POLICY UPDATE

No Poaching

BY LUNA SHEN

In March 2019, four fast-food chains — Dunkin Donuts, Arby's, Five Guys, and Little Caesars — agreed to stop requiring "no-poach agreements" of their franchise owners. The agreements allegedly restricted a franchisee's ability to recruit or hire employees from within the same chain, curbing the workers' job mobility. The settlement followed a yearlong investigation by 14 state attorneys general.

This settlement is another blow to no-poach agreements following an announcement by the Justice Department's Antitrust Division in October 2016 that it would treat naked no-poach agreements as criminal offenses. (Justice defined a "naked" no-poach agreement as one "not reasonably necessary to any separate, legitimate business collaboration between the employers.") The Justice Department views such agreements as in violation of the Sherman Act because they restrain competition in the labor market. They also hurt employees by limiting the information available to them, their bargaining power, and their job opportunities. At the same time as the Justice Department's announcement, Justice and the Federal Trade Commission (FTC) jointly released guidance on antitrust policy for human resources professionals.

In September 2017, Alan Krueger and Orley Ashenfelter of Princeton University published a paper revealing that among 156 of the largest franchise chains in the United States, 58 percent had no-poach agreements; among 40 of the largest fast-food chains, 80 percent had no-poach agreements. Spurred by this revelation and the Justice Department's new attitude, state attorneys and private plaintiffs launched investigations and filed class-action lawsuits against no-poach agreements. Washington state Attorney General Bob Ferguson reached settlements with more than 50 companies to end the agreements and sued Jersey Mike's Subs when they did not comply. The lawsuits initially focused on fast-food franchises but have since expanded to other franchises, including tax preparation services and hotels. For example, while Ferguson's first three waves of settlements targeted fast-food chains, he announced a fourth wave in October 2018 that included gyms and a car repair service.

There have also been no-poach agreements to restrict skilled employees. In September 2010, the Justice Department filed a civil antitrust complaint against Adobe Systems, Apple, Google, Intel, Intuit, and Pixar alleging they had made agreements among themselves to place their employees on "no call" lists so they would not recruit employees from one another. In the settlement, the companies agreed to stop these agreements for at least five years. Later, Apple, Google, Intel, and Adobe's employees won $415 million in a class-action lawsuit against them for their no-poaching practices. Noncompete clauses are illegal in California, so tech companies allegedly resorted to such agreements to try to keep their talent.

More recently, Duke University paid $54.5 million in a class-action suit over an alleged agreement with the University of North Carolina not to hire each other's faculty. The Justice Department participated in support of the plaintiffs.

The matter of the franchise no-poach agreements in particular is slightly more complicated because there are subtleties to what could be illegal versus legal agreements. For example, if two firms have some sort of joint venture and poaching would get in the way of that, a no-poach agreement might be lawful. Naked no-poach agreements would be treated as per se illegal — that is, inherently illegal, with factors such as intent not taken into account — while cases where a no-poach agreement could actually help competition would be reviewed under the "rule of reason," in which harms are weighed against benefits.

In several recent fast-food franchise cases, the Justice Department weighed in by filing a memorandum with the court stating its position that in the context of franchises, no-poach agreements should be judged under the rule of reason. According to an article by Nicole Castle and Matt Evola of the law firm McDermott Will & Emery, the Justice Department seemed to reason that no-poach agreements between parent companies and franchisees might help competition because they help promote brands and maintain brand quality, thus improving competition between brands even if they reduce competition within brands.

On the other hand, FTC Chairman Joseph Simons does not see the competitive benefits of such agreements. In a December 2018 interview with GCR USA, he stated, "The FTC doesn't see what the benefits of a non-compete agreement are when there is no highly skilled labour involved.... There doesn't seem to be any efficiency benefit, so outlawing that would seem not to have a cost to it; actually it might have a benefit." He did not, however, think it likely that such agreements violate antitrust laws, because the franchises do not have enough market power to limit competition; an employee could always quit and start working for another franchise.

The cost of a violation could be high. In a criminal Sherman Act case, a company can face criminal penalties of up to $100 million, while individuals can face penalties of up to $1 million and up to 10 years in prison — and that's before any civil actions. **EF**