

STATE ANTITRUST ENFORCEMENT OF NO-POACH AGREEMENTS AND NON-COMPETE AGREEMENTS



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By Christina Grey

As both federal and state enforcers begin treating non-compete and no-poach agreements to be anti-competitive in violation of the Sherman Act, the question becomes how are they investigating these agreements and whether the impact will actually be beneficial to low-wage workers. This article primarily describes State enforcement of no-poach and non-compete clauses as well as discusses how state investigations may have impacted federal enforcement. It will further discuss the benefit enforcement of these anti-competitive agreements has had on low-wage workers. First, this article discusses the Washington State Attorney General spearheading the enforcement against no-poach clauses, followed by other State Attorneys General and the Department of Justice. Second, it discusses how both State and Federal enforcers began investigating non-compete agreements, beginning with the Federal Trade Commission holding a public workshop in 2019 to examine whether it should restrict those agreements in employment contracts and with the Washington Attorney General investigating Washington coffee chain Mercurys Coffee. Finally, it discusses the implications of these investigations, including a 2021 economics study that found that the Washington State Attorney General's Office investigation of no-poach clauses benefited low-wage workers.

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I. INTRODUCTION

Since 2017, multiple State Attorneys General have pursued companies and franchises for having non-compete and no-poach agreements in either their employee contracts or their franchise agreements. Through investigation, the State Attorneys General have determined that these provisions potentially violate antitrust laws specifically for low-wage workers. These agreements block low-wage workers from exploring other opportunities that could lead them to receive higher pay.

This article first discusses what no-poach and non-compete agreements are and the effects on low-wage workers such as their wages and benefits. Second, it will discuss how the State Attorneys General have pursued no-poach and non-compete agreements through litigation as well as letters and comments to federal antitrust enforcement agencies. Lastly, it will discuss how the enforcement by State Attorneys General seems to have affected how the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) have begun looking at labor markets.

II. NO-POACH AND NON-COMPETE AGREEMENTS

No-poach agreements often appear in franchise agreements between the owner of the franchise and its corporate headquarters.² These agreements prevent one franchise store from hiring an employee from another franchise store within the same company.³ Essentially, no-poach agreements prohibit employees from moving to a store within the same corporate chain.⁴ According to economists, the practice of including no-poach agreements in franchise agreements contributes to stagnating wages and possibly limits an employee’s growth opportunities.⁵ These clauses likely lead to a lack of worker mobility which has “long been viewed as contributing to wage stagnation because switching jobs is one of the most reliable ways to get a raise.”⁶ For example, an employee at McDonald’s, assuming it has a no-poach agreement, would not be able to move to another McDonald’s that would offer them higher pay. However, these agreements are seen in industries other than fast food as well but are most common in the fast-food industry.⁷ These no-poach clauses in franchise agreements are known to the franchisee and franchisor but not to the employees they affect.⁸

One of the defenses for no-poach agreements is that restaurants have spent time and money training their workers and thus want to protect that investment.⁹ However, many people, including State Attorneys General, contend that no-poach clauses violate antitrust laws. No-poach affects employees at thousands of restaurants.¹⁰ On the other hand, non-compete clauses are placed in employee contracts to keep an employee from moving from one company to another, bringing trade secrets to their new employer.¹¹ A non-compete agreement is included in an employee’s employment contract, limiting them from taking a new job or starting their own business in the same industry within a certain geographic area for a certain period of time after leaving their job.¹² According to a 2020 press release by the Attorney General for the District of Columbia, nearly 25 percent of American workers are bound by non-compete agreements with 53 percent of those binding hourly, often low-wage, workers.¹³

2 Press Release, Office of the Washington Attorney General, *AG Report: Ferguson’s Initiative Ends No-Poach Practices Nationally at 237 Corporate Franchise Chains* (June 16, 2020), <https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate>.

3 *Id.*

4 *Id.*

5 Rachel Abrams, *Why Aren’t Paychecks Growing? A Burger-Joint Clause Offers a Clue*, NY Times (Sept. 27, 2017).

6 *Id.*

7 *Id.*

8 *Supra* note 2.

9 *Supra* note 5

10 *Id.*

11 *Id.*

12 Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Leads 19 Attorneys General Urging Federal Trade Commission to Crack Down on Abusive Non-Competes in the Workplace* (March 12, 2020).

13 *Id.*

Non-competes, at least as applied to low-wage workers, restrict competition in violation of antitrust laws and employees are unlikely to have trade secrets, and thus all it does is significantly influence pay.¹⁴ Similar to no-poach clauses, non-compete clauses prevent where low-wage workers can find new jobs and often force them to stay at one job rather than take another for better pay.¹⁵ However, non-compete agreements are not limited to one franchise but instead might be a McDonald's employee not able to work at any other fast food chain in a certain number of miles of their current job.¹⁶ If the geographical restriction is large enough, this could lead to the worker not being able to work at any fast food restaurant in their town.

III. HOW STATE ATTORNEYS GENERAL ARE PURSUING NO-POACH AND NON-COMPETE AGREEMENTS

A. No-Poach Agreements

Several State Attorneys General are pursuing corporate franchise chains for their no-poach clauses, but the Washington Attorney General has spearheaded the enforcement against no-poach clauses in franchise agreements. Between 2018 and 2020, the Washington Attorney General's Office "eliminated no-poach clauses in franchise agreements nationwide for every company that has three or more locations in Washington."¹⁷ These investigations ended with 237 corporate franchisors signing agreements to end no-poach clauses nationwide.¹⁸ The Washington Attorney General filed its first and only no-poach lawsuit in October 2018 against Jersey Mikes who refused to sign an agreement to end no-poach agreements.¹⁹ In 2019 the Washington Attorney General resolved the lawsuit with Jersey Mike's where Jersey Mike's agreed to end no-poach clauses as well as pay \$150,000.²⁰

In 2018 a group of States began an investigation into no-poach agreements because of concerns that these agreements harm low-wage workers by preventing them from switching employers for better opportunities.²¹ The multistate investigation included the Attorneys General of Pennsylvania, Massachusetts, California, District of Columbia, Iowa, Illinois, Maryland, Minnesota, North Carolina, New Jersey, New York, Oregon, Rhode Island, and Vermont.²² In 2019, these States settled with Dunkin', Arby's, Five Guys, and Little Caesars where these franchises agreed to stop including no-poach agreements in their franchise agreements as well as stopping the enforcement of the no-poach clauses in current franchise agreements.²³

More recently, the Illinois Attorney General's Office filed suit against three staffing agencies and their mutual client Colony Display, LLC.²⁴ The State Attorney General alleged that the three staffing agency defendants violated the Illinois Antitrust Act by agreeing "with each other not to recruit, solicit, hire, or 'poach' temporary employees from one another at Colony's facilities" and then Colony also violated the Act by facilitating "the Agency Defendants' agreement by acting as a go-between to communicate about the agreement among the Agency Defendants and by assisting in enforcing the Agency Defendants' no-poach conspiracy."²⁵ The Court of Appeals found that these no-poach agreements could be found to be in violation of the Illinois Antitrust Act and do not fall under the labor services exemption.²⁶

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Press Release, *supra* note 12.

¹⁷ *Supra* note 2.

¹⁸ *Id.*

¹⁹ *Id.*; Press Release, Office of the Washington Attorney General, *Jersey Mike's Will Pay \$150K to Resolve AG Ferguson's First No-Poach Lawsuit* (Aug. 23, 2019).

²⁰ Press Release, Office of the Washington Attorney General, *Jersey Mike's Will Pay \$150K to Resolve AG Ferguson's First No-Poach Lawsuit* (Aug. 23, 2019).

²¹ Press Release, Office of the Attorney General for the Commonwealth of Pennsylvania, *AG Shapiro Secures Win for Workers as Four Fast Food Chains Agree to End Use of No-Poach Agreements* (March 12, 2019).

²² *Id.*

²³ *Id.*

²⁴ State of Illinois ex rel. Raoul, No. 1-21-0840, at *1 (IL App.--1st 2022).

²⁵ *Id.*

²⁶ *Id.* at *4.

Another recent example is the New York Attorney General's investigation of AmTrust Title Insurance Company and First Nationwide Title Agency.²⁷ Both companies are title insurers where AmTrust issues title insurance policies either through First Nationwide or through another independent title agency.²⁸ The New York Attorney General's investigation concluded that AmTrust "entered into no-poach agreements with other title insurance companies and that these agreements effectively stifled competition for employees between AmTrust and their competitors, potentially impacting New York workers."²⁹ Attorney General Letitia James believed that these no-poach agreements thwarted labor competition, hurt workers, and limited their earning potential.³⁰ The New York Attorney General came to an agreement with the two title companies that they will terminate any existing no-poach agreements, pay the state \$1.25 million as well as cooperate with the Attorney General's ongoing investigation into this agency.³¹ This investigation is notable as it appears to be one of the few state antitrust enforcement against no-poach agreements in a non-franchise context—at least what research appears to show.

B. Non-Compete Agreements

In January 2019, the FTC held a public workshop to examine whether it should consider restricting non-competes in employment contracts and to aid this analysis, posed several questions to the public.³² A coalition of 18 Attorneys General submitted comments to the FTC urging collaboration between federal and state regulators to protect workers from non-competes which they alleged stagnate wages, limit job mobility, and limit opportunities for advancement.³³ The comment urged the FTC to look at the impact of company mergers on the labor market as well as the effects of non-compete, non-solicitation, and no-poach agreements on worker mobility.³⁴

One year later, on March 12, 2020, a group of State Attorneys General sent another comment letter to the FTC calling on federal antitrust regulators to issue a rule banning non-compete provisions in contracts.³⁵ California Attorney General Becerra emphasized that non-compete agreements are already unenforceable in California and that the federal government needed to catch up to the state by putting an end to anti-competitive practices that lead to lower wages and harm consumers.³⁶ This letter supported a petition submitted to the FTC in 2019 by labor unions, public interest groups, and legal advocates advocating for the FTC to initiate a rulemaking effort to classify worker non-compete provisions as an unfair method of competition and thus illegal under the Federal Trade Commission Act.³⁷ It also further built on earlier calls by a group of State Attorneys General in July and November for the FTC to use its authority to protect against anticompetitive practices such as non-compete provisions.³⁸

In October 2019, early into the no-poach and non-compete investigations, Washington State Attorney General settled with Washington coffee chain Mercurys Coffee where the company agreed to void all of its existing non-compete agreements.³⁹ Prior to this agreement, Mercurys Coffee required all employees to sign non-compete agreements that prevent employees from working at any coffee shop within 10 miles of a

27 Press Release, New York Attorney General, *Attorney General James Ends Harmful Labor Practices at Top Title Insurance Companies* (July 25, 2022).

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 Press Release, Office of the Attorney General for the District of Columbia, *AG Racine Leads Coalition of 18 AGs Urging Regulators to Protect Workers from Harmful Anticompetitive Labor Practices* (July 16, 2019).

33 *Id.* This coalition included the State Attorneys General of the District of Columbia, California, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Pennsylvania, Rhode Island, Virginia, and Washington. *Id.*

34 *Id.*

35 Press Release, State of California Department of Justice, *Attorney General Becerra Renews Call for Nationwide Ban on Non-Compete Agreements, Reminds Businesses of Existing Prohibition in California* (March 12, 2020). California Attorney General Becerra joined the state attorneys general of the District of Columbia, Maryland, Minnesota, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Puerto Rico, Rhode Island, Virginia, and Washington. *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 Press Release, Washington State Office of the Attorney General, *Attorney General Bob Ferguson Stops King County Coffee Shop's Practice Requiring Baristas to Sign Unfair Non-Compete Agreements* (Oct. 29, 2019).

Mercurys Coffee location for eighteen months after leaving the company.⁴⁰ Practically, this meant that any Mercurys Coffee employee could not work at most coffee shops in an entire Washington county including parts of another.⁴¹ The coffee chain also enforced these agreements by filing lawsuits against workers who started working at other coffee shops after leaving Mercurys Coffee.⁴² As part of its agreement with the Washington Attorney General, Mercurys Coffee must void all of its existing non-compete agreements, pay \$50,000 to reimburse the Attorney General's Office for attorney's fees and costs, and the coffee chain cannot require hourly baristas to sign non-compete agreements.⁴³

Recently, Washington Attorney General Bob Ferguson settled with Tradesmen International LLC regarding its existing non-compete agreements.⁴⁴ Tradesmen provides staffing services throughout the United States including seven offices in Washington state.⁴⁵ The company entered into non-compete agreements with the employers it placed workers at which prevented workers from finding permanent positions with those employers in violation of Washington law.⁴⁶ Tradesmen never disclosed these agreements with the workers themselves.⁴⁷ As part of the consent decree, Tradesmen must inform workers that it has employed since Washington's law against certain non-competes came into effect, that the non-competes are no longer enforceable and that it cannot require them in the future.⁴⁸ Tradesmen will also pay \$287,100 in restitution that the Washington Attorney General's Office will use for Tradesmen's current and former Washington employees.⁴⁹

IV. IMPLICATIONS

Just this past July, four economists published a study, *The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries*, which investigated the effects of the Washington State Attorney General's Office investigation of employee no-poach clauses in franchising contracts.⁵⁰ The researchers looked at over a million job postings by 576 companies across the country between 2015 and 2021 and compared wage offerings between those companies targeted by the Washington Attorney General and those that were not.⁵¹ The economists' research estimated that there was a 3.3 percent increase in chain-specific annual earnings based on the salary on the job postings following the removal of no-poach provisions.⁵² If a worker fell within the median annual earnings, this corresponded to an increase of \$862.39.⁵³ This paper does not directly analyze the impacts on existing workers but these wage increases in job postings give workers the opportunity to apply for those new, higher-paying jobs and potentially use the higher-wage job offers to bargain with current employers.⁵⁴ While this study may not prove definitively that initiatives against anti-competitive no-poach provisions encourage more competition in the labor market and thus provides for better wages and possibly working conditions for low-wage workers, it does imply that the State antitrust enforcement against those provisions is helping workers. Since the push against anti-competitive no-poach and non-compete clauses is still relatively new there are not many studies, but this study provides evidence that what the State Attorneys General are doing in this space is having a positive impact on low-wage workers.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 Press Release, Washington State Office of the Attorney General, *AG Ferguson Shuts Down Tradesmen International's Illegal Use of Non-Compete Agreements, Wins Restitution for Impacted Workers* (July 14, 2022).

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 Brian Callaci, et al., *The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155577 (last visited August 1, 2022). It is important to note that the authors are not connected to the Washington Attorney General's Office.

51 *Id.*; Press Release, *Lasting Impact: Study Finds AG Ferguson's No-Poach Initiative Boosted Income for Low-Wage Workers Nationwide*, Washington State Office of the Attorney General (July 26, 2022), <https://www.atg.wa.gov/news/news-releases/lasting-impact-study-finds-ag-ferguson-s-no-poach-initiative-boosted-income-low>.

52 Callaci *supra* note 50 at 1.

53 *Id.* at 11.

54 Press Release *supra* note 31.

State antitrust enforcement against no-poach and non-compete clauses also appears to have influenced the DOJ's and the FTC's positions on these provisions as well.⁵⁵ For example, the DOJ has said that no-poach agreements are prosecutable under criminal antitrust enforcement since 2016 but it did not pursue enforcement until later, after the State Attorneys General had already begun state enforcement. First, the DOJ began filing statement of interests in private no-poach cases.⁵⁶ In a private no-poach case alleging that Duke University and the University of North Carolina entered into an agreement to not poach each other's medical school faculty, the DOJ urged the Court to apply the *per se* rule because it was a 'naked no-poach agreement.'⁵⁷ Similar to the State Attorneys General, the DOJ showed interest in no-poach agreements in fast food franchise agreements.⁵⁸ In 2019, it filed Statement of Interest in three private no-poach cases and argued that "naked, horizontal no-poach agreements between rival employers within a franchise system are subject to the *per se* rule."⁵⁹ Then, in 2021, the DOJ began to bring a number of indictments based on no-poach agreements including (1) *United States v. Patel* which indicted six executives and managers for conspiring to suppress competition by "agreeing to restrict the hiring and recruiting of engineers and other skilled-labor employees;" and (2) *United States v. Surgical Care Affiliates, LLC* which indicted two entities for suppressing competition by agreeing not to solicit each other's senior-level employees.⁶⁰ While DOJ did lose its first no-poach case in front of a jury as the defendant was acquitted, the DOJ is unlikely to back down on these cases.⁶¹

Also in 2021, as mentioned above, the FTC and DOJ held a "Workshop on Competition" that focused on competition in labor markets such as non-compete, no-poach, and non-disclosure agreements.⁶² Opening remarks by representatives of both the FTC and the DOJ Antitrust Division stated a goal of pursuing any conduct that harms competition in the labor market through both criminal and civil litigation.⁶³ Whether this focus by the FTC and DOJ is solely because a change in administration or because both agencies were influenced by the State Attorneys General or both is unclear. It seems likely that the investigations by Washington and other State Attorneys General plus the State Attorneys General's letter and comments to the two agencies influenced both the DOJ and FTC to some degree. Hopefully, these actions by both federal and state antitrust enforcers will lead to further encourage competition in labor markets and lead to better wages and better job opportunities.

V. CONCLUSION

Overall, it appears that state enforcement in the labor market space involving non-compete and no-poach agreements seems to benefit workers, particularly low-wage workers. Hopefully, state enforcement and federal enforcement both continue allowing more competition in the labor market, preventing wage stagnation, and providing workers more bargaining power with their employer. The State Attorneys General have been pushing this for years and time will tell the full impact of this including whether other Attorneys General will begin to take interest in antitrust enforcement in the labor space as well. Already, several states have passed laws preventing some of these agreements from being used against low-wage workers.⁶⁴ In 2021, a bipartisan group of legislators introduced the Workforce Mobility Act of 2021 in both the House and Senate which would prohibit the use of non-compete agreements except in the context of a sale of a business or dissolution of a partnership.⁶⁵ Also in the year, the District of Columbia banned non-compete agreements and Illinois amended its current legislation regulating non-compete agreements that

55 Division Update Spring 2019, U.S. Department of Justice, <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach> (last visited August 2, 2022).

56 Division Update Spring 2019 *supra* note 39.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Expect Continued Law Enforcement Focus on No-Poach Agreements in 2022*, Sullivan & Cromwell LLP (Jan. 26, 2022), <https://www.sullcrom.com/expect-continued-law-enforcement-focus-on-no-poach-agreements-in-2022>.

61 Cooley Alert, *DOJ Loses First Wage-Fixing and No-Poach Cases as Juries Acquit*, Cooley (April 26, 2022), <https://www.cooley.com/news/insight/2022/2022-04-26-doj-loses-first-wage-fixing-and-no-poach-cases-as-juries-acquit>.

62 *Id.*

63 *Id.*

64 Press Release *supra* note 44.

65 *Top 10 Non-Compete Law Developments of 2021*, Faegre Drinker (January 7, 2022), <https://www.faegredrinker.com/en/insights/publications/2022/1/top-10-noncompete-law-developments-of-2021>.

further restricts the use of non-compete and non-solicitation agreements.⁶⁶ Nevada and Oregon also amended their laws regulating restrictive covenants.⁶⁷

What happens in this space will be interesting to watch especially given that, pressed by labor shortages, a growing number of employers are now trying to enforce non-compete clauses through litigation.⁶⁸ Even in states such as California, where non-compete clauses cannot be enforced, employers still put them in employment contracts likely hoping the employee believes it to be enforceable.⁶⁹

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Jessica Mach, *Labor Shortages Sparks Rise in Non-Compete Lawsuits by Employers*, Benefits Pro (May 10, 2022) (originally published on Law.com), <https://www.benefitspro.com/2022/05/10/labor-of-law-amid-labor-shortages-more-employers-suing-to-enforce-non-competes-412-129910/?slreturn=20220702180837>.

⁶⁹ *Id.*



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