NO-POACH AGREEMENTS

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Biography

Robert ("Bob") Brian Fitzpatrick is the principal in the law firm of Robert B. Fitzpatrick PLLC in Washington, D.C. where represents clients in employment law matters. Mr. Fitzpatrick has concentrated his practice in employment law disputes for more than fifty years. He has represented clients in individual and class actions. He has represented clients in employment discrimination, workplace harassment, retaliation, age discrimination, FMLA, ADA, whistleblower, wrongful termination, non-compete, trade secrets, Computer Fraud and Abuse Act, and wage and hour claims, among others. He counsels numerous executive clients regarding employment agreements and compensation issues. He has negotiated literally thousands of severance agreements. He is also a frequent speaker on employment law topics, and has written countless articles on employment law, a few of which can be found on his website and his blog, Fitzpatrick on Employment Law.

Prior to entering private practice, Mr. Fitzpatrick served as a staff attorney in the Jackson, Mississippi office of the Lawyers' Committee for Civil Rights Under Law in the late 1960's; as a staff attorney in the Office of General Counsel of the Equal Employment Opportunity Commission in the early 1970's; and with the Washington Research Project (now the Children's Defense Fund) training minority attorneys in the Deep South to litigate employment discrimination cases. He has been in private practice in Washington, D.C. since 1970. He is an avid hiker and kayaker. He is a Fellow of the College of Labor & Employment Lawyers, having been inducted as a Fellow at the first annual induction ceremony in 1996. He has been listed as one of The Best Lawyers in America® for at least 25 continuous years.

He is admitted to practice in all courts of the District of Columbia (Superior Court, D.C. Court of Appeals, and the Federal District Court of the District of Columbia), the Federal District Court for Maryland, the Federal District Court for the Northern District of Mississippi, the Supreme Court of the United States, the Federal Circuit, the Court of Federal Claims, and the United States Courts of Appeals for the District of Columbia as well as the Fourth and Sixth Circuits.

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I welcome questions, suggestions for future presentations, and criticism. All are welcome. Please do not hesitate to email me.

No-Poach Agreements

- A no-poach agreement is an agreement between employers not to hire or solicit the other's employees
- Sometimes, it takes the form of sharing wage data and sometimes territorial allocation agreements.
- A so-called "naked" no-poach is per se illegal under the antitrust laws.
- A "naked" no-poach agreement is an agreement unrelated to any legitimate collaboration.
  - Agreements among competitors to "divide markets" are per se unlawful. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U.S. 877, 886 (2007). Indeed, an agreement of this type "is a classic per se antitrust violation." *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (citing *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972)). The Supreme Court has "reiterated time and time again that '[agreements allocating markets among competitors] are naked restraints of trade with no purpose except stifling of competition.' Such limitations are per se violations of the Sherman Act." *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) (per curiam) (quoting *Topco Assocs.*, 405 U.S. at 608).

When are No-Poach Agreements Appropriate?

- DLA Labor Dish Editorial Board, *"No Hire" Agreements: Unlawful Collusion or Necessary Self-Protection?*, DLA Piper (Sep. 30, 2014).

Example of a No-Poach Agreement

Here is an example of a no-poach agreement between franchisees at McDonald's:

> *During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph 14 shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.*

Evan Starr, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts*, Economic Innovation Group (Feb. 2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf.

Sherman Act

- *Approved July 2, 1890, The Sherman Anti-Trust Act was the first Federal act that outlawed monopolistic business practices*, ourdocuments.gov, U.S. National Archives & Records Administration (Nov. 12, 2019).

- *No-Poach Approach*, U.S. DOJ – Division Update (Sept. 30, 2019).

- Michael E. Martinez, et. al., *DOJ Antitrust Division Provides Additional Insight on Its Analysis of No-Poach Agreements that May Be Subject to Criminal Prosecution,* K&L Gates – Alert (Mar. 19, 2019).

- Ted Hassi, et. al., *Debevoise Discusses Employee "No-Poach" Agreements and Antitrust,* The CLS Blue Sky Blog (Mar. 25, 2019).

- Matthew Lane, *Antitrust in 60 Seconds: No-Poach Agreements*, Disruptive Competition Project (Nov. 6, 2019).

Treble Damages

- *Seaman v.. Duke University, et al*, No. 1:2015cv00462 (M.D.N.C. Feb. 1, 2018).

- Bruce D. Sokler, *Antitrust Attacks on "No-Poach" Agreements Between Employers Accelerating*, Mintz – Insights (Feb. 12, 2018).

- Susan Milner Parrott and Kerry Shad, *DOJ Cracks Down on No-Poach Agreements*, Smith Anderson – Publications (Apr. 18, 2018).

Criminal Penalties

- Michael E. Martinez, et. al., *DOJ Antitrust Division Provides Additional Insight on Its Analysis of No-Poach Agreements that May Be Subject to Criminal Prosecution,* K&L Gates – Alert (Mar. 19, 2019).

- Stefan M. Meisner and Steven Vaughn, US DOJ Adds Complexity to Enforcement of "No-Poach" Agreements Under Antitrust Law, McDermott Will & Emery – Insights (March 14, 2019).

Antitrust Division of DOJ

- DOJ Antitrust Division

- *No-Poach Approach*, U.S. DOJ – Division Update (Sept. 30, 2019).

“Naked” Agreements

- *Entering Into a Naked No-Poach Agreement? Bring a Lawyer.*, MoginRubin – Blog (Mar. 28, 2019).

- Steven John Fellman and David K. Monroe, *Naked Agreements Not to Poach Competitor’s Employees are Per Se Antitrust Violations*, GKG Law – Client Alert (Mar. 11. 2019).

Wage-Fixing Agreements

- Peter J. Levitas and Keron J. Morris, *Wage Fixing and No-Poach Agreements*, Arnold & Porter – Publications and Presentations (Feb. 19, 2019).
- Mark Krotoski, et al, *No-Poaching and Wage Fixing Agreements and Antitrust Laws: What Global Employers Should Know*, Morgan Lewis & Bockius (Sept. 18, 2018).
- Ted Hassi, et. al., *Debevoise Discusses Employee "No-Poach" Agreements and Antitrust*, The CLS Blue Sky Blog (Mar. 25, 2019).
- Clay Creps, *Wage-Fixing And No-Poaching Agreements – Criminal Prosecution Is A Real Risk*, JD Supra (July 10, 2018).

Quick Look Review

- An abbreviated rule of reason analysis
- Pleading requirements are relaxed
- A horizontal restraint may "facilitate the creation of new products, improve efficiencies, or lead to lower consumer costs[,]" and, thus, may not be "clearly harmful to competition." *Lifewatch*, 902 F.3d at 336. Id. Under those circumstances, the horizontal restraint is not per se unreasonable and would be "analyzed under some form...of a 'rule of reason' burden-shifting framework, which seeks to determine whether the restraint's harmful effects are outweighed by any procompetitive justifications and, if so, whether there are less restrictive alternatives." *Id*. A *complete* rule of reason analysis in those circumstances is not always warranted; rather, a "quick look" analysis may be conducted. The Third Circuit Court of Appeals has explained:
  - A quick look "presum[es] competitive harm without detailed market analysis" because "the anticompetitive effects on markets and consumers
  - are obvious." *Deutscher Tennis Bund*, 610 F.3d at 832. It is inappropriate if " 'the contours of the market' ... are not 'sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition ....' " *Id*. (quoting *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n.*, 388 F.3d 955, 961 (6th Cir. 2004)).
- *Lifewatch*, 902 F.3d at 336 n.8. In other words, a quick look analysis falls between the rule of reason and per se condemnation. *eBay*, 968 F.Supp.2d at 1037.

“Quick look” Analyses

- *In re: Railway Industry Employee No-Poach Antitrust Litigation*, No. 2:18-mc-00798 (W.D. Pa. June 20, 2019).
- Boris Bershteyn, et al., *DOJ Wades Deeper Into No-Poach Advocacy,* Skadden, Arps, Slate, Meagher & Flom LLP (Mar. 19, 2019).
- *Richmond v. Bergey Pullman, Inc.*, 2:18-cv-00246 (E.D. Wash. 2019).
- *Harris v. CJ Star, LLC,* No. 2:18-cv-00247 (E.D. Wash. 2019).
- *Seaman v.. Duke University, et al*, No. 1:2015cv00462 (M.D.N.C. Feb. 1, 2018).
- *Stigar v. Dough Dough, Inc.,* No. 2:18-cv-00244 (E.D. Wash 2019).

Motion to Dismiss Granted

- In *Ogden v. Little Caesar Enterprises*, 393 F.Supp.3d 622 (E.D. Mich. 2019), the court held a no-poach agreement did not justify application of either the per se rule or the "quick look" analysis.

- Bershteyn, et al., *As Treatment of No-Poach Agreements Evolves, DOJ To Examine Antitrust in Labor Markets*, Skadden, Arps, Slate, Meagher & Flom LLP (Aug. 19, 2019).

Rule of Reason Review

- The court is to balance harms and benefits.

- The per se rule does not apply to all no-hire and no-solicitation agreements, however. The franchise relationship is in many respects a vertical one because the franchisor and the franchisee normally conduct business at different levels of the market structure. Restraints imposed by agreement between the two are usually vertical and thus assessed under the rule of reason. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

Some Agreements Acceptable if Necessary for Legitimate Collaborations or Transactions

- Joint venture partners agreeing not to hire or recruit employees involved in the joint venture; A business agreeing not to hire or recruit employees with whom the business has come into contact while negotiating or conducting diligence for a transaction;
- The seller of a business agreeing with the purchaser that the seller will not, for a limited period of time, rehire or recruit key employees from the business being sold; or
- A business agreeing not to hire or recruit employees whom a consultant has staffed on a project for the business.
- Peter J. Levitas and Keron J. Morris, *Wage-Fixing and No-Poach Agreements*, Arnold & Porter – News and Perspectives (Feb. 19, 2019).

Procompetitive Purposes

- Increase in output
- Quality control
- Protection of sensitive information
- Prevention of free-riding

"Hub-and-Spoke" Conspiracy

- *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786 (S.D. Ill. July 31, 2018).

- *Illinois District Court Denies Sandwich Franchisor's Motion To Dismiss Sherman Act Claim Alleging Damages From No-poach Agreement*, Shearman & Sterling – Antitrust (Aug. 28, 2018).
  - The plaintiffs argue that the rule of reason is inapplicable because they are not challenging vertical restraints between the franchisor and its franchisees. Instead, the plaintiffs argue, the challenged no-poach agreements are the products of horizontal hub-and-spoke conspiracies among each franchisor and its franchisees. Their argument that the per se rule applies thus hinges on whether they have adequately pleaded hub-and-spoke conspiracies.

Common Law Theories

- *Pittsburgh Logistics Sys., Inc. v. BeeMac Trucking, LLC*, 202 A.3d 801 (Pa. Super. 2019), *appeal granted*, 216 A.3d 1032 (Pa. 2019) (en banc with a dissent).

Heyde Theory Rejected

- In *Heyde Companies., Inc. v. Dove Healthcare*, LLC, 258 Wis.2d 28, 41 (2002), the court denied enforcement of a no-hire clause because the employees did not know of the restriction and did not consent to it.

- The *Heyde* rationale has been rejected by at least three other state courts.

- Yana Zubareva, *Pitfalls of For-Cause Terminations Outside of the US*, DLA Piper – The Labor Dish (Sept. 30, 2014).

- See also *Therapy Services, Inc. v. Crystal City Nurses Center, Inc.*, 239 Va. 385, 388 (Va. 1990) (Nursing home attempted to poach employees from outsource rehabilitation service despite a no-poach clause in its service agreement).

Single Enterprise Defense

- *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447-48 (9th Cir. 1993) (per curium).
- Defense seldom used as it might allow the joint employer theory to be used in other labor and employment contexts.

“Single Entities” Theory Rejected

- *Yi v. SK Bakeries LLC,* No. 3:18-cv-05627 (W.D. Wash. Nov. 13, 2018).

- *Western District of Washington Rejects Per Se Rule, But Allows Cinnabon Worker’s No-poach Class Action To Proceed After “Quick Look” Analysis*, Shearman & Sterling – Antitrust (Nov. 20, 2018).

Chronology of Developments – 2016-2017

- Quick Look Analyses are used "when the likelihood of anticompetitive effects can easily be ascertained." *California Dental Assn. v. FTC*, 526 U.S. 756 (May 24, 1999) (DOJ files Statement of Interest).

- 2016 White House Report

- Fall 2016 Antitrust Division Announcement

- March 2017, the American Guild of Organists agreed to eliminate rules that restrict its members from competing for opportunities to perform to settle charges brought by the FTC. *See also* FTC Press Release.

- In September 2017, Princeton University published a study finding 58% of the 156 largest franchisors employing approximately 340,000 employees, have some form of no-poach agreements. *See* Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, Princeton University (September 28, 2017).

Chronology of Developments - 2018

- January 2018, Washington state AG commences investigations, resulting in "Assurance of Discontinuance" agreements with numerous fast-food and restaurant chains.

- January 2018, Principal Deputy Assistant AG Andrew Finch announced that DOJ would proceed criminally against "naked" no-poach agreements. *See* Andrew C. Finch, *Trump Antitrust Policy After One Year*, DOJ – Justice News (Jan. 23, 2018).

- Conrad Shawn Kee, et al., *Lead Antitrust Attorney Hints At Upcoming Prosecutions For No-Poach Agreements*, Jackson Lewis: Non-Compete and Trade Secrets Report (January 25, 2018).

- *Seaman v.. Duke University, et al*, No. 1:2015cv00462 (M.D.N.C. Feb. 1, 2018) (DOJ files Statement of Interest).

- April 2018 DOJ sues two of the world's largest railroad equipment suppliers. *See In re Railway Industry Employee No-Poach Antitrust Litigation*, No. 2:18-mc-00798 (W.D. Pa. June 20, 2019).

- Spring 2018 Senators Booker and Warren introduce "The End Employer Collusion Act" S.2480 — 115th Congress (2017-2018). *See also* Jeffrey Stein, *Booker, Warren Take Aim at Chains that Use 'Non-Poaching' Deals to Keep Workers Stuck at One Store, Washington Post* (Mar. 1, 2018).

Chronology of Developments - 2018

- Summer 2018, multiple state AG's send letters to franchises.

- July 17, 2018, Wharton School issues article and podcast, "How Fair – or Legal – Are Non-Poaching Agreements?".

- Conrad Shawn Kee, et al., *Antitrust Director Signals Heightened Focus on Deterring No-Poach Agreements in Healthcare Industry*, National Law Review (July 17, 2018).

- In July 2018, state attorneys general from 11 states formed a coalition to investigate no-poach agreements in franchise contracts that restrict the ability of a firm to recruit or hire employees from the franchisor or another franchisee of the same chain. *See* Peter J. Levitas & Keron J. Morris, *Wage-Fixing and No-Poach Agreement*, Arnold & Porter (Feb. 19, 2019).
  - As part of the investigation, the coalition requested information about no-poach policies and practices from several fast food franchises, including:
    - Arby's;
    - Burger King;
    - Dunkin' Donuts;
    - Five Guys;
    - Little Caesars;
    - Panera Bread;
    - Popeyes; and
    - Wendy's

Chronology of Developments - 2019

- *AG Ferguson's Initiative to End No-Poach Clauses Nationwide Secures End to Provisions at Seven More Corporate Chains*, Washington State Office of the Attorney General (Feb. 15, 2019).
- Stefan M. Meisner and Steven Vaughn, *U.S. DOJ Adds Complexity to Enforcement of "No-Poach" Agreements Under Antitrust Law*, McDermott Will & Emery – Insights (Mar. 14, 2019) (DOJ files Statement of Interest).
- Boris Bershteyn, et al., *DOJ Wades Deeper Into No-Poach Advocacy,* Skadden, Arps, Slate, Meagher & Flom LLP (Mar. 19, 2019) (DOJ files Statement of Interest).
- May 2019, American Antitrust Institute sends letter to DOJ advocating against department's "no-poach" analysis.
- American Antitrust Institute Letter to DOJ.

Chronology of Developments - 2019

- *In re: Railway Industry Employee No-Poach Antitrust Litigation*, No. 2:18-mc-00798 (W.D. Pa. June 20, 2019).
  - Statement of Interest of the United States

- *Richmond v. Bergey Pullman, Inc.*, 2:18-cv-00246 (E.D. Wash. 2019) (DOJ files Statement of Interest).

- *Harris v. CJ Star, LLC,* No. 2:18-cv-00247 (E.D. Wash. 2019) (DOJ files Statement of Interest).

- *Stigar v. Dough Dough, Inc.,* No. 2:18-cv-00244 (E.D. Wash 2019) (DOJ files Statement of Interest).

- Dian Gillis, et al., *DOJ Publishes Statements Clarifying Its Analysis of No-Poach Agreements – But Questions Remain*, JD Supra (June 17, 2019) (DOJ fils Statement of Interest).

- Boris Bershteyn, et al., '*Titans' of Antitrust Policy Clash Over No-Poach Agreements*, Skadden, Arps, Slate, Meagher & Flom LLP (June 7, 2019) (DOJ files Statement of Interest).

DOJ-FTC Guidance

- In October 2016, the two agencies issued Antitrust Guidance for human resources professionals.

- *Antitrust Guidance for Human Resource Professionals*, DOJ Antitrust Division and the Federal Trade Commission (Oct. 20, 2016).

FTC Hearings – State AG's Weigh in on Labor Issues in Antitrust

- *Public Comments of 18 State Attorneys General on Labor Issues in Antitrust*, Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, (July 15, 2019).

Antitrust Red Flags for Employment Practices

- The DOJ and FTC have jointly issued a non-exhaustive list of agreement "red flags" that should prompt caution, including:
  - Agreeing with another company to refuse to hire that other company's employees;
  - Agreeing with another company about employee salary or other terms of compensation, either at a specific level or within a range;
  - Agreeing with another company about employee benefits or other terms of employment;
  - Communicating to competitors that you both should limit competition for employees;
  - Exchanging company-specific information about compensation or terms of employment with another company;
  - Participating in a meeting, including a trade association meeting, where the above topics are discussed; Discussing the above topics with colleagues at other companies, including during social events or non-professional settings; and
  - Receiving documents that contain another company's internal data about employee compensation. Any businesses considering an agreement with provisions of this sort should consider carefully whether the agreement may violate the antitrust laws.

Franchise Agreements

- Alex Davis, *"No-Poach" Clauses in Franchise Agreements: Are Franchisors Taking Things Too Far?,* Shipe Dosik Law LLP (Nov. 13, 2019).
- Daniel J. Green, *No-Poach Clauses in Franchise Agreements: Four More Franchisors Agree to Drop Them and the DOJ Weighs In on Class Actions Alleging Antitrust Violations*, Epstein Becker Green – Trade Secrets and Employee Mobility (Apr. 1, 2019).
- Christopher Young, *Legal Challenges to No-Poach Provisions in Franchise Agreements*, 23 Distributions 1 (January 2019).
- Nicole L. Castle and Matt Evola, *DOJ Distinguishes 'No-Poach' Franchise Agreements*, Bloomberg: Mergers & Antitrust Law News (Mar. 21, 2019).
- International Franchise Association Congressional Letter (June 20, 2018).

Antitrust Implications of Franchise No-Poach Agreements

- Tyson Y. Herrold, Carl W. Hittinger & Jeffrey D. Martino, *Demystifying the Antitrust Implications of Franchise No-Poach Agreements*, BakerHostetler (Nov. 11, 2019).

Antitrust Considerations of Intra Franchise No-Poach Agreements

- Poach-No-More: Antitrust Considerations of Intra-Franchise No-Poach Agreements, College of Labor & Employment, https://www.laborandemploymentcollege.org/images/WritingCompetitionWinners/Poach-No-More_Antitrust-Considerations-of_Intra-Franchise_No-Poach-Agreements-CLE-Submission.pdf.

No-Poach Agreements Among Franchises

- *Blanton v. Domino's Pizza Franchising LLC*, No. 18-13207 (E.D. Mich. May. 24, 2019).

- *Eastern District of Michigan Allows Sherman Act Suit Based On Employee No-poach Agreement To Proceed*, Shearman & Sterling – Antitrust (June 4, 2019).

- Catherine E. Schaefer, *Disagreeing Over Agreements: A Cross-Sectional Analysis of No-Poaching Agreements in the Franchise Sector*, 87 Fordham L. Rev. 2286 (2019).

- Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, IZA Institute of Labor Economics Discussion Paper Series (July 2018).

Washington Initiative to End Use of Franchise No-Poach Agreements

- Testimony of Assistant Attorney General Rahul Rao, Office of the Attorney General of the State of Washington before the United States House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, Hearing on Antitrust and Economic Opportunity: Competition in Labor Markets (Oct. 29, 2019).

Private Class-Action Lawsuits

- Steven B. Fairman, et al., *Plaintiffs Bar Takes Aim at Franchise "No-Poach" Agreements Through Class Actions*, Antitrust and Franchise Law Alert – Nixon Peabody (Aug. 10, 2018).

Duke Litigation

- Historically, the healthcare industry has not been the focus of litigation concerning agreements not to solicit or recruit employees. However, as healthcare and hospital mergers continue, and the number of employers in a geographic market decreases, competition for highly trained employees may intensify, driving up salaries and costs. The recent cases are a good reminder that healthcare employers should avoid discussions about employees with other providers in a region that may have the effect of limiting competition for employees. The recent cases also raise the possibility that use of "no-poach" agreements in healthcare contexts may carry new, potential litigation-related risks.

- Lisl Dunlop and Carrie Maas, *New Risks of "No-Poach" Agreements in the Healthcare Industry?*, Manatt – Insights – Antitrust Law (Sept. 24, 2015).

- *Seaman v. Duke University, et al*, No. 1:2015cv00462 (M.D.N.C. Feb. 1, 2018).

- *Duke/UNC "No-Hire" Agreement*, Lieff Cabraser Heimann & Bernstein – Antitrust & IP (Sept. 24, 2019).

Duke Litigation

- Alleging that they conspired to suppress the compensation of their employees by entering into agreements to not "poach" certain medical facility faculty and staff from each other.[3] The complaint alleges that the deans of Duke and UNC had entered into an agreement not to recruit each other's faculty and medical staff after Duke tried to recruit UNC's entire bone marrow transplant team, resulting in UNC paying a large retention package in order to keep the team from moving.
- The complaint alleges that due to the alleged agreement and compounded by the fact that Duke and UNC are the dominant and preeminent employers of skilled medical labor in North Carolina, doctors have been effectively foreclosed from seeking alternative employment. Further, the agreement has allegedly fixed compensation of medical faculty and staff at artificially low levels. The case is currently pending in the United States District Court, Middle District of North Carolina.

Physician No-Poach Agreements

- Peter J. Levitas and Keron J. Morris, *Wage-Fixing and No-Poach Agreements*, Arnold & Porter – News and Perspectives (Feb. 19, 2019).

Health Care - Nurses

- Detroit Medical Center (Wage information exchange agreement).

- Class action certification denied in Chicago and Memphis nurse cases.

Detroit Nurse Wages Antitrust Settlement

- *Cason-Merenda v. VHS of Michigan, Inc.*, 296 F.R.D. 528 (E.D. Mich. Sep. 13, 2013).

- *Detroit Nurse Wages Antitrust Settlement*, Keller Rorhback LLP.

Washington State Lawsuit Against Jersey Mike's Subs

- Order denying Jersey Mike's motion to dismiss AG's no-poach lawsuit.

- *Judge Rejects Jersey Mike's Motion to Dismiss AG Ferguson's No-Poach Lawsuit*, Washington State Office of the Attorney General (Jan. 28, 2019).

- Marian Johns, *Washington state court dismisses Jersey Mike's attempt to halt lawsuit over 'no-poach' clause*, Legal Newsline (Feb. 4, 2019).

State Investigations on Fast Food Franchise No-Poach Agreements

- Hailey Mensik, *Eric A. Posner's Research on Franchise 'No-Poaching' Clauses Prompts Investigation*, Chicago Tribune (July 9, 2018).

Protecting Low Income Workers

- Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, The Hamilton Project (Feb. 27, 2018).

The High-Tech Cases

- *In re High-Tech Employee Antitrust Litigation*, 856 F.Supp.2d 1103 (N.D. Cal. 2012).

Silicon Valley Settles

- Sued in 2011 by Lieff Cabraser and settled in 2015 for $435,000,000.

Class Status Denied, But No-Poach Agreements May be Illegal

- *In re Railway Industry Employee No-Poach Antitrust Litigation*, No. 2:18-mc-00798 (W.D. Pa. June 20, 2019).

- *Plaintiffs' No Poach Class Claims Run Off The Rails*, Shearman & Sterling – Antitrust (July 2, 2019).

Hollywood Settles

- Intuit Inc., Lucas Films, and Pixar settle in 2014.

Proposed Federal Legislation

- The Workforce Mobility Act
- The Restoring and Improving Merger Enforcement Act
- The End Employer Collusion Act
- The Economic Freedom and Financial Security for Working People Act of 2018

Has DOJ Enforced the Antitrust Laws Against Anti-Competitive No-Poach Agreements?

- *United States v. Knorr-Bremse AG*, No. 1:18-cv-00747-CKK (D.D.C. July 11, 2018).
- *United States v. eBay, Inc.*, 968 F.Supp.2d 1030 (N.D. Cal. Sept. 2, 2014).
- *United States v. Lucasfilm Ltd.*, No. 10–02220 (RBW) (D.D.C. June 3, 2011).
- *United States v. Adobe Sys.,* No. 10 CV 1629 (D.D.C. Mar. 18, 2011).

Litigation Update

- *Eastern District of Michigan Allows Sherman Act Suit Based On Employee No-poach Agreement To Proceed*, Shearman & Sterling – Antitrust (June 4, 2019).
- *Illinois District Court Denies Sandwich Franchisor's Motion To Dismiss Sherman Act Claim Alleging Damages From No-poach Agreement*, Shearman & Sterling – Antitrust (Aug. 28, 2018).
- *Western District of Washington Rejects Per Se Rule, But Allows Cinnabon Worker's No-poach Class Action To Proceed After "Quick Look" Analysis*, Shearman & Sterling – Antitrust (Nov. 20, 2018).
- Department of Justice Seeks to Intervene in No-Poach Class Action To Counter Arguments that Such Agreements Are Per Se Illegal, Shearman & Sterling – Antitrust (Feb. 5, 2019).
- *Plaintiffs' No Poach Class Claims Run Off The Rails*, Shearman & Sterling – Antitrust (July 2, 2019).

Litigation Update Continued

- *Pittsburgh Logistics Systems, Inc. v. Beemac Trucking, LLC*, No. 11571-2016 (Sup. Ct. Penn. Jan. 11, 2019).

Stigar v. Dough Dough, Inc.

- *Stigar v. Dough Dough Inc., et al.*, No. 2:18-cv-00244-SAB (E.D. Wash. 2019).
  - *Stigar v. Dough Dough Inc.* – DOJ Statement of Interest.

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