mar. 7, 2019).

year.[131] However, with the outcomes of both *Manahe* and *DaVita*, the DOJ claimed its first set of victories—in part—by establishing that the per se standard applies to naked no-poach agreements where they impose horizontal restraints. Despite this small victory, the jury in both *Manahe* and *DaVita* acquitted all defendants, concluding that the DOJ failed to show that the defendant's agreements allocated a market for the employees that "meaningfully" stifled competition.[132] Perhaps the only win came in October 2022 against *VDA OC, LLC*. Here, although the DOJ secured a guilty plea for agreeing to conspire with competitors and allocate employees,[133] this victory merely resulted in criminal fines and restitution and did not result in jail time.[134] Thus, it's hard to argue that the DOJ has been successful in achieving its goal and agenda under the Guidelines.

Certainly, it can be argued that despite the acquittals in *Manahe, DaVita,* and most recently in *Patel*, the DOJ has successfully proved that the alleged anti-competitive conduct is within the scope of antitrust laws. [135] At the very least, this can account for momentum in the DOJ's favor. Perhaps this also suggests that the DOJ is not losing on the merits of the per se standard. Rather, perhaps the DOJ is facing an evidentiary issue. For example, in *DaVita,* the court found that while the DOJ failed to prove that management entered into agreements to hinder competition (as opposed to merely entering into

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131. Dan Papscun, *UnitedHealth Unit Cites DOJ No-Poach Loss in Dismissal Motion*, BLOOMBERG LAW (May 10, 2023 11:35 AM), https://www.bloomberglaw.com/bloomberglawnews/antitrust/X6D9QIO000000?bna_news_filter=antitrust#jcite ("The DOJ's loss in Connecticut confirms that competitors' agreements are not a per se violation.").

132. Alexandra Keck, et. al., *First DOJ Criminal Wage-Fixing and No-Poach Trials End in Acquittals*, JD SUPRA (April 19, 2022), https://www.jdsupra.com/legalnews/first-doj-criminal-wage-fixing-and-no-1930361/#6; Barbara Sicalides, et. al., *DOJ Fails to Convict No-Poach/Wage-Fixing Case,* BUSINESS LAW TODAY (Apr. 12, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-april/doj-fails-to-convict/ ("[P]rosecution failed to convince the jury that an agreement was ever actually reached or acted upon by any of the defendant"); Bruce D. Sokler & Tinny T. Song, *DOJ Loses Two Criminal Antitrust Labor Trials, Stymied by (Lack of) Evidence*, MINTZ (Apr. 19, 2022), https://www.mintz.com/insights-center/viewpoints/2191/2022-04-19-doj-loses-two-criminal-antitrust-labor-trials-stymied.

133. Dan Papscun, *DOJ Notches First No-Poach Win With Staffing Firm's Sentencing*, BLOOMBERG LAW (Oct. 27, 2022), https://news.bloomberglaw.com/antitrust/doj-notches-first-no-poach-win-with-guilty-plea-sentencing.

134. *See supra* note 119 and accompanying text.

135. Notably, the jury in *Jindal* also acquitted the former owner and the former clinical director of the healthcare staffing agency, however as discussed, this is a wage fixing case and therefore outside the immediate scope of this paper. *See* United States v. Jindal, 2021 U.S. Dist. LEXIS 227474, at *21 (E.D. Tex. 2021).

agreements to maintain staffing relationships), the court nevertheless held that naked horizontal solicitation agreements that allocate market have "no purpose except stifling competition" and are per se violations of the Sherman Act.[136] Here, the Government survived the motion to dismiss because the indictment sufficiently alleged the per se standard. [137] At trial, however, the judge required the prosecution to prove that the defendant acted with the specific intent to constrain the labor markets and instructed the jurors that the Government had to prove not only that an agreement existed to allocate specific markets for employees but also that the defendants did so with the specific anti-competitive intent to end meaningful competition.[138] Ultimately, this was a burden that the Government could not meet.

In *Manahe*, the court was also willing to accept the per se standard, echoing that "just because this is the first time the Government has prosecuted for this type of offense does not mean that the conduct at issue has not been illegal until now."[139] Here, the court sided with the Government and did not allow the defendants to produce evidence of pro-competitive justifications, confirming that the reasonableness of the defendant's conduct is irrelevant to the issue before the jury.[140] Still, the DOJ failed to convince the jury that the defendants entered into such an agreement. Therefore, despite losses, both *DaVita* and *Manahe* suggest that the DOJ has succeeded in proving that the per se standard does apply, as courts seem generally comfortable accepting a per se standard to horizontal restraints. Thus, the biggest hurdle may be convincing juries that the defendants are guilty.

2. Vertical Agreements and Per Se Liability

In vertical arrangements, the application of the per se rule is less clear. As discussed, an agreement among competing fast-food franchises not to hire each other's employees could fall into the

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136. Sokler, *supra* note 132.

137. Judge Jackson found that naked no-poach agreements belong to an existing category of per se treatment—market allocation—because the DOJ sufficiently alleged that defendants agreed to allocate senior level employees by not soliciting each other's senior level employees, which made the horizontal market allocation agreement clear. Order Denying Mot. to Dismiss, United States v. DaVita, Inc.,2022 U.S. Dist. LEXIS 16188, at *21 (D. Colo. Jan. 28, 2022).

138. United States v. DaVita, Inc., 2022 U.S. Dist. LEXIS 54544, at *9 (D. Colo. Mar. 25, 2022).

139. *See* United States v. Jindal, 2021 U.S. Dist. LEXIS 227474, at *21 (E.D. Tex. 2021).

140. United States v. Manahe, 2023 U.S. Dist. LEXIS 32626, at *2 (D. Me. Feb. 28, 2023).

category of per se liability. For example, where the franchisees were actual or potential competitors, "such a restraint would be a horizontal agreement, and if not ancillary to any legitimate and pro-competitive joint venture, would be per se unlawful."[141] A properly pleaded and proved hub-and-spoke conspiracy may also warrant per se treatment for vertical participants who agreed to participate in a horizontal conspiracy or where the anti-competitive effects were felt at the horizontal level.[142] However, to succeed under this argument, there must be a "rim" to the wheel in the form of an agreement,"[143] as "parallel but independent vertical agreements are not per se unlawful."[144] Likewise, a naked horizontal market allocation agreement among franchises would be subject to the per se rule where the franchises operated under the same brand name and agreed amongst themselves not to hire any person previously employed by another franchisee party to the agreement.[145] In this sense, courts have found no basis to treat liability standards in labor or franchise contexts differently from other markets,[146] and therefore, there is no need to apply the rule of reason to an otherwise per se illegal market allocation agreement in the shape of a no-poach.[147]

Generally, however, outside these contexts, there is almost no chance that the per se rule will apply to franchises. Notably, courts have reached this conclusion because the franchise relationship is largely a vertical one—with each the franchisor and franchisee conducting business at different levels of the market—and where

141. Corrected Statement of Interest of the United States of America at 11-12, Joseph Stigar v. Dough Dough Inc., et al., No. 2:18-cv-00244, at 16 (E.D. Wash. Mar. 8, 2019), https://www.justice.gov/atr/case-document/file/1141731/download.

142. *Id.* at 20 (quoting United States v. Apple, Inc., 791 F.3d 290, 322, 323 (2d Cir. 2015)) ("all [of its] participants [are] liable when the objective of the conspiracy was *per se an* unreasonable restraint of trade, including the "vertical market participants.").

143. *Id.* at 18-19 (citing *Apple,* 791 F.3d at 314 n.15).

144. *Id.* at 20. (quoting Dickson v. Microsoft Corp., 309 F.3d 193, 205–06 (4th Cir. 2002)).

145. *Id.* at 16 *(*quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S, 36,57 n.28 (1977) ("applying the rule of reason to vertical restraints imposed by franchisor on franchisees but recognizing that 'horizontal restrictions originating in agreements among the retailers . . . would be illegal *per se*.'").

146. *See* United States v. Deslandes, 81 F.4th 699, 703 (7th Cir. 2023) (McDonald's competes horizontally in labor markets with its franchisees therefore imposing horizontal restraints regardless of how the ultimate product market relates).

147. *See* [Proposed] Brief for the American Antitrust Institute as Amicus Curiae in Support of Plaintiffs, Robinson v. Hewitt, Inc., No. 19-cv-09066 (D.N.J. Oct. 20, 2023), https://www.antitrustinstitute.org/wp-content/uploads/2023/10/Exhibit-A-Proposed-AAI-Amicus-JH2.pdf (arguing franchised companies can have a vertical relationship in one market and compete in another, and the likely effect of the restraint is what matters for the *per se* analysis).

these no-poach restrictions constitute vertical allocation agreements, the Supreme Court has determined they will "be adequately policed under the rule of reason."[148] In fact, the DOJ itself has adopted this position. Further, while the court in *Deslandes* suggested that a vertical arrangement *could* proceed under the per se standard, no other court has yet to apply it or reach a clear conclusion, with the majority proceeding under the rule of reason.

3. Current State of Per Se Liability

So, thus far, the consensus among courts seems to be that the per se standard is generally accepted, or at least that it *can* apply. At least, this was the case until the DOJ's most recent defeat in *Patel* which provides a different framework. In *Patel*, the judge held that the alleged allocation agreement was not a per se violation.[149] Here, the judge granted the defendant's motion to dismiss before the case made it to the jury, finding that "no reasonable juror could conclude there was a 'cessation of meaningful competition' in the allocated market."[150] The Government alleged that Pratt and Whitney and its outsourced engineering agencies agreed not to solicit or hire one another's engineers. The judge, however, held that the Government failed to meet its burden as a matter of law because the alleged agreement "had so many exceptions that it could not be said to meaningfully allocate the labor market of engineers"[151] and "the restrictions shifted constantly throughout the course of the alleged conspiracy."[152] In fact, the court also recognized that "even if the government had presented evidence sufficient for the jury to find that Defendants entered into a market allocation agreement …, it still would not be entitled to present its case to the jury on a per se theory of liability without proving that the alleged agreement was, in fact, a naked, non-ancillary one."[153]

In *Patel*, several factors cut against the Government's case. First, the Government's own exhibits showed that the agencies viewed Pratt as an independent actor that would make its own hiring decisions and

148. GTE Sylvania Inc., 433 U.S. at 59; *see* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

149. United States v. Patel, 2023 U.S. Dist. LEXIS 74104, at *16 (D. Conn. Apr. 28, 2023) ("As a matter of law, this case does not involve a market allocation under the *per se* rule.").

150. Ruling and Order on Defs.' Mots. for J. of Acquittal at 18, United States v. Patel, 2023 U.S. Dist. LEXIS 74104, at *27 (D. Conn. Apr. 28, 2023).

151. *Id.* at *25.

152. *Id.* at *20.

153. *Id.* at *16.

was not constrained by the agreement.[154] Second, the engineers themselves testified during the Government's case in chief that many workers got hired by alleged co-conspirators, that the restrictions constantly shifted, and that hiring was often permitted during the period of the alleged conspiracy.[155] Thus, the court found that any episodic hiring limitation could not have affected market allocation "to any meaningful extent."[156] Here, the judge again imposed a "meaningful" standard previously adopted in *DaVita*, further blurring the line between the per se and rule of reason analysis.

Therefore, moving forward, the DOJ must be able to distinguish from the court's holding in both *DaVita* and *Patel* to continue to pursue these cases successfully. Because this will likely prove difficult to do against the limited body of precent, it seems more likely that the decisions in *Patel* and *DaVita,* compounded with the decision to drop its case against SCA, suggest that this "meaningful" standard is here to stay.

B. What Does Meaningful Market Allocation Mean?

Following the court's decision in *Patel* and *DaVita*, the success of future no-poach prosecutions depends not only on what standard shall be imposed—whether it be per se or otherwise—but also on the instructions given to the jury. Further, if this "meaningful" standard is widely adopted, prosecutors and juries will face high burdens as both will struggle to define and prove "meaningful" interference.

Unlike most statutes, the Sherman Act is not clear on precisely what conduct it regulates: only that it prevents unreasonable restraints on trade. To counteract the burden of conducting a reasonableness analysis, the court relied the per se doctrine in *United States v. Socony-Vacuum Oil Co.,* which condemns certain categories of conduct without further inquiry into market power. Developed over years of case law, these categories now include price fixing, market

154. *Patel,* 2023 U.S. Dist. LEXIS 74104, at *24.

155. *Id.* at *21.

156. *Id.* at *18. Significantly, the *Patel* court addressed none of the other open legal issues presented by the parties, including whether the DOJ must define a market in a *per se* no-poach case, and, whether the market described in the indictment was properly defined. The court also did not resolve which party has the burden of proving that the agreement was naked, and not ancillary, however, Judge Bolden found it unnecessary to decide these issues because the question of the insufficiency of the evidence was dispositive. *See* Tara L. Reinhart, *DOJ Suffers Rare Acquittal From the Bench in Fourth Criminal No-Poach Loss,* SKADDEN (May 5, 2023), https://www.skadden.com/insights/publications/2023/05/doj-suffers-rare-acquittal.

allocations, and some concerted refusals to deal or group boycotts.[157] Notably, absent from this list are no-poach agreements. Still, as discussed, no-poach agreements have been prosecuted as per se violations of the Sherman Act under a theory that they resemble market allocations.[158] A market allocation occurs when competitors agree to divide geographic areas, customers, or other components of the market to limit competition. Indeed, these are naked agreements that allow firms to reap the benefits in an artificially created market, free from competition that the firms would otherwise face absent the agreement.

1. Meaningful Horizontal Interference

While not all market allocation agreements are subject to the per se standard—such as where the restraint is ancillary to a larger pro-competitive venture—this is most often the case. As previously noted, an analysis under the per se standard does not require further inquiry into the actual effect on the market or the intentions of those who engaged in the conduct.[159] What matters is that the conduct is categorically anti-competitive and therefore illegal under Section 1 of the Sherman Act.[160] Thus, once a prosecutor demonstrates that a defendant has engaged in conduct that is per se illegal, liability attaches, and courts need not engage in any sort of balancing test, as required by the rule of reason. That is, the court does not engage in

157. United States v. Socony-Vaccum Oil Co., 310 U.S. 150, 216 (1940); *see* Cont'l TV., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, 54-55 (1977) (holding vertical territorial restrictions were no long per se unlawful because per se conduct applies only to "conduct that is manifestly anticompetitive," and "[e]conomists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers"); Leegin Creative Leather Prods. Inc., v. PSKS Inc., 551 U.S. 877, 889 (holding minimum resale price maintenance no longer per se unlawful because "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance.").

158. U.S. Dep't of Just., Archived Antitrust Resource Manual, https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement (Feb. 20, 2020) ("Per Se Rule: Price fixing, bid rigging and market allocation are among the group of antitrust offenses that are considered 'per se' unreasonable restraints of trade.").

159. *See supra* Part II.

160. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

any inquiry that assesses the "meaningfulness" of the restraint, as the courts in both *DaVita* and *Patel* suggest.[161]

In acquitting the defendants in *Patel*, the judge relied on the Second Circuit's decision in *Bogan v. Hodkins*.[162] In *Bogan*, the court held that an alleged no-poach agreement between NML General Agents[163] was not per se illegal because it allowed for transfers, applied only to a subset of individuals, and therefore "did not allocate the market for agents to any meaningful extent."[164] This "meaningful competition" standard was first adopted in the no-poach context in *DaVita*. Here, citing *Bogan*, the court found that a "horizontal market allocation requires "cessation of 'meaningful competition' in the allocated market."[165] The court explained, "This standard requires the government to prove actual allocation, or conspiracy to actually allocate, but does not allow defendants to disprove the government's case by showing that switching employers is theoretically possible or occurred in a few exceptional cases."[166] In proposing this standard, the judge rejected the defendant's argument that "all competition must cease for something to be classified as a market allocation agreement."[167] Thus, the court required the Government to prove more than the mere existence of an agreement. Instead, the court required the DOJ to "prove beyond a reasonable doubt that the defendants agreed with the purpose of allocating the market."[168] That is, they had to prove intent. In turn, the court instructed the jury that to find intent, they must find that the parties sought to end meaningful competition for the services of the affected employees.[169] Likewise, the court instructed the jury that they may consider pro-competitive benefits in determining whether the defendants entered

161. United States v. Patel*,* 2023 U.S. Dist. LEXIS 74104, at *18 (D. Conn. Apr. 28, 2023).

162. 166 F.3d 509 (2d. Cir. 1999).

163. Northwestern Mutual Life (NML) Insurance Company operates via a multi-teared structure of independent contractor insurance agents with exclusive contracts. NML contracts with General Agents who then contract with Special Agents and District agents in a given area. The General Agents are responsible for paying and training both the District and Special Agents, and agreed not to hire or solicit each other's agents, or permit a transfer from one agency to another, except if made by mutual agreement of the General Agents involved. *Id.* at 511.

164. *Id.* at 515.

165. United States v. DaVita, Inc., U.S. Dist. LEXIS 54544, at *10 (D. Colo. Mar. 25, 2022).

166. *Id.* at *9.

167. *Id.* at *10.

168. *Id.* at *4.

169. *Id.* at *14.

into an agreement with the intent to allocate the market.[170] Thus, although the court allowed the case to go forward on the per se standard, the court ultimately provided instructions contrary to the per se standard established in precedent.

Similarly, applying the decisions in *Bogan* and *DaVita*, the court in *Patel* held that because the agreement "had so many exceptions" and "shifted constantly," "it could not be said to meaningfully allocate the labor market of engineers."[171] The *Patel* court, however, went one step further than the court in *DaVita*, holding that a per se market allocation claim required the Government to prove conspiracy or actual employee allocation and "cessation of meaningful competition."[172] Ultimately, the court found that the exceptions to the agreement that permitted hiring during the agreement could not be said to "allocate the market . . . to any meaningful extent,"[173] and "no reasonable juror could conclude that there was a 'cessation of "meaningful competition" in the allocated market.'"[174] Nevertheless, in holding that this agreement was "not a market allocation agreement as a matter of law,"[175] the court conducted a balancing analysis which weighed the fact that the agreement provided for certain hiring exceptions[176] against the fact that a naked agreement not to hire was in place.[177] Thus, contrary to a true per se analysis, the court engaged in a balancing act—reserved for the rule of reason—by assessing the extent to which the labor market was "meaningfully" allocated—not whether it had, in fact, been allocated.

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170. *Id.* at *15–*17 ("The challenge is thus to permit defendants to introduce evidence of the agreements salutary effects without the jury interpreting such evidence as either potential market-based justifications for the agreement or an alternative purpose of the agreement that would necessarily exonerate the defendants even if it were consistent with an unlawful purpose.").

171. United States v. Patel, 2023 U.S. Dist. LEXIS 74104, at *20, *25 (D. Conn. Apr. 28, 2023) (citing *DaVita*, 2022 U.S. Distr. LEXIS 54544, at *3)

172. *Id.* at *18.

173. *Id.* at *26–27 (citing Bogan v. Hodgkins, 166 F.3d 509, 515 (2d. Cir. 1999).

174. *Id.* at *27 (citing *DaVita*, 2022 U.S. Dist. LEXIS 54544, at *3)

175. *Patel*, 2023 U.S. Dist. LEXIS 74104, at *27.

176. The alleged agreement, however, allowed for exceptions that were regularly used even during periods of hiring "freezes," such as the exception that a supplier company could hire engineers and other skilled laborers if they separated from their prior employer. For example, one former employee stated that "he was hired by Pratt during 2016." *Id.* at *23.

177. This was evidenced by "statements in e-mails suggesting a blanket agreement not to hire." For example, "Mr. Patel stat[ed] that Pratt and Whitney 'agreed with Quest that P&W will not hire ay Quest employee.'" *Id.*

2. Meaningful Vertical Interference

Although not yet applied, adopting a "meaningful" standard would similarly impact the court's analysis of vertical no-poach agreements. As discussed, while most vertical agreements proceed under a rule of reason analysis, the effects of a vertical no-poach can still be felt at the horizontal level and can be subject to per se liability.[178] For example, the Seventh Circuit in *Deslandes* recently found that the complaint alleged a horizontal restraint insofar as McDonald's operates several restaurants itself or through a subsidiary.[179] Here, the court reversed the lower court's decision, which held that the no-poach was ancillary to McDonald's franchise agreement and was subject to the rule of reason.[180] On review, however, the Seventh Circuit established that a more rigorous review of the facts was necessary before the per se standard could be rejected.[181] For example, the court suggested that if a no-poach clause covered too broad of an area or lasts longer than necessary for the franchise to recoup its investment in that employee, then there is evidence that the agreement was not "ancillary" and may be per se unlawful.[182]

While it seems that proceeding under the per se standard would increase the plaintiff's likelihood of success against their franchise employers—who often have strong ancillary restraint defenses—the court's "meaningfulness" rule ultimately provides a roadblock to succeed under this standard. That is, even if the court allows the plaintiff to proceed under this less rigorous standard, the plaintiff will still face difficulty establishing a meaningful cessation of competition if only a few employees bring the case, especially if the jury may consider, as in *DaVita*, the pro-competitive benefits of the agreement. Therefore, while the *Deslandes* decision raises the bar on a defendant's ancillary restraint defense, the decisions in *DaVita* and *Patel* impose higher and arguably impossible burdens for employees to overcome—especially for employees with limited resources compared to their franchisor employers.[183] Thus, the meaningful standard ultimately makes any likelihood of success for plaintiffs or prosecutors extremely unlikely and burdensome.

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178. *See supra* Part II.

179. Deslandes v. McDonald's United States, LLC, 81 F.4th 699, 703 (7th Cir. 2023).

180. *Id.* ("[T]he district court jettisoned the *per se* rule too early.").

181. *Id.* at 705.

182. *Id.* at 704.

183. Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260, at *14–*15 (N.D. Ill. Jun. 25, 2018); *see supra* Part II.

C. The Court's Shortcomings and the Future of No-Poach Litigation

Although the *Patel* court maintains that it is not "grafting a new element into the per se offense" and is trying "to expand the common and accepted definition of market allocation in a way not clearly used before[,]" this is simply not the case.[184] In fact, the only truth to that statement is that the meaningful standard establishes a form of "market allocation . . . not [] used before." That is, this standard diverges from antitrust precedent, which has long held that the per se standard proceeds without regard to the offender's market power or an assessment of the conduct's anti-competitive effects and pro-competitive benefits.[185] It follows that any assessment of meaningfulness should be conducted under the rule of reason, which is designed to balance the pro-competitive and anti-competitive arguments.[186] Therefore, if it is true that no-poach agreements resemble market allocation agreements because they allocate employees in the labor market, then the courts cannot assess meaningfulness under the per se standard.

As mentioned, the meaningfulness standard not only conflicts with the per se analysis rooted in antitrust precedent but also imposes an imprecise and unreasonable burden for prosecutors and plaintiffs to overcome, making it difficult to administer accurately and consistently. Largely, this stems from the fact that "meaningful cessation of market allocation" has yet to be defined. In fact, the closest we've gotten to a definition of "meaningful" was in the court's instructions to the *DaVita* jury, which instructed that "'meaningful competition' is another way of saying 'significant competition' or 'competition of consequence.'"[187] But what does this look like? We don't know. We only know what it is not: the agreements in both *Patel* and *DaVita*.

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184. United States v. Patel, 2023 U.S. Dist. LEXIS 74104, at *27 n.7 (D. Conn. Apr. 28, 2023).

185. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."); *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 909 (6th Cir. 2003) ("[T]he virtue/vice of the per se rule is that it allows courts to presume that certain behaviors as a class are anticompetitive without expending judicial resources to evaluate the actual anticompetitive effects or procompetitive justifications in a particular case.").

186. State Oil Co. v. Khan, 522 U.S. 3, 10–18 (1997).

187. Mutchnik, *supra* note 2. *See* Order on Pending Motions, United States v. DaVita Inc., 2022 U.S. Dist. LEXIS 76806, *8–*9 (D. Colo. Mar. 21, 2022).

Significantly, "meaningful cessation" would look different in a horizontal versus a vertical arrangement proceeding under the per se standard. For example, the pro-competitive justifications at play in a vertical agreement may mean that the plaintiff must prove that the worker's mobility was nearly absolute: that almost all employees were foreclosed from seeking alternative opportunities or that they did, in fact, seek those opportunities to establish meaningful market allocation. This may be especially challenging to prove given that a franchise employer, for example, likely doesn't have the luxury of being jobless or may even lack the resources to bring or join such a case. Further, a vertical no-poach, which may not prevent a McDonald's employee from seeking employment at Burger King, would naturally differ from a horizontal no-poach agreement, which prevents an employee from moving to a competing firm within the industry. Thus, plaintiffs and prosecutors will have different burdens of proof in establishing how meaningful the restraint really was.

In effect, the court's decisions in *Patel* and *DaVita* suggest that the court may oppose the DOJ's efforts and prefer the prosecution of no-poach agreements to proceed under the rule of reason. Although this position opposes the traditional values of preserving the court's time and resources by favoring a more rigorous analysis, the "meaningful" standard nevertheless requires the court to conduct further inquiry into the firm's intent despite the presence of a naked restraint and thus weigh the pro-competitive justifications against the presence of the agreement itself. Therefore, while courts have consistently held that the per se standard *can* apply to the prosecution of no-poach agreements, they are making it more difficult for the Government to succeed under this standard.[188] This raises the question of whether the court subtly disagrees with the DOJ's initiative by requiring meaningful allocation and weighing pro-competitive benefits as if it were a rule of reason analysis.

Ultimately, the "meaningful" inquiry takes away from any clear distinction between the per se and rule of reason standards and suggests that there may be no need to distinguish between the two—or settle on which standard to apply—if the court ultimately will engage in some sort of balancing regardless. Perhaps this even suggests that the courts are trending towards not applying antitrust laws to labor markets. Sure, the Government may be facing an evidentiary burden as they have been unable to convince a court or a jury. But when the standard is as vague and undefined as "meaningful," it seems the Government stands no chance. At the very

188. *See supra* Part II.

least, the DOJ's track record suggests that courts aren't buying it, and perhaps it is time to move on.

PART IV: THE PATH FORWARD

There is no doubt that the DOJ is failing to prosecute no-poach agreements successfully. That is, if their goal under the Guidelines is to secure convictions, then they have yet to meet this goal in the seven years since the Guidelines were issued. Still, even if their goal is merely to deter this type of anti-competitive conduct—regardless of convictions—it is hard to say that the DOJ has been any more successful in this endeavor. For example, the DOJ's only claimed victory resulted in a plea agreement that imposed a criminal fine of merely $62,000, restitution of $72,000, and community service for the charged individual: [189] an outcome which "appears to temper [the] DOJ's position on the seriousness of these offenses."[190]

The DOJ's most recent decision to drop the charges against SCA again demonstrates that the DOJ's initiative may lack the teeth to continue prosecuting these cases and deter this type of anti-competitive conduct.[191] So far, courts have imposed criminal penalties three times in labor market cases: (1) the corporate fine and restitution order against VDA; (2) the community service program for VDA's former manager; (3) the probationary sentence for the obstruction count in *Jindal*—a wage-fixing case which remains outside the scope of this paper.[192] Thus, the Department's only success to date has been in pre-trial motions on the application of the per se rule. Still, while the DOJ maintains its position that these pre-trial motions support a "growing body of precedent that supports its underlying legal theory in these cases," these penalties and the Government's inability to convince juries ultimately is unlikely to have a deterrent effect.[193] In fact, the DOJ's inability to secure a conviction has left the question of sanctions largely unanswered. Therefore, while law firms continue to advise their clients to be mindful of the Guidelines and to avoid entering into naked no-poach agreements, the actual consequences of doing so are negligible.[194] In

189. Press Release, *supra* note 46.
190. Reichel, *supra* note 45.
191. United States Motion to Dismiss, United States v. Surgical Affiliates, LLC, No. 3:21-cr-0011-L (N.D. Tex. Nov. 13, 2023); Press Release, *supra* note 46.
192. Reichel, *supra* note 45.
193. *Id.*
194. *See Guidance for HR Antitrust Compliance,* CORP. COUNS. BUS. J. (2020), https://ccbjournal.com/articles/antitrust-and-employment-guidance-for-hr-antitrust-

fact, despite the DOJ's contention that these setbacks will not deter the Department from criminally investigating and prosecuting antitrust violations in labor markets, the Department has only one case in the pipeline: *United States v. Lopez*—a wage-fixing case.[195]

This lack of a deterrent effect suggests that something needs to change to police the anti-competitive effects of no-poach agreements effectively—which do harm workers. There are at least two viable solutions to the current ineffective enforcement regime. First, if the DOJ and courts are adamant that antitrust laws apply to labor markets, then the courts must adopt the rule of reason standard of liability in all cases. Doing so will lead to more consistency in administering antitrust laws in the labor markets because the path forward is clear, leading to greater efficiency and accuracy.[196] However, even the rule of reason will likely prove difficult for prosecutors and plaintiffs to overcome. Thus, the larger inquiry is whether antitrust laws are the proper enforcement mechanism. Therefore, the second solution to ending anti-competitive no-poach agreements may be outside of antitrust laws, which may mean policing them or through other avenues of contract law and the criminal justice system.

A. *If Antitrust Laws Apply to Labor Markets*

The DOJ is adamant—and courts tend to agree—that Section 1 of the Sherman Act applies to both product and labor markets, where

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compliances; *DOJ Signals Increased Scrutiny on Information Sharing,* GIBSON DUNN (Feb. 10, 2023), https://www.gibsondunn.com/doj-signals-increased-scrutiny-on-information-sharing/; *DOJ Losses in No-Poach Prosecutions Mount, but Antitrust Caution Still Warranted*, HOLLAND & KNIGHT (Mar. 27, 2023), https://www.hklaw.com/en/insights/publications/2023/03/doj-losses-in-nopoach-prosecutions.

195. Press Release, U.S. Dep't of Just., Health Care Staffing Executive Indicted for Fixing Wages of Nurses (Mar. 16, 2023), https://www.justice.gov/opa/pr/health-care-staffing-executive-indicted-fixing-wages-nurses; Reichel, *supra* note 45. ("The lone indictment came on March 15, 2023, which charges the defendant with a single count of fixing the wages of home health care nurses in the Las Vegas area.").

196. Ideally under rule of law principles, an antitrust standard should promote: accuracy, administrability, consistency, objectivity, applicability, and transparency. Here, I am focusing on the link between consistency—which leaves no subjective input from the decision-makers—, administrability—that the standard should be easy to apply—and accuracy—that the standard should minimize false positives and negatives. *See also* OECD, WHAT MAKES CIVIL JUSTICE EFFECTIVE 2 (2013) ("A good enforcement of contracts stimulates agents to enter [] economic relationships, by dissuading opportunistic behavior and reducing transaction costs. This has a positive impact on growth through various channels: it promotes competition, fosters specialization in more innovative industries, contributes to the development of financial and credit markets and facilitates firm growth.").

firms exercise market power as buyers of labor. Therefore, just as naked market allocation agreements constitute per se antitrust violations, agreements that seek to allocate workers are also categorically unlawful.[197] Or, at least as far as the DOJ is concerned, they should be. While we've seen that courts generally agree that the per se standard *can* apply, this standard as we know it has yet to be applied, and the DOJ has yet to win on the merits of the per se standard. As we've looked closer at these cases, we've raised the possibility that the DOJ is facing an evidentiary issue. For example, even though the DOJ successfully made it to the jury in *DaVita,* they ultimately remained unconvinced.[198] Still, it is hard to imagine that an evidentiary issue is the only explanation for the DOJ's inability to succeed under the per se standard. After all, the per se standard requires only that the Government prove an agreement exists—which they have done in many cases.[199] Therefore, perhaps it is not the DOJ that is getting it wrong. Perhaps it is the courts.

We first saw signs that the courts are muddying the waters in *DaVita* with the introduction of the "meaningful" standard. Here, although the court allowed the Government to proceed under a per se analysis, they imposed plus factors—a type of rule of reason analysis—by requiring the Government to prove intent to meaningfully interfere in the market and allowing the jury to consider pro-competitive justifications.[200] This same standard was again adopted in *Patel* and is likely the culprit for the Government's most recent decision to drop its case against SCA despite compelling evidence of an agreement.[201] Therefore, this meaningful standard has effectively stripped prosecutors of the benefits of the per se standard and blurred the distinction between the per se standard and the rule of reason. Ultimately, this begs the question of whether the per se standard should apply to labor markets at all or if a different standard should apply—if it doesn't already.

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197. *See* CONG. RSCH. SERV., LSB10725, ANTITRUST ISSUES IN LABOR MARKETS (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10725/2#:~:text=As%20a%20formal%20matter%2C%20the,se%20illegal%20under%20current%20law.

198. *See supra* notes 57–58 and accompanying text.

199. For example, in *Patel* the government established that the parties had entered into an agreement by presenting email evidence of the terms of the agreement, and that it was being enforced. *See supra* notes 152, 176.

200. United States v. DaVita, Inc., 2022 U.S. Dist. LEXIS 54544, at *9 (D. Colo. Mar. 25, 2022).

201. *See supra* notes 56, 65, 149–50 and accompanying text.

1. Is the Rule of Reason or the Quick Look a Better Approach?

As discussed, there are several reasons why the per se rule may be more favorable to the DOJ over the rule of reason. For one, restraints analyzed under the per se standard are so inherently anti-competitive and damaging to the market that they warrant condemnation without further inquiry into their effects or justifications.[202] In other words, the plaintiff must only prove that the anti-competitive conduct took place by proving an agreement or a hub-and-spoke conspiracy. The plaintiff, however, does not need to demonstrate the conduct's anti-competitive nature or the negative effects in the relevant product of geographic markets, [203] and the defendant is not entitled to the defenses of pro-competitive justifications.[204] As such, it makes sense that the DOJ would seek to prosecute under the per se rule as it is arguably the most favorable standard—especially where there is clear evidence of a naked agreement or conspiracy not to poach employees.

Conversely, the rule of reason requires an intensive analysis. As a reminder, this standard requires plaintiffs to demonstrate that a challenged restraint is, in fact, unreasonable and anti-competitive, which entails a detailed analysis of the challenged conduct by weighing its perceived anti-competitive effects against its pro-competitive effects.[205] Still, even naked agreements are entitled to the rule of reason if the agreement is ancillary to a separate legitimate joint venture.

Under these two standards, the distinction between horizontal and vertical agreements is critical. Simply put, if a naked horizontal agreement exists, then the courts have held that the per se standard applies. If, however, the agreement is ancillary, then the rule of reason or the quick look applies. The rule of reason will likewise apply to vertical agreements where firms compete at different levels of the market. Thus, at a glance, it seems simple: if the agreement is plainly anti-competitive, it should be per se illegal; if not, then the rule of reason or quick look should apply. But as we've seen, even vertical agreements can have horizontal effects, and thus "the distinction between horizontal [] and vertical agreements is hopelessly tangled."[206] Further, even plainly anti-competitive agreements are proceeding under a pseudo rule of reason analysis—the "meaningful"

202. U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 216 (1940).

203. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

204. Nat'l Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679, 691 (1978).

205. *Id.*

206. Iona Marinescu & Eric A. Posner, *Why Has Antitrust Law failed Workers?,* 105 CORNELL L. REV. 1343, 1386 (2019).

standard—which allows pro-competitive benefits of the agreements to carry weight in the court or the jury's decision. Therefore, despite its purpose, the classification of the per se standard is operationally meaningless and, as we've seen, does not help plaintiffs or prosecutors win their cases.

Thus, perhaps the best way forward is to abandon the per se rule in the labor markets and adopt the rule of reason in all contexts—horizontal or vertical. In essence, this seems to be what the courts are already doing under the guise of the "meaningful" standard. Notably absent from the court's inquiry under this standard, however, is any analysis of the firm's market power.[207] Thus, this pseudo rule of reason standard may more closely resemble a quick look, which combats the rigorous analysis required by the rule of reason.

As discussed, the quick look applies where per se condemnation is not merited, but where the evidence plainly suggests anti-competitive effects. That is, the restraint is presumed anti-competitive, and the defendant may present pro-competitive justifications. [208] Although this in-between standard, which gives both parties the opportunities to present their best case, may lead one to think that the quick look may be the better approach,[209] adopting the quick look sends us back into "the sea of doubt"[210] with courts again struggling with which standard to apply. In fact, even where courts have applied a quick look, the case has been remanded without a disposition of the issues. For example, even though the court in *Deslandes* held that the plaintiff plausibly alleged a restraint that might be unlawful under a quick look, the court ultimately held that it did not have enough

207. See Cont'l T.V., Inc. v. GTE Sylvania, Inc.. 433 U.S. 36, 49 (1977) (This standard requires a court to "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

208. *See* Iadevaia, *supra* note 18, at 161 ("[B]ecause the burden initially lies with the defendant—not the plaintiff, like the rule of reason—it is significantly more likely that a court will rule in favor of the plaintiff.").

209. *See* Iadevaia, *supra* note 18 ("The rule of reason has been criticized in no-poach agreements as a dead end for plaintiff's class action claims."); *see also* Marinescu, *supra* note 205 ("The antitrust laws have rarely been used against employers by private litigants. . .").

210. This phrase comes from William Howard Taft, when he was a 6th Circuit judge. ("It is true that there are some cases in which the courts, mistaking, as we conceive, the proper relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of parties, how much restraint of competition is in the public interest, and how much is not. The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would be a strong reason against adopting it.") United States v. Addyston Pipe & Steel Co., 85 F. 271, 283-84 (6th Cir. 1898).

experience with no-poach provisions in franchise agreements to condemn them without undertaking a fuller review.[211] Thus, as in *Brown*, the quick look may only complicate and lengthen litigation.[212] After all, courts have warned that it should be applied "only in rare cases" as the quick look is a standard that is difficult to apply consistently.[213] Therefore, if the DOJ and courts want a solution that will help both plaintiffs and prosecutors succeed in their litigation of no-poach agreements, a quick look should not apply, and a rule of reason analysis must be conducted fully.[214] This means that if the "meaningful" standard is here to stay, courts must conduct a more rigorous market analysis.

2. Challenges with the Rule of Reason

The rule of reason, however, is not a perfect solution. Specifically, the rule of reason will likely pose problems for franchise plaintiffs in proving the relevant market and overcoming compelling pro-competitive justifications.[215] For example, in *Deslandes*, the court held that the relevant product market for each plaintiff's labor is hundreds or thousands of relevant markets, broken up into smaller geographic areas.[216] Therefore, as in *Deslandes,* plaintiffs will face difficulty in certifying a class and proving harm where competition in these markets can look drastically different and where individual injury will vary based on the different dynamics in each labor market, especially where franchises enforce no-poach agreements unevenly.[217]

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211. Deslandes v. McDonald's USA, LLC, 2021 U.S. Dist. LEXIS 140735, at *19 n.4 ("The Court is not suggesting that this evidence is undisputed or that a factfinder would fit it persuasive. The point is merely that in the face of defendant's significant evidence of pro-competitive effects, a full analysis under the rule of reason, rather than a quick look is necessary.").

212. United States v. Brown Univ. 5 F.3d 658, 669 (3d Cir. 1993).

213. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 775–76 (1999).

214. *See* Corrected Statement of Interest of the United States of America at 16-17, Joseph Stigar v. Dough Dough Inc., et al., No. 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019), https://www.justice.gov/atr/case-document/file/1141731/download (arguing that when no-poach restrictions within a franchise system warrant rule of reason analysis, "they warrant full rule of reason analysis, not a quick look.").

215. *See supra* note 210.

216. Deslandes v. McDonald's USA, LLC, 2018 U.S. Dist. LEXIS 105260, at *13 (N.D. Ill. Jun. 25, 2018).

217. The court in *Deslandes* found that in some markets McDonald's restaurants will have so many competitors that a no-poach agreement is unlikely to have anticompetitive effects, unlike markets with little outside competition where a no-poach restricting worker's movements could lead to wage suppression and other harm. *Id.* The *Jimmy John's* decision also underlines other difficulties plaintiffs may face in certifying a class in this area. The court there held that because franchises unevenly enforced the no-poach provision, with some ignoring it outright and others granting

Similarly, these intrabrand restraints can increase efficiency, reduce free riding, and help the company compete with other brands by ensuring cooperation among the franchises.[218] For example, McDonald's franchisors argued that "no-hire restriction[s] promote[] intrabrand competition [in the product market] for hamburgers by encouraging franchisees to train employees for management positions."[219] However, one could argue that "[e]fficiency benefits, or benefits in the product market, would be out-of-market and, therefore, should not be considered in the analysis as to whether an otherwise anti-competitive restrain in the *labor* market is unlawful."[220] That is, the pro-competitive justifications in the product market have no potential positive effect on driving down compensation and restricting mobility for workers in the labor markets.[221] It follows that for this approach to work—and for plaintiffs to have the hope of success—courts should only weigh the competitive effect of the no-poach in the labor market in which it occurs and not consider any effects in the product market.[222]

Prosecutors will similarly face difficulty under the rule of reason. However, it is difficult to say whether a full rule of reason analysis will be any more laborious than proving "meaningful cessation," as is currently the case. That is, firmly adopting the rule of reason in all contexts likely would not significantly change the burden on prosecutors who are already subject to a pseudo rule of reason standard. Therefore, adopting the rule of reason across both horizontal and vertical contexts, and in both naked and ancillary restrictions, will ultimately provide greater consistency and

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waivers to select employees, individual proof would be needed to establish which franchises were involved in the alleged conspiracy. Butler v. Jimmy John's Franchise, LLC, 331 F.Supp. 3d 786, 793 (S.D. Ill. 2018).

218. *Butler*, 331 F.Supp at 794. Likewise, McDonald's argued that the provision was necessary to prevent franchisees from stealing other's employees and free riding of training costs and to improve procompetitive, brand-enhancing consistency and quality. *Deslandes*, 2018 U.S. Dist. LEXIS 105260, at *21.

219. *Deslandes*, 2018 U.S. Dist. LEXIS 105260, at *22 ("[B]etter service equals happier customers.").

220. Iadevaia, *supra* note 18, at 179 (citing Polygram Holding, Inc. v. FTC, 416 F.3d 29, 38 (D.C. Cir. 2005)).

221. *See* Cal. ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1161 (9th Cir. 2011) (en banc) (Reinhardt, J., concurring in part and dissenting in part) ("driving down compensating to works in this way is not a benefit to consumers cognizable under our laws as a 'procompetitive' benefit.").

222. Iadevaia, *supra* note 18, at 181 (citing Marinescu, *supra* note 205) ("Marinescu and Posner suggest that section 1 standards should be relaxed for labor market standards. They argue that, among other things, for section 1 claims in the labor market, the standard should only assess a relevant commuting zone for the purposes of establishing labor market concentration, rather than assessing the entire labor market.").

administrability across court decisions a—something all courts and prosecutors strive to achieve.[223] This would also mean there would be no reason to distinguish between horizontal and vertical arrangements. Ultimately, this would dispel the challenges of what standard to apply when the anti-competitive effects of a vertical arrangement are felt on a horizontal level. Likewise, this would eliminate the need for the ancillary restraint defense because pro-competitive justifications would be argued regardless of the motivation. True, prosecutors may face difficulty proving their case under this more intense and demanding standard, but prosecutors are already facing difficulty in proving their case. So, the risks of abandoning the per se standard from the prosecution of no-poach agreements do not seem to subject prosecutors to a higher burden than under the currently undefined "meaningful" standard. Therefore, although the rule of reason does not necessarily promote efficiency in the same way as the per se standard, having one standard apply to all contexts nonetheless promotes consistency—which ultimately leads to greater efficiency in tackling the enforcement of antitrust laws to no-poach agreements.[224]

Significantly, with the *Deslandes* case up on appeal before the Supreme Court, we may ultimately get some answers to these questions. Here, the petition for writ of certiorari raises a question about the applicability of federal antitrust laws to no-poach agreements and "whether courts assessing a restraint under the Sherman Act must ignore pro-competitive effects in related markets."[225] It follows that the outcome would set a precedent not only for no-poach litigation in the franchise industry but also on the specific application of the per se and rule of reason standards in horizontal and vertical relationships. In fact, legal experts anticipate that the case could provide the "essential guidance on the delicate

223. *Supra* note 195 and accompanying text.

224. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) ("Certain categories of agreements, however, have been held to be per se illegal, dispensing with the need for case-by-case evaluation."); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) ("Per se liability is reserved only for those agreements that 'are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'"); *see also* Amanda Triplett, "*No More No-Poach": An Antitrust Plaintiff's Guide*, 26 WASH & LEE J. CIV. RTS. & SOC. JUST. 381, 389 (2019) ("The practical effect of this analysis—which will be important if the per se rule is not applied to no-poach agreements—is that the plaintiff is not required to put forth detailed evidence of anticompetitive effects through a demonstration of market power.").

225. Petition for Certiorari at 2, Deslandes v. McDonalds, 81 F.4th 699, 703 (7th Cir. 2023); *see McDonald's Appeals to Supreme Court in No-Poach Case,* COMPETITION POL'Y INT'L (Dec. 4, 2023), https://www.pymnts.com/cpi_posts/mcdonalds-appeals-to-supreme-court-in-no-poach-case/ [hereinafter *McDonald's Appeals to Supreme Court*].

balance between protecting fair competition and acknowledging legitimate business interests" that the courts so desperately need.[226]

Still, the challenges of winning under the rule of reason for both prosecutors and plaintiffs beg the question of whether antitrust laws fit labor markets and whether the rule of reason sufficiently addresses the effects that no-poach agreements have on real people and their livelihood. Therefore, perhaps the larger issue is not what standard should apply but whether these cases are fit for enforcement under antitrust laws.

B. *Is Antitrust Law the Right Fit?*

Historically, only conduct deemed per se unlawful has been subject to criminal prosecution under the Sherman Act. Likewise, the DOJ has "made clear time and time again that it only brings criminal prosecutions in the context of per se conduct."[227] As already discussed, however, no-poach agreements are not being scrutinized under a per se standard but rather a pseudo rule of reason analysis: the "meaningful" standard. Thus, as it currently stands, prosecutors and plaintiffs are facing evidentiary challenges as courts have imposed this higher and more demanding burden. Still, the DOJ continues to assert that "agreements among competitors to allocate markets have long been condemned as *per se* unlawful, . . . and [that] the same rule applies whether competitors agree to allocate the market for customers."[228] With the introduction of the "meaningful" standard, however, the court has cut against the entire purpose of the per se standard, rendering it almost meaningless in the context of no-poach agreements. That is, even though the court has found the per se standard *can* apply, the DOJ's inability to secure victories has yet to demonstrate that it *does* apply. Therefore, the court has not only minimized the entire purpose and utility of the per se standard but also suggested that the DOJ may not be able to succeed under a rule of reason analysis either. Thus, perhaps these agreements simply don't align with antitrust laws.

The purpose of the Sherman Act is "not to protect [] business[es] from the working of the market; it is to protect the public from the

226. *McDonald's Appeals to Supreme Court*, *supra* note 224.

227. Mutchnik, *supra* note 2 (citing David Costello et. al., Antitrust Violations, 53 AM. CRIM. L. REV. 939, 940 (2016)) ("As a general rule, the Antitrust Division will only seek criminal indictments for clearly intentional violations, such as price fixing or bid rigging.").

228. Statement of Interest of the United States of America, Markson v. CRST Int'l, Inc., No. 17-CV-01261 (C.D. Cal. Aug. 5, 2022), https://www.justice.gov/media/1232791/dl?inline.

failure of the market" out of concern for the public interest.[229] It follows that the enforcement of no-poach agreements under antitrust laws does little to protect the public from the failures of the market. Although penalties for violating antitrust laws can be severe,[230] as we've seen, there is little deterrence for entering into these types of restraints because most cases have been settled out of court and imposed no jail time. As such, the threat of high penalties does little to prevent this type of conduct if they have yet to be enforced. In fact, the only "victory" on record amounted to only $134,000 of fines and restitution, and community service for the individual players.[231]

Likewise, the high burden required under the rule of reason and this new "meaningful" standard make it unrealistic and impossible for the Government, let alone an individual plaintiff, to win. Largely, this stems from the court's inability—and perhaps unwillingness—to define what "meaningful" means. Just as courts facing these issues have refused to answer which standard applies, their unwillingness to define what this standard looks like imposes an impossible burden as the Government works to gather evidence. After all, how can the Government garner sufficient evidence if the courts have yet to say what "meaningful" looks like? This evidentiary burden is similarly impossible for individual plaintiffs in, say, the franchise context. Here, these plaintiffs will not only face difficulty in establishing a class and proving the effects in the relevant market but also will face high costs and potential social stigmatization in going up against large franchisors with significantly more resources to defend the action—a luxury which frankly many franchise employees may not have.

One solution that re-imagines the analysis of no-poach agreements suggests that the analysis be brought in line with the treatment of non-compete agreements, which have never been deemed per se violations under the Sherman Act.[232] This framework provides that non-competes are enforceable only "if the employer can demonstrate that it furthers a legitimate interest of the employer," which is "defined as a trade secret (other than protectable confidential

229. Spectrum Sports v. McQuillen, 506 U.S. 447, 458 (1993).

230. For per se criminal violations, companies face a maximum fine of up to $100 million or twice the gross gain or gross loss suffered, and an individual may be fined up to $1 million or face a ten-year prison sentence. 18 U.S.C. § 3571.

231. U.S. District Court Judge Richard F. Boulware II sentenced VDA to pay a criminal fine of $62,000 and restitution of $72,000 to victim nurses. Press Release, U.S. Dep't. of Just., Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses (Oct. 27, 2022), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

232. Marinescu, *supra* note 205, at 1388; *see* Iadevaia, *supra* note 18, at 180.

information), customer relationships, investment in the employee, or purchase of a business owned by the employee."[233] Under this approach, the employer identifies "a protectable interest only when the employee has gained serious training and investment," allowing for a no-poach agreement to survive in only a narrow set of circumstances.[234]

Likewise, states could seek to minimize litigation by entering into agreements with companies prohibiting companies from entering and imposing no-poach agreements on their workers. For example, the Washington Attorney General has entered into agreements with over 237 corporate franchisors, from McDonald's to Jiffy Lube, across more than 4,700 Washington locations and nearly 200,000 locations nationwide to eliminate the use of no-poach clauses.[235] Although this framework does not necessarily answer what happens if a firm refuses to enter one of these agreements, it provides sufficient deterrence and incentive to end harmful no-poach practices outside the courtroom. In fact, these agreements have been found to enhance opportunities for workers. A study conducted in July of 2022 found that this approach "directly increa[es] wages for low-income franchise workers nationwide" by 3.3% compared to companies that were not a part of the initiative.[236] Further, these workers would also have the opportunity to apply for higher-paying jobs or use these opportunities to bargain for raises at existing employers.

Ultimately, if these agreements may not provide the same disincentive as potential criminal liability, perhaps all that is necessary is a collective movement away from litigation and toward

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233. Iadevaia, *supra* note 18, at 180 (citing RESTATEMENT (THIRD) OF EMPLOYMENT L. § 8.07 (AM. L. INST. 2015).

234. *Id.* (arguing that this approach is much easier to analyze because it does not get caught up in the different standards and forms of inquiries under antitrust law).

235. Press Release, Wash. State, Office of the Att'y Gen., Lasting impact: Study finds AG Ferguson's no-poach initiative boosted income for low-wage workers nationwide (Jul. 25, 2022), https://www.atg.wa.gov/news/news-releases/lasting-impact-study-finds-ag-ferguson-s-no-poach-initiative-boosted-income-low#:~:text=Ferguson%27s%20No%2DPoach%20Initiative%20was,Anytime%20Fitness%20and%20Jiffy%20Lube; Press Release, Wash. State, Office of the Att'y Gen., AG Report: Ferguson's initiative ends no-poach practices nationally at 237 corporate franchise chains (Jun. 16, 2020), https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate.

236. This study examined job postings from a group of 185 corporations that changed their practice as a result of Ferguson's No-Poach Initiative. The authors determined that advertised wages increased by more than 3.3% specifically as a result of the initiative, which equated to a pay raise of $1,041.71 for workers employed by these corporations, who earn an average salary of $31,567. Brian Callaci, et. al. *The Effect of Franchise No-poaching Restrictions on Workers Earnings* (July 20, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155577.

reaching an agreement. Doing so would naturally allow for enforcement under contract law and existing criminal statutes to address the conduct of individual bad actors. As in Washington, if states successfully negotiate these muti-company agreements prohibiting no-poach agreements, millions of workers across the country stand to gain. In fact, under such a framework, employees benefit, and the DOJ achieves its goal of "fair opportunity" in the market for our labor and ideas.[237] All of which can take place outside of antitrust laws.

CONCLUSION

The DOJ's record in no-poach labor market cases suggests it is time to retreat from its aggressive stance. As discussed, despite their commitment to continue prosecuting these cases criminally as a "lasting part of [the Department's] program,"[238] there is little to demonstrate that doing so is an important part of achieving their mission to "deliver economic justice for the American People."[239] In fact, the Department's most recent decision to drop the charges against SCA suggests that they may actually agree.

Apart from a few positive dispositions on motions to dismiss, the Government has suffered significant setbacks that will prove difficult to overcome moving forward. In addition to the acquittals in *Manahe* and *Patel*, the Department's only "win" obtained nominal penalties, both of which are unlikely to deter this conduct. There also remains the separate question of whether juries will be convinced to convict defendants, and the vague and varied jury instructions across cases suggest that the DOJ will only continue to struggle moving forward. Likewise, with the introduction of the "meaningful" standard, courts have deprived the Department of the benefits of the per se standard and have blurred the distinction between the rule of reason and per se analysis, making it unlikely that courts will impose consistent rules of law and methods of analysis in the future. Thus, if these cases continue to be brought under antitrust laws, the rule of reason must apply, or risk further damaging the reputation of the per se standard and rendering it 'meaningless.' However, the forgoing complexities and losses ultimately suggest that antitrust laws are not the right

237. Kanter, *supra* note 6.

238. Brian Koenig, *DOJ 'Certainly Learning' from Failed No-Poach Prosecutions*, LAW360 (Apr. 10, 2023), https://www.law360.com/competition/articles/1595529?nl_pk=d01618f4-3c4f-4ab2-9c52-6ba993d39e6a&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-04-11&nlsidx=0&nlaidx=1.

239. Kanter, *supra* note 4.

enforcement mechanisms for the successful litigation of no-poach agreements. Therefore, while antitrust laws remain an important instrument in government and private party efforts to "foster competition for works and their wages and job mobility,"[240] it is time that the DOJ abandon these efforts and seek enforcement under existing contract and criminal law to help minimize harm to workers going forward.

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240. Polden, *supra* note 7, at 612.