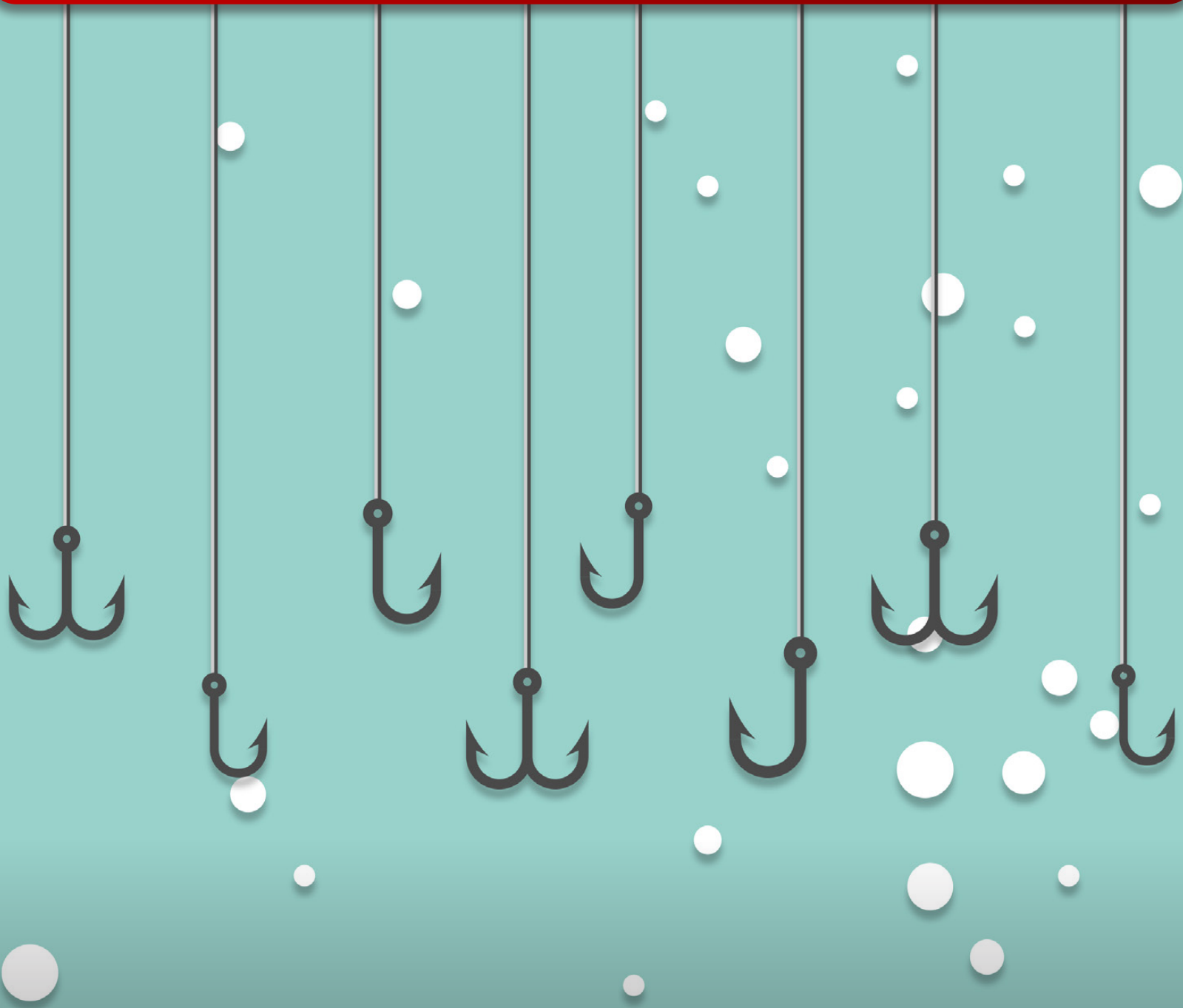# NO POACHING AGREEMENTS AND ANTITRUST ENFORCEMENT

BY CHRISTINE PIETTE DURRANCE[1]

1 Associate Professor, Department of Public Policy, University of North Carolina at Chapel Hill, Christine.durrance@unc.edu.

CPI ANTITRUST CHRONICLE
MAY 2020

Visit www.competitionpolicyinternational.com for access to these articles and more!

I. INTRODUCTION

Agreements to fix prices by sellers of a good or service have long been considered naked restraints of trade.[2] Collusion on price is a violation of Section 1 of the Sherman Act and is judged under a *per se* standard as price fixing is unambiguously harmful to consumers. Collusion on the buying side is similarly impermissible and receives comparable antitrust treatment.[3] In recent years, the exercise of monopsony power has become more prevalent in labor markets, in particular through anticompetitive agreements among firms. No poaching agreements are agreements among rival employers to not recruit or hire another firm's employees.[4] No poaching agreements affect the price of an input (i.e. the wage) through reduced competition in the labor market and lower compensation. In 2016, the antitrust agencies released guidelines targeted to human resource professionals, outlining impermissible agreements that harm employees and reduce their compensation. The guidelines indicate that the agencies will seek criminal prosecution and penalties for those involved in naked agreements that harm employees including no poaching agreements.

No poaching agreements deprive employees of the competitive benefits resulting from outside employer interest. Collusive no poaching agreements have been highlighted in recent agency investigation, government action, and private litigation. For example, in the *High Tech Employees*[5] litigation, a number of high tech firms were alleged to have conspired through no poaching agreements for their skilled employees. The conspiracy was alleged to have included agreements to not actively recruit one another's employees, to provide notification when making an offer to rival's employee, and agreements not to counteroffer. Moreover, franchise agreements have received antitrust scrutiny for contract provisions that prohibit franchisees from hiring rivals' employees. Franchise agreements have both vertical (franchisor to franchisee) and horizontal (franchisee to franchisee) elements, and as such, have received rule of reason treatment as some courts have considered no poaching agreements to be ancillary to the franchise agreement itself.

In this paper, I explore the role of monopsony buying power in employer no poaching agreements. In what follows, I review some high-profile no poaching litigation. I then narrow my focus to no poaching agreements in health care settings, specifically *Seaman v. Duke*, which involved a no poaching agreement between the deans of Duke and UNC Schools of Medicine. I offer an economic analysis of no poaching agreements and a theory of damages. Finally, I review the DOJ's recent guidelines to human resource professionals and offer some concluding thoughts.

---

2 *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940).

3 *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

4 In some cases, these agreements may also include provisions to share information on wages, salary, benefits, and other contractual terms.

5 *In re High-Tech Employee Antitrust Litigation*, Case No. 11-CV-2509-LHK (2011).

II. BACKGROUND

There has been a flurry of no poaching litigation in recent years. Prominent examples include the *High Tech Employees* and *Digital Animators* litigations, as well as litigation disputing agreements contained within franchise contracts.[6,7] In this section, I review these high profile examples before examining no poaching agreements in health care specifically.

A. High Tech Employees and Digital Animators

No poaching agreements have received recent public and private antitrust scrutiny.[8] First, the Department of Justice ("DOJ") initiated an investigation into several high tech companies and digital animators including Adobe Systems, Apple, Google, Intel, Intuit, Pixar,[9] Lucasfilm,[10] and eBay.[11] In these industries, employers demand workers with highly specialized skills. The no poaching agreements were said to have been in place between 2005 and 2009, and included agreements not to cold-call or solicit each others' employees. In 2010, the DOJ reached an agreement with Adobe Systems, Google, Apple, Intel, Intuit, and Pixar to cease their anticompetitive practices.

Private antitrust class actions were also filed.[12] Defendants were alleged to have conspired and specifically agreed to (1) not recruit each other's employees; (2) provide notification if making an offer to a rival's employee; and (3) limit pay packages offered to prospective employees at the initial offer thereby not increasing counteroffers.[13] In 2014, Lucasfilm and Pixar agreed to pay $9 million, and Intuit agreed to settle for $11 million. In 2015, Apple, Google, Intel, and Adobe Systems agreed to settle for $415 million. These settlements will be paid out to over 64,000 affected employees. A private class action suit was also filed against digital animators, including Walt Disney, DreamWorks Animation, Sony Pictures, and Blue Sky Studios.[14] The class settled for a total of $169 million, with $100 million from Disney and its subsidiaries, $50 million from DreamWorks, $13 million from Sony, and $5.95 million from Blue Sky Studios.[15]

---

6 In *Therapy Source*, the FTC charged two Texas staffing companies, Your Therapy Source and Integrity Home Therapy, with violations of Section 5 of the FTC Act because of allegations of pay rate exchange information and agreements to reduce the pay of therapists for home health agencies. They were also alleged to have attempted to recruit other competitors to join their conspiracy. The companies entered into a consent decree with the FTC to cease their wage information sharing and wage setting behavior. *Your Therapy Source, LLC*, FTC File No. 1710134 (July 31, 2018).

7 In *U.S. v. Knorr-Remse*, Knorr-Bremse, Westinghouse Air Brake, and Faiveley (which was acquired by Westinghouse Air Brake in 2016) each produce rail equipment for passenger and freight rail purposes. The companies compete in the labor market for skilled rail industry employees. Beginning in 2009, all 3 companies were alleged to have entered into no-poaching agreements with one another which prohibited the recruiting or hiring without approval of each others' employees. The agreements were said to have "denied employees access to better job opportunities, restricted their mobility, and deprived them of the competitively significant information they could have used to negotiate better terms of employment." The Court found for the government, and prohibited the defendants from engaging in future no-poaching agreements. Following the settlement, a class action of employees filed suit against the rail equipment suppliers for damages. *US v. Knorr-Bremse AG and Westinghouse Air Brake*, Case 1:18-cv-00747 (2018), 2018 U.S. Dist. LEXIS 142125 (D.D.C. July 11, 2018), Complaint.

8 Lindsay (2019) reviews some of the recent court history in no poaching litigation. Michael A. Lindsay. *McDonald's and Medicine: Developments in the Law of No-Poaching and Wage-Fixing Agreements*, 33 Antitrust 18 (2019).

9 *US v. Adobe Systems et al.*, Case No. 1:10-cv-01629-RBW (March 18, 2011).

10 *US v. Lucasfilm*, Case No. 1:10-cv-02220 (December 21, 2010).

11 *US v. eBay*, Case No. 5:12-cv-05869-EJD (November 15, 2012).

12 In re: High-Tech Employee Antitrust Litigation, Case No. 5:11-cv-02509-LHK (N.D.Cal. May 4, 2011).

13 *Id.*

14 In re: Animation Workers Antitrust Litigation, No. District of California, Case No. 14-cv-04062-LHK (123 F.Supp.3d 1175 (2015)).

15 Amid Amidi. *Animation Workers Set To Receive $170 Million Payout From Wage-Theft Lawsuit, June 27, 2018*, https://www.cartoonbrew.com/artist-rights/animation-workers-set-to-receive-170-million-payout-from-wage-theft-lawsuit-161482.html.

B. Franchise Contracts

In 2018, 10 Attorneys Generals and the District of Columbia initiated investigations into no poaching agreements among fast food franchises.[16,17] In immediate response, some franchises removed any language from their contracts that constituted no poaching agreements. There have been myriad private class actions filed in the franchise arena.[18] In some franchise agreements between the franchisor and franchisee, there are prohibitions on recruiting or hiring another franchisee's employees. In fact, 58 percent of franchise agreements were identified to contain no poaching language.[19] Upon the filing of 3 private cases against Auntie Anne's, Arby's, and Carl's Jr.,[20] the DOJ issued statements of interest to clarify the agencies view of no poaching agreements in a franchise setting. These agreements are horizontal in nature because they effectively limit competition for employees between franchisees, but also vertical in nature because the agreements are bound between the franchisor and the individual franchisee. The DOJ took the position that franchisee/franchisor agreements should be judged under a rule of reason rather than a per se rule, because franchise restrictions may have both procompetitive purposes and anticompetitive effects. They further suggested that it would be important to consider if the restraint is ancillary to the larger franchise collaboration.[21]

III. NO-POACHING AGREEMENTS IN HEALTHCARE: *SEAMAN V. DUKE*

No poaching agreements have received antitrust scrutiny in the health care setting.[22] This section describes one particular high-profile case involving collusion between two prominent medical schools in North Carolina.

The research triangle of North Carolina houses several major universities including Duke University and the University of North Carolina at Chapel Hill ("UNC"). Both universities have medical schools, are two of the largest academic medical systems in North Carolina, and are two large employers of physicians in the area. *Seaman v. Duke*[23] was a private suit that arose because Dr. Danielle Seaman, a Duke faculty member in radiology, was interested in an open position at the UNC School of Medicine. Despite being a "great fit," Dr. Seaman could not be considered because "lateral moves between Duke and UNC medical schools are not permitted."[24] Dr. Seaman filed suit on behalf of a class of similarly situated hospital faculty employees. The agreement was alleged to have been made between the Deans of the Medical Schools at the respective institutions and effectively prohibited the poaching of employees at the same rank. The agreement was alleged to have only affected faculty positions at medical schools, and not other hospital employees.

Evidence presented in this case included email communication, indicating that the recruiter "received confirmation today from the Dean's office that lateral moves of faculty between Duke and UNC are not permitted. There is reasoning for this 'guideline' which was agreed upon

16 A. Christopher Young. *Legal Challenges to No-Poach Provisions in Franchise Agreements, Pepper Hamilton LLP*, January 2019, https://www.pepperlaw.com/publications/legal-challenges-to-no-poach-provisions-in-franchise-agreements-2019-01-07/.

17 *Id.* In 2018, Senators Booker and Warren introduced Senate Bill 2480, The End Employer Collusion Act, which would prohibit no poaching agreements in franchise agreements.

18 Carl Karcher Enterprises (i.e. Carl Jr.'s) (*Bautista v. Carl Karcher Enters., No. BC 649777* (Sup. Ct. Cal. Feb. 8, 2017); McDonald's (*Deslandes v. McDonald's USA, LLC*, No. 17-cv-04857 (N.D. Ill. June 25, 2017); Pizza Hut (*Ion v. Pizza Hut, LLC*, No. 4:17-cv-00788 (E.D. Tex. Nov. 3, 2017); Jimmy John's (*Butler v. Jimmy John's Franchise, LLC, et al*, No. 18-133 (S.D. Ill. July 31, 2018); Arby's (*Richmond v. Bergey Pullman, Inc., et al*, No. 2:18-cv-00246 (E.D. Wa. August 3, 2018); Cinnabon (*Yi v. SK Bakeries, LLC, et al.*, No. 18-5627 RJB (W.D. Wa. August 3, 2018); Little Caesars (*Ogden v. Little Caesars Enterprises, Inc., et al.*, No. 2:18-cv-12792 (E.D. Mi. Sept. 7, 2018); Burger King (*Michel v. Restaurant Brands Int'l Inc., et al.*, No. 1:18-cv-24304 (S.D. Fl. October 18, 2018); and Dunkin Donuts (*Avery v. Albany Shaker Donuts LLC, et al.*, No. 1:18-cv-09885 (S.D. N.Y. October 25, 2018).

19 Krueger & Ashenfelter (2018) obtained data on US Franchise Disclosure Documents ("FDDs") from FRANdata. They analyzed franchise agreements from 156 of the largest US franchise chains, and find that 58 percent of franchise agreements in the sample had no poaching language. Alan Kruger & Orley Ashenfelter. Theory and Evidence on Employer Collusion in the Franchise Sector, *NBER Working Paper* #24831.

20 *Stigar v. Dough Dough, Inc. (Auntie Anne's)*, 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019); *Richmond v. Bergey Pullman (Arby's)*, 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019); Harris v. CJ Star, LLC (Carl's Jr., Hardees), 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019).

21 Corrected Statement of Interest of the United States of America, Filed March 8, 2019, *Stigar v. Dough Dough* (No. 2:18-cv-00244-SAB); *Richmond & Rogers v. Bergey Pullman* (No. 2:18-cv-00246-SAB); *Harris v. CJ Star LLC* (No. 2:18-cv-00247-SAB).

22 There are other examples of no poaching examples in health care. For example, a private class of registered nurses (RNs) filed suit against eight Detroit hospitals, alleging a conspiracy to restrain the compensation of nurses and exchange information about compensation. *Cason-Merenda v. VHS of Michigan, Inc.*, 862 F. Supp. 2d 603 (E.D. Mich. 2012) (No. 06-cv-15061).

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

24 *Id.*

between the deans of UNC and Duke a few years back." In later correspondence, UNC's Chief of Cardiothoracic Imaging admitted that "the 'guideline' was generated in response to an attempted recruitment by Duke a couple of years ago of the entire UNC bone marrow transplant team; UNC had to generate a large retention package to keep the team intact." It was further explained that "the only way [Duke and UNC] can hire each other's faculty is if there is an upward move, i.e. a promotion."[25]

The defendants argued that UNC, as a state institution, was immune from antitrust scrutiny under the state action doctrine.[26] A statement of interest in this case filed by the US Attorney General[27] took the position that UNC was not a state actor as articulated by the state action doctrine and clearly fails the two part test that requires a clear state purpose (there was no state articulation of policy restraining hiring between employers) and active supervision (there was no state supervision of this restraint of trade). The defendants also argued that the alleged agreement should be evaluated under the rule of reason rather than a per se standard since the agreement was ancillary to collaboration between UNC and Duke (of which there was no evidence).

In February 2018, UNC settled its lawsuit and agreed never again to enter a no-hire agreement. In April 2019, Duke School of Medicine settled its case and Duke Health Systems agreed to pay $54.5 million.

IV. DAMAGE THEORY

In a competitive labor market, wages are determined by the interaction of supply and demand, where each firm is a wage taker. In the labor market, firms demand labor (D_l) and employees supply labor (S_l) at different wages (w). In Figure 1, the competitive wage and quantity of labor hired are w^* and L^*, respectively. In the competitive model, the sum of consumer surplus and producer surplus is maximized and represented as area afe. In this setting, social welfare is maximized.

Figure 1. Competitive and Monopsony Labor Market
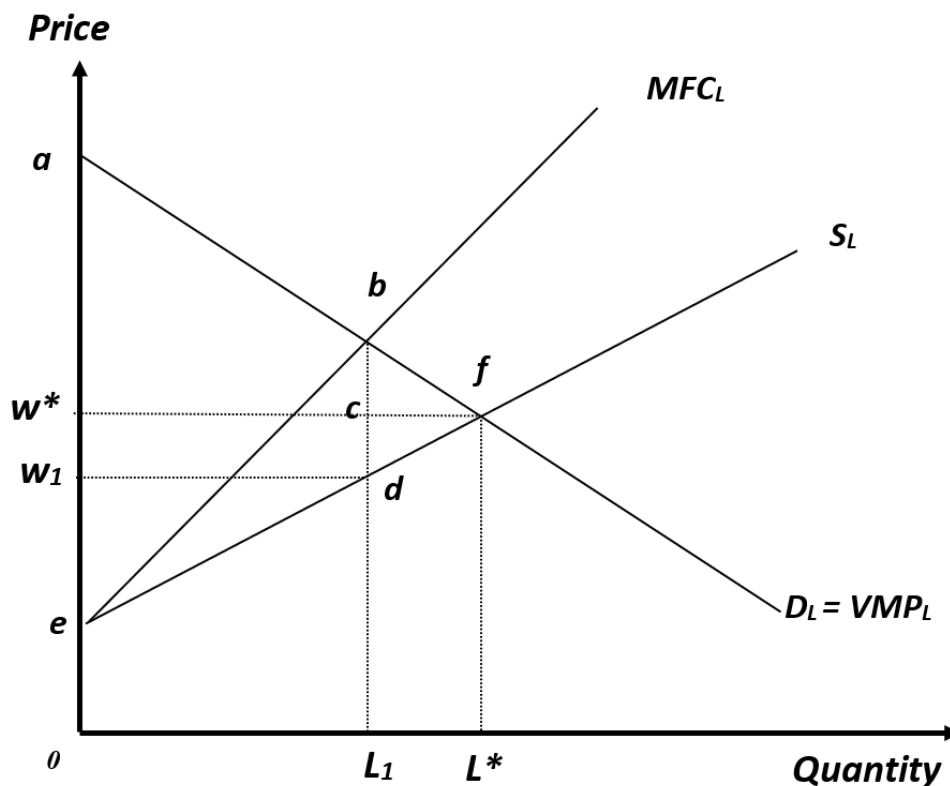
25 *Id.*

26 *Parker v. Brown*, 317 US 341 (1943).

27 *Danielle Seaman v. Duke University*, et al., No. 1:2015cv00462 (M.D.N.C. Feb. 1, 2018). Statement of Interest of the United States, 2019.

Now compare the competitive labor market to a labor market with a monopsony[28] employer, where there is only one buyer to employ labor. In Figure 1, S_L is the supply of labor while MFC_L is the marginal factor cost. The demand for labor (D_L) is also noted as the value of the marginal product of labor (VMP_L). Profit maximization by the monopsonist leads to an employment of L_1 units of labor and a wage of w_1.[29] The monopsonistic buyer is able to depress the wage below w^* and restrict the number of workers hired below L^*. This restriction in the number of workers hired and the wage paid leads to social welfare loss as given by area *bfd*. This is the economic argument against monopsony.

No poaching agreements are not equivalent to pure monopsony, but they are similar to models where groups of firms use monopsony power or collude to create and utilize monopsony power. Let us consider some economic possibilities that explain the effects of no poaching agreements. Recall that in *Seaman*, Duke and UNC are each large academic medical centers and large employers in the area. Employers like UNC and Duke already have some power to depress wages below the competitive level. It is costly for employers, like UNC and Duke, to identify and recruit employees with desirable skills and qualifications. Employers want to retain these employees at lowest cost, avoid competitive bidding wars for employees with rivals, and minimize turnover. Employers could make their positions more attractive through offers with higher compensation, benefits, working conditions, and the like. This type of retention activity is procompetitive and could preempt departures. If employers jointly decide to not solicit a rival's employees, retention is also preserved, but in violation of the antitrust laws.

First, assume a market with a small number of employers, like the high tech market or digital animator firm market. Assume these firms collude to fix the wages paid to their employees. Wage setting is not alleged in *Seaman*, but has been alleged elsewhere.[30] The economic effects of price fixing or wage setting agreements are well-known and receive per se treatment under the antitrust laws. In its simplest form, a wage-fixing agreement emulates the monopsony solution in Figure 1, leading to the same wage reduction, labor input reduction, and resulting deadweight social welfare loss. Such behavior would be judged under a *per se* standard in violation of Section 1. No poaching agreements, however, are not equivalent to wage setting agreements.

Second, firms that agree to participate in no poaching agreements conspire to not compete on certain dimensions, even if not explicitly agreeing to set wages. In this way, no poaching agreements may be more similar to employee allocation, which is the equivalent of market division or customer allocation on the selling side. In such an agreement, firms would agree to divide the market for employees, only to hire from its own market for employees, and not to hire from the rivals' market for employees. In this setting, each firm would have a monopsony in their own labor market. In this way, firms could offer different wages in their respective market, but not compete directly for workers. In *Seaman*, the damage theory was based on UNC and Duke implementing an employee allocation agreement, given that UNC and Duke are unique employers in the area. In this agreement, wages were not set directly, but the agreement required the rivals not to compete on the recruiting and hiring dimension, which reduced competition in the recruiting and hiring of same rank positions.

Third, no poaching agreements affect buying power, or the degree to which an employer can depress the wage paid below the competitive wage.[31] Let us consider the Lerner index as adapted to monopsony power.[32] Let λ be the measure of buying power which is given by the deviation from the competitive outcome or

28 Joan Robinson (1933) referred to the gap between an employee's marginal revenue product and the wage paid as "monopsonistic exploitation." Joan Robinson, *The Economics of Imperfect Competition*, 1933.

29 The monopsonist has buying power; as a result, the wage that the monopsony pays is a function of the number of people it hires, $w(L)$. The monopsony's profit function is given by $\pi = pQ - w(L)L - rM$, where p is the output price of the product, Q is the output, w is the wage, L is the labor input, M is the fixed capital input, and r is the rental rate of the fixed input. Profit maximization leads to $\frac{\partial \pi}{\partial L} = p\frac{\partial Q}{\partial L} - \left[w(L) + L\frac{\partial w}{\partial L} \right] = 0$. Because $\frac{\partial Q}{\partial L}$ is the marginal product of labor, or MP_L, which indicates the contribution to total product from a small increase in labor input, the first term, $p\frac{\partial Q}{\partial L}$, represents the value of the marginal product of labor (VMP_L). The second term, $w(L) + L\frac{\partial w}{\partial L}$, represents the marginal factor cost (MFC_L). The MFC_L is made up of two competing effects. When the monopsony hires an additional worker, it must pay that new worker the higher wage ($w(L)$) and it must pay all the previously employed workers the higher wage ($L\frac{\partial w}{\partial L}$). The sum of these two effects is the MFC_L. Profit maximization for the monopsonist requires setting VMP_L equal to MFC_L. This profit maximization results in paying a wage of w_1 and hiring L_1 workers.

30 *Supra* note 22.

31 Naidu, Posner, & Weyl (2018) discuss the role of elasticity of supply in labor market power. Naidu, Suresh, Eric A. Posner, & Glen Weyl (2018). "Antitrust Remedies for Labor Market Power," 132 *Harvard Law Review* 536.

32 The Lerner Index for monopoly power was developed by Abba Lerner, The Concept of Monopoly and Measurement of Monopoly Power, 1 Rev. Econ. Stud. 157 (1934).

$$\lambda = (VMP_L - w) / w$$

which is equal to the inverse of the elasticity of supply (ε_S)[33] or

$$\lambda = 1/\varepsilon_S$$

The elasticity of supply measures the responsiveness of the supply of labor to changes in the wage. In other words, the more responsive (elastic) workers are to changes in the wage, the less the monopsony power of the employer. Mathematically, this makes sense since the larger the denominator (i.e. ε_S), the smaller the overall buying power (λ). This means that the gap between the VMP_L and wage narrows as buying power is reduced. Now consider the implementation of a no poaching agreement. The agreement effectively reduces ε_S because it reduces the likelihood that a worker can leave one employer for another. This in turn increases the buying power (λ) and exacerbates the gap between the wage and VMP_L.

If no poaching agreements do not require specific agreements on price, then how do they affect a worker's wages? No poaching agreements effectively restrict the information available to all employees about their marketability or value in the labor market through the prohibition of recruiting. Moreover, there are fewer (or no) employers competing for employees, which reduces competition. Information asymmetries work against the party with less information, i.e. the employee. Without outside offers from a rival employer, an employee is foreclosed from upward mobility both within their own employer and from a rival employer. If a faculty physician at UNC were recruited by Duke, UNC could either make a preemptive retention offer with a higher salary to discourage the employee from interest in the Duke position, or they could make a (presumably higher) counteroffer if the faculty physician received a competing offer from Duke. The faculty physician has a decision to make; stay at UNC or leave for Duke.[34] In either case, the faculty physician's salary will increase. Under the no poaching agreement, neither of these scenarios is permissible and salary increases of this type are not attainable. Information exchange and employee movement between employers would impact both those employees involved in recruiting, as well as other employees not currently being recruited.

In response to a faculty physician departure, a hospital may increase wages for its remaining employees to improve the likelihood of retention. In other words, rising tides lift all boats. If you want to retain your employees, you have to incentivize them to stay in their positions. The hospitals involved in the no poaching agreements reduced costs on retentions that "should" have happened and any salary response to remaining employees as a result of those retentions. No poaching agreements will necessarily have effects on all employees under the agreement given existing salary structures. Duke and UNC, like other academic institutions, have some salary structure both at baseline and within rank (i.e. Assistant, Associate, Full Professor), where promotions between some ranks are further complicated by tenure procedures. When no poaching agreements eliminate lateral hiring, they affect all employees because the employer pressure to raise compensation through preemptive or reactive retentions is removed, information about competitive salaries is blunted, and worker mobility is restricted.

In the case of no poaching agreements, employee wages have been depressed. This reduction in the wage relative to the wage that arguably should have been paid but for the no poaching agreement constitutes antitrust injury and is compensable in the form of antitrust damages. Antitrust damages in the form of an underpayment would be sustained by all employees of the colluding employers. The underpayment for each worker is given by

$$Damage = (w_a - w_{bf})L$$

where w_a represents the actual wage paid, w_{bf} represents the but for wage or the wage that should have been received but for the no poaching agreement, and L is the number of units of labor supplied.

Estimating damages involves identifying the wages that employees actually received (w_a), using administrative business records. Additionally, it requires identifying the wages that employees would have received in the absence of the no poaching agreement (the but for wage).

---

33 Recall that under profit maximization, $VMP_L = MFC$ and that $MFC_L = w(L) + L\frac{\partial w}{\partial L}$. Therefore, the buying power index is given by: $\lambda = \left[w + L\frac{\partial w}{\partial L} - w\right]/w$ or $\lambda = \frac{L}{w}\frac{\partial w}{\partial L}$

or $1/\varepsilon_s$. See, for example, Roger D. Blair & Jeffrey L. Harrison, *Monopsony in Law and Economics*, 2010.

34 Of course, there are other academic medical centers outside of the triangle area of NC. But locally, the two provide alternative employment options with the lowest switching costs. A faculty member could, of course, choose to move outside of North Carolina, but the switching costs are much larger.

CPI Antitrust Chronicle June 2020

With data available during the no poaching agreement period as well as data available outside of the no poaching agreement (either before or after or both), it would be possible to estimate the underpayment using regression analysis. This approach would involve estimating a wage equation, where the dependent variable is the individual worker wage. The key independent variable is an indicator for the time period during the no poaching agreement (relative to outside of the no poaching agreement). Other independent variables must include control variables for other important factors that would necessarily affect the wage of the employee, such as years of experience, highest degree attained, other specific skills, geographic location, rank, and others. Using this approach, the estimated harm to all employees under a no poaching agreement could be credibly estimated.[35]

V. DOJ-FTC GUIDANCE

The Antitrust Division of the Department of Justice and the Federal Trade Commission issued joint guidelines in 2016 for human resource professionals,[36] providing clarity in the competitive processes of hiring and retaining workers. In response to concerns about no-poaching and other anticompetitive hiring agreements, the agencies have put human resource professionals on notice and specifically stated:

> An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constraints individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities.[37]

Firms may unilaterally set their own hiring and recruiting policies, but firms are not permitted to make agreements with other firms about those hiring policies or to agree not to compete on any terms of employment. Any agreement among firms to set wages or to implement no poaching agreements could be subject to a *per se* rule if these agreements are *naked* restraints of trade. As such, the *per se* standard would not require investigation of any procompetitive aspects of the agreement; rather, only proof of an agreement would be necessary. The agencies have said such an agreement could be "informal or formal, written or unwritten, spoken or unspoken."[38] The agencies assert in their guidelines that the DOJ intends to prosecute such naked restraints in criminal proceedings.[39] Any such agreement could be a violation of the antitrust laws. Such a violation could result in criminal prosecution by the DOJ against the individual and/or company; civil prosecution by the DOJ or FTC; and/or private suits that are eligible for trebled damages if successful. Even information sharing without an overt agreement can reduce competition in the labor market. Specifically, the agencies caution against sharing wage and benefit information with other employees, as this information sharing could be used to negatively affect compensation for employees. This kind of information can also be offensive to the antitrust laws and lead to scrutiny by the agencies or private claims.

VI. CONCLUDING REMARKS

The agencies have made clear statements to employers and their human resource representatives about how no poaching agreements will be perceived and subsequently treated under the antitrust laws. It is clear that no-poaching agreements are harmful to the competitive process, to employees and their compensation, and to social welfare. Collusive no poaching agreements result in the depression of wages through reductions in recruiting and information available to employees. Employees affected by no poaching agreements have suffered antitrust injury in the form of undercompensation and should be able to collect damages.

---

35 An approach of this type as taken by the economic expert, Dr. Edward Leamer, in *High Tech Employees Antitrust Litigation*, submitted October 1, 2012.

36 DOJ/FTC (2016). Antitrust Guidance for Human Resource Professionals, https://www.justice.gov/atr/file/903511/download.

37 *Id*. at 1.

38 *Id*. at 3.

39 *Id*. at 4.

CPI

COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.