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NOTE

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I. INTRODUCTION

When non-law-abiding citizens wonder whether their conduct is subject to criminal penalties, most turn to state and federal criminal statutes for guidance. Under antitrust law, potential wrongdoers must look to the Sherman Act – a broad "charter of freedom" requiring an unusual level of interpretation by federal courts.[1] Reflecting Congress' belief that "competition is the best method of allocating resources in a free market,"[2] the Sherman Act simply outlaws "every contract, combination, or conspiracy in restraint of trade or commerce."[3] The drafters of the Sherman Act could have delineated specific categories of proscribed conduct such as bid-rigging, price-fixing, or entering into no-poach agreements, yet the Act says nothing at all to this effect.[4] Instead, Congress left the task of construing the Sherman Act's vague mandate in the hands of the courts, forcing them to determine what conduct is prohibited under the Act on a case-by-case basis.[5] While the judiciary has

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[1] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940); *see also* RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 104 (2016).

[2] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978).

[3] 15 U.S.C. § 1.

[4] *See generally* 15 U.S.C. §§ 1–7.

[5] Brief for the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae at 8–9, Sanchez v. United States, No. 19-288 (U.S. Oct. 24, 2019) (citing EARL W. KINTNER, 1 THE

made significant headway in defining the contours of unlawful behavior in *consumer markets* over the past century, a dearth of precedent concerning the *labor market* has left employers with little to no notice as to what may constitute illegal behavior in the labor market.[6]

Despite this gap, antitrust policing of labor markets has continued to increase substantially in recent years, with particular scrutiny of agreements between employers not to recruit or solicit one another's employees – often called no-poach agreements.[7] Although these agreements have been the subject of debate in recent years, the U.S. Antitrust Agencies, which include the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ"), first issued formal Guidance in 2016 indicating that DOJ would criminally prosecute no-poach agreements.[8] Until that point, the agencies focused only on civil enforcement, and courts therefore analyzed challenged no-poach restraints under the rule of reason.[9] The new Guidance has led to reinvigorated agency investigations and settlements, new waves of private litigation, and, just in the past year, criminal indictments.[10]

This Note explores DOJ's increasingly aggressive criminal enforcement of no-poach agreements in labor markets and the pressing uncertainty regarding how courts will analyze such agreements. Part II explains the development of an analytical framework for antitrust violations in labor markets. Part III describes the Antitrust Agencies' 2016 Guidance and DOJ's subsequent efforts to prosecute no-poach agreements as per se illegal. Thereafter, Part IV discusses the absence of the notice or judicial precedent required to substantiate criminal prosecutions of no-poach agreements under antitrust law, and DOJ's failure to acknowledge the procompetitive benefits of no-poach agreements.

II. LEGAL BACKGROUND

Since the passage of the Sherman Act, the Supreme Court of the United States has recognized that Sherman Act cases are far too complex

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LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 97 (1978)) [hereinafter *Sanchez*, Brief for the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae].

[6] *See* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 540 n.10 (2018).

[7] U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (Oct. 2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/R8EH-A6M5].

[8] *Id.*

[9] Eric S. Hochstadt & Nicholas J. Pappas, *Restrictions on Employee Change of Jobs: Antitrust Challenges to "Non-Compete" and "No-Poach" Clauses*, 34 ABA J. OF LAB. & EMP. L. 253, 254 (2020).

[10] *See infra*, Part III.

for the judiciary to resolve with strict adherence to a literal reading of the statute's text.[11] Early on, the judiciary rejected a plain reading of the statute's language when courts reasoned that because every contract restrains trade to some extent, not *every* conceivable contract or combination is prohibited by the Act – only those that *unreasonably* restrain trade.[12] The Act, however, provides little direction beyond this. Courts recognized that without parameters, corporations and individuals would be left with little guidance in predicting what constitutes legal and illegal action under the Sherman Act.[13] As such, the judiciary has spent more than a century attempting to assess liability in individual cases through the application of common law standards.[14]

A. Developing an Analytical Framework

Courts generally assess potentially anticompetitive conduct under one of two standards.[15] The primary mode for determining the reasonableness of a restraint is the rule-of-reason analysis.[16] Under the rule of reason, a court looks at various factors – including the history of the challenged restraint – and then weighs the procompetitive justifications against the anticompetitive effects of the business practice in the relevant economic and geographic market.[17] Most critically, there is no presumption of unreasonableness.[18] The plaintiff bears the burden of showing anticompetitive harms, after which the defendant may show off-setting procompetitive benefits.[19]

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[11] Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 51 (2007) ("[A]ntitrust cases are too complex and socially important to turn on simplistic legal commands.").

[12] *See* Standard Oil Co. v. United States, 221 U.S. 1, 60–68 (1911) (emphasis added).

[13] United States v. Topco Assocs., 405 U.S. 596, 609 n.10 (1972).

[14] *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); Appalachian Coals v. United States, 288 U.S. 344, 359 (1933); *see also* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 36 (1978) ("[T]he Sherman Act [is] not a set of specific rules, still less a body of precedent . . . .").

[15] There is a third standard of review, called the "quick look," which is an abbreviated rule-of-reason analysis applied when "the great likelihood of anticompetitive effects can easily be ascertained." Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 779 (1999). The quick look analysis is applicable only in civil enforcement actions and therefore, it is not discussed further for the purposes of this Note.

[16] *See* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 50 (2019).

[17] *See* Bd. of Trade of Chi. v. United States, 246 U.S. 231 (1918); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687–91 (1978).

[18] *See Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 690.

[19] *See id.*

By contrast, the per se rule condemns a business practice as a matter of law without any further consideration of procompetitive benefits.[20] It assumes an irrebuttable presumption of unreasonableness.[21] Defendants can only proffer procompetitive effects as justification in limited instances, such as when they can demonstrate that the challenged restraint is ancillary to any anticompetitive harms.[22] Historically, courts have treated horizontal price-fixing, horizontal market allocations, and other concerted actions as per se illegal.[23] Because the per se rule forecloses inquiry into the justifications or procompetitive effects of a restraint, the Supreme Court has strictly limited its application to conduct that is manifestly anticompetitive and on its face lacks any redeeming virtue.[24] For this reason, DOJ only criminally prosecutes conduct considered per se illegal.[25] With the stakes so high, the Court has held that "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."[26]

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[20] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984) (citing Broad. Music, Inc. v. CBS, 441 U.S. 1, 19–20 (1979)).

[21] *Id.*

[22] Ancillary restraints are defined as agreements that are 'reasonably necessary' to a separate, legitimate, pro-competitive integration. *See Bd. of Regents*, 468 U.S. at 100–03; *see also* Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 5, 63 (1st Cir. 2004) ("[R]estraints that are truly ancillary to a larger efficiency-gaining enterprise . . . are not normally condemned per se without looking at likely consequences.").

[23] United States v. Socony-Vacuum 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).

[24] *See, e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) ("[P]er se rules are appropriate only for 'conduct that is manifestly anticompetitive.'") (quoting Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977)); Broad. Music, Inc. v. CBS, 441 U.S. 1, 8 (1979) (noting that "certain agreements or practices are so plainly anticompetitive . . . that they are conclusively presumed illegal without further examination . . . ."); 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.").

[25] U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION MANUAL III-12 (5th ed. 2015) (available at https://www.justice.gov/atr/file/761166/download [https://perma.cc/RG34-V6GQ]).

[26] United States v. Topco Assocs., 405 U.S. 596, 607–08 (1972); *see also* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 349 n.19 (1982) (discussing the "established position that a new per se rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged."); FTC v. Sup. Ct. Trial Laws. Ass'n, 493 U.S. 411, 432–33 (1990) (noting that the per se rule "reflect[s] a longstanding judgment that the prohibited practices by their nature have a substantial potential for impact on competition.") (quoting Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984)).

Nevertheless, the practical effect of whether the rule of reason or per se rule applies has profound implications for the outcome of an enforcement action.[27] In criminal prosecutions, for example, a judicial finding that a defendant's conduct should be evaluated under the rule of reason effectively amounts to a dismissal, whereas a per se rule severely limits a defendant's opportunity to defend her actions.[28]

B. Criminal Liability Under the Sherman Act

The author of the Sherman Act, Ohio Senator John Sherman, originally intended for the legislation to be a broad remedial statute, providing that anticompetitive agreements or cartel activity be subject to private litigation for double damages and civil forfeiture actions by the government.[29] After making its way through various committees in the House and Senate, however, the law that emerged – ripe with vague, undefined language – allowed for misdemeanor criminal liability if violated.[30] The bill's legislative history highlights concerns by various congressmen who recognized that the courts would need to define the broad terms of the statute.[31] In fact, the author of the House Judiciary Committee report on the bill admitted that neither he "nor any man could know just what contracts" will be barred by the law "until the courts determine."[32]

For eighty-four years, the Sherman Act remained a misdemeanor statute.[33] Imprisonment was rare, imposed in less than four percent of DOJ's criminal cases, many of which also involved acts of violence.[34] There were, however, a few deviations from this norm.[35] In 1921, the first four individuals convicted for engaging in cartel activity reported to prison.[36] The defendants, all building contractors, each received a ten-

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[27] Todd Fishman, *The Rule of Reason as a Bar to Criminal Antitrust Enforcement*, JD SUPRA (Jan. 31, 2019), https://www.jdsupra.com/legalnews/the-rule-of-reason-as-a-bar-to-criminal-87406/ [https://perma.cc/W2U9-GQVJ].

[28] *Id.*

[29] *Sanchez*, Brief for the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae, *supra* note 5, at 2 (citing EARL W. KINTNER, 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 97 (1978).

[30] *Id.* at 8–10.

[31] *Id.* at 7–10.

[32] *Id.* at 9.

[33] *Id.* at 10.

[34] *Id.*

[35] Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUROPEAN COMPETITION J. 19, 20, n.3_(2009).

[36] United States v. Alexander & Reid Co., 280 F. 924, 927 (S.D.N.Y. 1922); Werden, *supra* note 35, at 20 n.3. Though the per se standard had yet to be formally articulated, the court in *McDonough* effectively applied the same principles.

month sentence for their part in a bid-rigging scheme.[37] Then, in 1959, four individuals were each sentenced to ninety days for fixing the prices of hand tools.[38]

During this same general period, the Supreme Court first formally articulated the per se rule in its 1940 decision in *United States v. Socony-Vacuum Oil Co*.[39] The Court in *Socony-Vacuum* stated that if defendants were allowed to argue over whether their alleged price-fixing restrained trade unreasonably, the Sherman Act "would not be the charter of freedom which its framers intended."[40] The defendants in the case were convicted, though the harshest punishment given to any individual defendant was a $1,000 fine.[41]

The consequences for convicted criminal defendants in Sherman Act cases have since increased dramatically.[42] Reacting to inflation and public outrage regarding influence-peddling in the Nixon administration, Congress upgraded the misdemeanor penalty provision to a felony violation in 1974 and increased the maximum sentence from one year to three years.[43] Fines also increased to $1 million for corporations and $100,000 for individuals.[44] To better align the sentences with other white-collar crimes and ensure that corporate fines reflected the harm cartels inflict on the economy,[45] in 2004, Congress further increased the criminal

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Alexander & Reid Co., 280 F. at 927 ("[T]he court is satisfied that the mere imposition of a fine as to certain of the more flagrant instances will afford no cure . . . the situation presented here is of such character that the time has come to put a stop to these criminal practices . . .").

[37] Werden, *supra* note 35, at 20 n.3.

[38] United States v. McDonough Co., 180 F. Supp. 511, 514 (S.D. Ohio 1959); Werden, *supra* note 35, at 20 n.4.

[39] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); *Sanchez*, Brief for the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae, *supra* note 5, at 11. While the court first applied what later came to be known as the per se approach in *United States v. Trenton Potteries*, the court did not use the language "per se" as it relates to antitrust matters until *Socony-Vacuum*. 273 U.S. 392, 396 (1927).

[40] *Socony-Vacuum Oil Co.*, 310 U.S. at 221; *Sanchez*, Brief for the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae, *supra* note 5, at 12.

[41] Adjusted for inflation, this would amount to roughly $20,000 in 2022. U.S. Inflation Calculator, https://www.usinflationcalculator.com [https://perma.cc/D6UH-AXNN]; Robert E. Connolly, *In the Clash Between the Venerable Per Se Rule and the Constitution, the Constitution Shall Prevail (in Time)*, 30 NO. 1 COMPETITION: J. ANTIRUST, UCL & PRIV. SEC. OF CAL. LAWS. ASS'N 117, 122–23 (2020).

[42] Connolly, *supra* note 41, at 123.

[43] *Sanchez*, Brief for the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae, *supra* note 5, at 15–19.

[44] *Id.* at 19.

[45] Scott D. Hammond, *An Overview Of Recent Developments In The Antitrust Division's Criminal Enforcement Program*, U.S. DEP'T. JUST. ANTITRUST DIV. (Jan. 10, 2005), https://www.justice.gov/atr/speech/overview-recent-developments-antitrust-divisions-criminal-enforcement-program [https://perma.cc/J84R-S38N].

penalties to a term of imprisonment of up to 10 years, and fines of $100 million for corporations and $1 million for individuals.[46]

C. Labor Agreements Subject to Enforcement

Antitrust law was designed to ensure the proper functioning of both consumer and labor markets.[47] In an effort to decrease long-term costs on the sell-side of the market, employers can exercise market power on the labor side – or buy-side – by implementing various types of agreements, though doing so may trigger antitrust violations.[48] Explicit wage-setting agreements with competitors and joint decisions allocating workers,[49] for example, decrease costs directly.[50] Other actions, such as no-poach agreements,[51] data exchanges,[52] or employer agreements regarding each other's non-competes, lower costs more indirectly by preventing workers from resigning in favor of higher paying jobs.[53] While some types of labor market agreements, like explicit wage-fixing, have always been condemned as unlawful the Antitrust Agencies and the courts have recently expanded their enforcement efforts.[54] The agencies argue that competition in the labor market provides actual and potential employees with higher wages, better benefits, and more varied types of employment – all of which they claim ultimately benefit consumers because a more

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[46] *Sanchez*, Brief for the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae, *supra* note 5, at 19–20.

[47] *See* Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 628–36 (2018) (describing the antitrust law's application to labor market monopsonies).

[48] *See* George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 812–13 (1991).

[49] Wage-fixing agreements are arrangements whereby companies agree to constrain "employees' salary or other terms of compensation, either at a specific level or within a range." *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No-Poach" and Wage-Fixing Agreements*, U.S. DEP'T JUST. ANTITRUST DIV. (Apr. 10, 2018), https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements [https://perma.cc/GBQ2-S9VH].

[50] *See, e.g.*, Cordova v. Bache & Co., 321 F. Supp. 600, 606–07 (S.D.N.Y. 1970); *see also* Anderson v. Shipowners' Ass'n of Pac. Coast, 272 U.S. 359, 364–65 (1926).

[51] No-poach agreements, also referred to as "anti-solicitation," "no-hire," "no-switching," or "no cold call" agreements, are arrangements whereby companies agree not to compete for each other's employees by not soliciting or hiring them. *No More No-Poach*, *supra* note 49.

[52] *See* Todd v. Exxon, 275 F.3d 191, 203 (2d Cir. 2001).

[53] *See In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1110–12 (N.D. Cal. 2012).

[54] ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, *supra* note 7.

competitive workforce may lead to greater quality and quantities of goods and services.[55]

Antitrust scrutiny of no-poach and other types of agreements in the employment context is nothing new,[56] though the persistent focus over the years on consumer output markets has led to a lack of precedent relating to labor input markets.[57] This has created uncertainty among the courts as to what analytical framework should apply in challenges to such restraints.[58] The uncertainty is heightened by the different factual scenarios that arise in labor-related cases, which presumably make courts reluctant to use a straightforward application of a standard.[59] Courts appear more comfortable applying a per se standard in wage-fixing cases,[60] though this is likely because no-poach agreements are more often deemed to be ancillary to a procompetitive purpose, whereas wage-fixing is more directly analogous to price-fixing on the sell-side.[61]

The term "no-poach" first came into the antitrust spotlight in 2010 when DOJ filed a complaint against several Silicon Valley technology firms challenging their use of no-poach and wage-fixing agreements.[62]

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[55] *Id.*; *see also In re* Papa John's Emp. & Franchisee Emp. Antitrust Litig., No. 3:18-CV-825, 2019 WL 5386484, at *9 (W.D. Ky. Oct. 21, 2019) ("Plaintiffs also sufficiently plead antitrust injury. Plaintiffs contend that the no-hire provision is an agreement not to compete for labor and that the agreement had the purpose and effect of depressing wages and diminishing employment opportunities.").

[56] *See, e.g.*, Anderson v. Shipowners' Ass'n of Pac. Coast, 272 U.S. 359, 364–65 (1926) (shipowners violated Sherman Act by agreeing to have hiring and wage decisions set collectively through a complex registration scheme); Cordova v. Bache & Co., 321 F. Supp. 600, 606–07 (S.D.N.Y. 1970) (brokerage firms violated antitrust law by collectively agreeing to reduced commissions for employee brokers).

[57] *See* Naidu et al., *supra* note 6.

[58] *See, e.g.*, Union Circulation Co. v. FTC, 241 F.2d 652, 656–57 (2d Cir. 1957) (finding that "no-switching" agreements were not inherently anticompetitive because they are "directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing").

[59] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886–87 (2007) (holding that per se standards should rarely be expanded).

[60] *Compare* Todd v. Exxon, 275 F.3d 191, 198 (2d Cir. 2001) ("If plaintiff . . . could allege that defendants actually formed an agreement to fix MPT salaries [the] per se rule would likely apply."), *with* Nichols v. Spencer, 371 F.2d 332, 335–36 (7th Cir. 1967) (finding that the injury caused by a no-poach agreement must be shown through output markets effects).

[61] *See* Eichorn v. AT&T, 248 F.3d 131, 145 (3d Cir. 2001) (finding a limited no-poach agreement was ancillary to a procompetitive merger).

[62] Companies involved include Adobe, Apple, Google, Intel, Intuit, and Pixar. *See* Press Release, U.S. Dep't. of Just. Antitrust Div., Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010) (available at https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee [https://perma.cc/V4RM-KNPB]).

The civil complaint alleged that the companies entered explicit agreements to refrain from soliciting highly skilled employees from each other's companies.[63] Because customer non-solicitation agreements are a recognized form of market allocation in output markets,[64] DOJ advanced the then-novel argument that no-poach agreements represent the same kind of behavior, just in an input market.[65]

A settlement followed in which the defendants entered into consent decrees enjoining them from participating in the challenged business practices.[66] Following DOJ's settlement with the defendants, a class action was filed on behalf of 64,000 of the defendants' employees, and the case ultimately settled for $415 million.[67] Because both cases settled, the court never reached the issue of whether a rule of reason or per se analysis would apply to the no-poach agreements in question.[68]

Soon after the Silicon Valley cases, DOJ filed a similar complaint concerning no-poach agreements against eBay in November 2012.[69] The defendants moved for dismissal, arguing that under the rule of reason, DOJ's complaint failed to properly allege an unreasonable restraint of trade.[70] The trial court noted that the agreement constituted a horizontal market allocation agreement, which is generally a per se violation, because "[a]ntitrust law does not treat employment markets differently from other markets in this respect."[71] Nevertheless, in denying the motion to dismiss, the judge held that the court need not reach the question of the appropriate analytical standard at the pleading stage.[72] Soon thereafter, eBay settled with DOJ in an agreement that enjoined the company from entering into

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[63] Competitive Impact Statement by United States at 2–5, United States v. Adobe Syss., Inc. et al., No. 1:10-cv-1629, 2011 WL 10883994 (D.D.C. Sept. 24, 2010).

[64] *See* United States v. Cooperative Theaters of Ohio, 845 F.2d 1367, 1373 (6th Cir. 1988); *see also* United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991) ("A market allocation agreement between two companies at the same market level is a classic per se antitrust violation.").

[65] *Adobe Syss., Inc.* Competitive Impact Statement by United States, *supra* note 63, at 7–9.

[66] *See Adobe Syss., Inc.*, 2011 WL 10883994, at *2.

[67] Melissa Lipman, *Judge Koh OKs $415M Google, Apple Anti-Poaching Deal*, LAW360 (Sept. 3, 2015) (subscription required), https://www.law360.com/cases/4e3fb5601d1d2e4449000001/articles [https://perma.cc/5ZEJ-LZSB].

[68] *See In re* High-Tech Employee Antitrust Litigation, 856 F. Supp. 2d 1103, 1112 (N.D. Cal. 2012) (granting in part and denying in part defendants' joint motion to dismiss).

[69] *See generally* United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1032 (N.D. Cal. 2013).

[70] *Id.* at 1034.

[71] *Id.* at 1039.

[72] *Id.* at 1040.

any future no-poach arrangements.[73] Once again, as the court did not rule based on a full evidentiary record, this action did little to provide clarity as to the proper standard of review for no-poach agreements.[74]

III. RECENT DEVELOPMENTS

The impact of these no-poach agreements and the litigation that followed did not end there. Together with the FTC, DOJ decided that greater enforcement of antitrust laws in labor markets was necessary to protect employees, and that enforcement began with the Antitrust Guidance issued in 2016.[75]

A. Introducing Criminal Liability for No-Poach Agreements

In October 2016, DOJ and the FTC jointly issued "Antitrust Guidance for Human Resource Professionals" with the goal of providing a roadmap to corporations on the application of federal antitrust laws regarding hiring practices and certain employment agreements.[76] Reiterating DOJ's position from the Silicon Valley cases that an agreement not to compete for employees' services is a per se antitrust violation, the agencies pointedly warned the business community, "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poach agreements."[77] The Guidance also noted, however, that if the agreement is not separate from or is reasonably necessary to a larger legitimate collaboration between the employers, it would be considered ancillary, and not per se illegal.[78] But it did not provide detailed instruction on how to evaluate whether the agreement was reasonably necessary and what might constitute a legitimate collaboration.[79]

Antitrust practitioners and academics have vigorously debated the substantive merits of DOJ's policy shift in the last few years.[80] Some

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[73] *See* Order Granting Motion to Approve Consent Judgment at 3, *eBay, Inc.*, No. 5:12-cv-5869 (N.D. Cal. entered Sept. 2, 2014).

[74] *Id.*

[75] *See* ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, *supra* note 7.

[76] *Id.*

[77] *Id.* at 4.

[78] *Id.* at 3.

[79] *See id.*

[80] *Compare* Jamie Chen, "*No-Poach" Agreements as Sherman Act § 1 Violations: How We Got Here and Where We're Going*, 28 COMPETITION: J. ANTITRUST, UCL & PRIV. SECTION CAL. LAWS. ASS'N 82, 93 (2018) *with* Dina Hoffer & Elizabeth Prewitt, *To Hire or Not to Hire: U.S. Cartel Enforcement Targeting Employment Practices*, 3 CONCURRENCES COMPETITION L.J. 78, 81 (Sept. 2018), https://www.lw.com/thoughtLeadership/to-hire-or-not-to-hire-us-cartel-enforcement-

commentators argue that the Guidance brings antitrust jurisprudence "full circle" to the precedent set forth a century prior by extending the same level of antitrust protection to individuals and employees as to products.[81] Conversely, the abrupt policy change has also received criticism where these agreements may offer some procompetitive effects such that outright condemnation as per se anticompetitive is "precipitous and inappropriate."[82] Regardless, DOJ has used its enforcement powers to bring cases against firms that use no-poach and related restraints to inhibit worker mobility and pay, yet several questions remain about government enforcement policies in this area.

B. Post-Guidance Enforcement

In the first four years following the Antitrust Guidance, DOJ did not formally bring any criminal prosecutions related to no-poach agreements. Instead, DOJ brought civil enforcement actions and intervened in private lawsuits relating to no-poach agreements.[83]

For example, in April 2018, the Government brought its first post-Guidance civil enforcement action against two leading firms in the railroad equipment industry for allegedly agreeing not to hire each other's employees.[84] Within the rail industry, DOJ observed a high demand for – yet limited supply of – skilled employees.[85] Moreover, the agency found 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 for better terms of employment.[86]

In its competitive impact statement,[87] DOJ echoed its position that no-poach agreements unlawfully allocate employees between the

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targeting-employment-practices [https://perma.cc/QGN7-US4H] (subscription required).

[81] *See* Anderson v. Shipowners' Ass'n of Pac. Coast, 272 U.S. 359 (1926); Jamie Chen, "*No-Poach" Agreements as Sherman Act § 1 Violations: How We Got Here and Where We're Going*, 28 COMPETITION: J. ANTITRUST, UCL & PRIV. SECTION CAL. LAWS. ASS'N 82, 93 (2018).

[82] *See* Hoffer & Prewitt, *supra* note 80.

[83] *See, e.g.*, Complaint at 1, United States v. Knorr-Bremse AG, No. 1:18-cv-747, 2018 WL 4386565 (D.D.C. July 11, 2018); Statement of Interest of the United States, *In re* Ry. Indus. Emp. No-Poach Antitrust Litig., No. 2:18-MC-798-JFC (W.D. Pa. Feb. 8, 2019); Statement of Interest of the United States, Seaman v. Duke Univ., No. 1:15-cv-462, 2019 WL 4674758 (M.D.N.C. Mar. 7, 2019).

[84] Complaint at 1, United States v. Knorr-Bremse AG, No. 1:18-cv-747, 2018 WL 4386565 (D.D.C. July 11, 2018).

[85] *Id.* at 5.

[86] *Id.* at 10–11.

[87] A competitive impact statement is a document filed by the government which provides analysis on the potential effects that an agreement will likely have on

companies and thus are indistinguishable from market allocation agreements, which are per se unlawful restraints of trade that violate Section 1 of the Sherman Act.[88] However, DOJ reached a settlement in the case rather than pursue a criminal investigation.[89] The parties consented to a judgment that enjoined the defendants from engaging in future no-poach agreements and required them to turn over any evidence of additional no-poach agreements with other companies.[90]

DOJ has additionally used statements of interest to intervene in private enforcement actions involving no-poach agreements.[91] For example, DOJ intervened and filed a statement of interest in subsequent class actions brought by the employees of the railroad equipment firms, arguing that the court should apply the rule of per se illegality.[92] DOJ cited multiple decisions, including the Silicon Valley and eBay cases, where courts denied defendants' motions to dismiss because plaintiffs plausibly alleged that no-poach agreements were per se unlawful, even though those cases were ultimately settled before the courts could articulate specific rules.[93] Up until this point, no court had passed on the correct framework for analysis. While the court agreed with DOJ and found that the plaintiffs plausibly alleged that the challenged agreements were naked horizontal restraints subject to a per se analysis,[94] the cases again ultimately settled before the court had the opportunity to apply the rule.[95]

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competition in the relevant market. *See* Antitrust Procedures and Penalties Act (Tunney Act), Pub. L. No. 93-528, § 2(b).

[88] *See* Competitive Impact Statement at 9, *Knorr-Bremse AG*, No. 1:18-cv-747, 2018 WL 4386565 ("Market allocation agreements cannot be distinguished from one another based solely on whether they involve input or output markets.").

[89] *See id.* at 12.

[90] *See* Final Judgment at 1–4, *Knorr-Bremse AG*, No. 1:18-cv-747, 2018 WL 4386565 (describing the agreed-upon terms between the parties).

[91] *See, e.g.*, Statement of Interest of the United States, *In re* Ry. Indus. Emp. No-Poach Antitrust Litig., No. 2:18-MC-798-JFC (W.D. Pa. Feb. 8, 2019); Statement of Interest of the United States, Seaman v. Duke Univ., No. 1:15-cv-462, 2019 WL 4674758 (M.D.N.C. Mar. 7, 2019).

[92] Statement of Interest of the United States, *In re* Ry. Indus. Emp. No-Poach Antitrust Litig., No. 2:18-MC-798-JFC (W.D. Pa. Feb. 8, 2019).

[93] Boris Bershteyn et al., *DOJ Wades Deeper into No-Poach Advocacy*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Mar. 19, 2019), https://www.skadden.com/en/insights/publications/2019/03/doj-wades-deeper [https://perma.cc/6B54-UQHN].

[94] *In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019).

[95] Matthew Santoni, *Wabtec, Knorr Get Initial Nod On $49M In No-Poach Deals*, LAW 360 (Mar. 19, 2020), https://www.law360.com/articles/1255140/wabtec-knorr-get-initial-nod-on-49m-in-no-poach-deals [https://perma.cc/FV7C-JLMS].

In 2019 DOJ filed another statement of interest in *Seaman v. Duke University*,[96] in which the plaintiffs alleged that the medical schools of Duke University and the University of North Carolina ("UNC") agreed to a guideline that prohibited lateral moves of faculty between Duke and UNC.[97] DOJ once again emphasized that naked no-poach agreements should be subject to a per se analysis, and noted that Duke had not identified any specific collaborations to which the no-poach agreement could have been ancillary.[98] After DOJ's intervention, the UNC defendants settled, and in May 2019, Duke agreed to settle for $54.5 million.[99] Once more, the court did not reach a determination as to the appropriate standard.

In April 2020, the Antitrust Agencies issued a joint statement reaffirming the importance of competition for American workers.[100] The statement warned companies that, particularly in light of the COVID-19 pandemic, the Antitrust Agencies would be "on alert" for "agreements to suppress or eliminate competition with respect to compensation, benefits, hours worked, and other terms of employment, as well as the hiring, soliciting, recruiting, or retention of workers."[101] The agencies also reminded employers that enforcement officials were prepared to criminally prosecute firms entering into these agreements.[102] Less than a year later, DOJ made good on that promise.[103]

C. The Beginning of No-Poach Criminal Indictments

In January 2021, DOJ brought its first criminal action regarding no-poach agreements against Surgical Care Affiliates ("SCA"), an operator

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[96] *See generally* Statement of Interest of the United States, Seaman v. Duke Univ., No. 1:15-cv-462, 2019 WL 4674758 (M.D.N.C. Mar. 7, 2019).

[97] *See id.* at 2–4.

[98] *Id.* at 19–22, 28–29.

[99] Stephanie K. Mann, *Duke University's $54.5M settlement in alleged no-hire pact suit approved*, WOLTERS KLUWER (Sept. 26, 2019), https://lrus.wolterskluwer.com/news/antitrust-law-daily/duke-university-s-54-5m-settlement-in-alleged-no-hire-pact-suit-approved/95795/ [https://perma.cc/7B46-B28B].

[100] Press Release, U.S. Dep't of Just. Antitrust Div., Justice Department and Federal Trade Commission Jointly Issue Statement on COVID-19 and Competition in U.S. Labor Markets (Apr. 13, 2020) (available at https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-jointly-issue-statement-covid-19-and [https://perma.cc/K7B5-EH5A]).

[101] *Id.*

[102] *Id.*

[103] *See infra* Part III.C.

of outpatient surgical facilities.[104] The indictment alleges that SCA entered into and engaged in two separate bilateral conspiracies with other health care companies not to solicit senior-level employees, thereby suppressing competition for the employees' services.[105] In the first count, DOJ alleges that over a three-year period, SCA and another Texas-based company conspired to suppress competition between them by agreeing not to solicit each other's senior-level employees.[106] In the second count, DOJ alleges that, beginning at least as early as February 2012 and continuing until at least as late as July 2017, SCA conspired with a Colorado-based company to allocate senior-level employees through a similar non-solicitation agreement.[107]

DOJ also alleges various ways that SCA enforced its no-poach agreements, such as by instructing recruiters not to recruit senior-level employees, requiring senior-level employee applicants to notify their managers when they were seeking other employment, monitoring compliance with the no-poach agreements, and refraining from soliciting each other's senior-level employees.[108] The case is pending in federal court in Texas with a trial set to begin in January of 2023.[109]

In March 2021, DOJ announced it had secured a second no-poach criminal indictment against VDA OC LLC ("VDA"), a health care staffing company, and its former manager, Ryan Hee, for conspiring with an unnamed competitor company to allocate employee nurses and to fix those nurses' wages.[110] According to the indictment, a school district in Nevada contracted with both VDA and the other private health care staffing company to provide nurses who work with students requiring specialized medical care.[111] Beginning in or around October 2016, and continuing until at least July 2017, VDA, Hee and the other staffing company agreed

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[104] *See* Indictment at 1–2, United States v. Surgical Care Affiliates, LLC et. al., No. 3:21-cr-00011-L (N.D. Tex. filed Jan. 5, 2021) [hereinafter *Surgical Care Affiliates, LLC*, Indictment].

[105] *See id.* at 2–10.

[106] *Id.* at 2–3.

[107] *Id.* at 7.

[108] *Id.* at 3–5.

[109] *See Upcoming Public Hearings in Pending Cases*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/upcoming-public-hearings-pending-cases#surgical (last updated Apr. 19, 2022).

[110] Press Release, U.S. Dep't of Just. Antitrust Div., Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses (Mar. 30, 2021) (available at https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses [https://perma.cc/M4HY-95JS]).

[111] Indictment at 3, United States v. Hee et al., No. 2:21-cr-00098-RFB-BNW (D. Nev. filed Mar. 30, 2021) [hereinafter *Hee*, Indictment].

not to recruit or hire each other's nurses assigned to the school district and to refrain from raising those nurses' wages.[112]

The indictment alleges that the parties carried out the no-poach and wage-fixing conspiracy via conversations and communications between executives.[113] In one email, Hee purportedly stated that VDA would not recruit any active nurses whereupon an individual from the other company wrote back, "Agreed on our end as well."[114] The two staffing companies also allegedly agreed that if a nurse employed by one company sought employment with the other, the company would notify the employing company immediately and would not discuss potential employment with the nurse.[115] The case is currently pending in federal court in Nevada, with a trial set to begin in July 2022.[116]

Another no-poach indictment came in July 2021 when DOJ brought charges against DaVita Inc., another health care company, and its former CEO Kent Thiry, for allegedly participating in the SCA conspiracy noted above.[117] The indictment alleges that SCA and DaVita had an unwritten "gentlemen's agreement" not to poach each other's senior-level employees.[118] Recruitment efforts were allegedly permitted only after the employee notified her employer of her intent to leave.[119] Even where an employee gave notice, the defendants allegedly declined to interview candidates, concealing the existence of the agreement and later informing the current employer about the outreach and response.[120] The indictments further allege that the defendants had a valuable relationship that they did not wish to jeopardize by competing for senior executives.[121]

DOJ continued to build momentum in its latest indictment filed in December 2021 against multiple executives and managers from aerospace firms accused of enforcing no-poach deals.[122] According to the

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[112] *Id.* at 4.

[113] *Id.*

[114] *Id.* at 5.

[115] *Id.*

[116] *See Upcoming Public Hearings in Pending Cases*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/upcoming-public-hearings-pending-cases#surgical (last updated Apr. 19, 2022).

[117] *See* Indictment at 1–3, United States v. DaVita Inc., No 1:21-cr-00229-RBJ (D. Colo. filed July 14, 2021) [hereinafter *DaVita Inc.*, Indictment].

[118] *Id.* at 2–4.

[119] *Id.* at 4.

[120] *Id.* at 4–5.

[121] *Id.* at 7.

[122] *See* Press Release, U.S. Dep't of Just. Antitrust Div., Former Aerospace Outsourcing Executive Charged for Key Role in a Long-Running Antitrust Conspiracy (Dec. 9, 2021) (available at https://www.justice.gov/usao-ct/pr/former-aerospace-outsourcing-executive-charged-key-role-long-running-antitrust-conspiracy [https://perma.cc/UZC6-UHJS]).

indictment, Mahesh Patel, a former director of Pratt & Whitney, allegedly participated in a long-running conspiracy with managers and executives of several outsource engineering suppliers to restrict the hiring and recruiting of engineers and other skilled laborers among their respective companies.[123] Patel allegedly enforced these agreements by confronting the suppliers and threatening to punish them by taking away access to projects.[124] DOJ's press release noted, "The conspiracy affected thousands of engineers and other skilled workers in the aerospace industry who perform services in the design, manufacturing and servicing of aircraft components for both commercial and military purposes."[125] The case is currently pending in federal court in Connecticut.[126]

These indictments represent the first tests of DOJ's policy of criminally prosecuting no-poach agreements, though they are unlikely to be the last.

As these cases move forward through the judicial system, courts are starting to grapple with the challenges of applying a century of output-focused precedent to labor market agreements. In January 2022, a federal district judge in the DaVita and Thiry case declined to dismiss the indictment, writing that "[A]s violators use new methods to suppress competition by allocating the market or fixing prices these new methods will have to be prosecuted for a first time."[127] The judge said further in the ruling that "defendants had ample notice that entering a naked agreement to allocate the market would expose them to criminal liability, however they did it."[128] The case subsequently went to trial in April 2022. During the trial, DaVita and Thiry conceded that they had in fact reached agreements with other health care staffing companies.[129] But after deliberating for two days, a jury found DaVita and Thiry not guilty on all counts.[130] The jury concluded that DOJ failed to meet its burden of

[123] Indictment at 4–5, United States v. Patel, No 3:21-cr-00220-VAB (D. Ct. filed Dec. 15, 2021) [hereinafter *Patel*, Indictment].

[124] *Id.* at 11.

[125] *Former Aerospace Outsourcing Executive Charged for Key Role in a Long-Running Antitrust Conspiracy*, *supra* note 122.

[126] *See generally Patel*, No. 3:21-cr-00220-VAB.

[127] Order Denying Motion to Dismiss at 10, United States v. DaVita Inc., No 1:21-cr-00229-RBJ (D. Colo. filed Jan. 28, 2022).

[128] *Id.* at 18.

[129] Alexandra Keck, et. al, *First DOJ Criminal Wage-Fixing and No-Poach Trials End in Acquittals*, JD SUPRA (Apr. 19, 2022), https://www.jdsupra.com/legalnews/first-doj-criminal-wage-fixing-and-no-1930361/#6.

[130] Verdict, United States v. DaVita Inc., No 1:21-cr-00229-RBJ (D. Colo. filed Apr. 15, 2022).

showing that the defendants' agreements allocated a market for employees that resulted in a stifling of meaningful competition.[131]

IV. DISCUSSION

The government intends to frame no-poach cases as straightforward conspiracies between competitors, including allegations about concealment of agreements and persistent monitoring to verify compliance among conspirators. But in doing so, the government obscures the fact that felony criminal charges against no-poach agreements between employers are unprecedented and thus raise important questions about how to evaluate these agreements, particularly in light of possible procompetitive benefits and prior judicial findings.

A. Procompetitive Benefits of No-Poach Agreements

By treating no-poach agreements between employers as per se illegal, DOJ potentially opens the door to criminal enforcement of conduct that falls outside the Sherman Act's intended scope. According to DOJ in the first criminal indictments announced last year, the only action necessary to qualify for criminal liability is agreeing not to hire each other's senior-level employees.[132] DOJ's view is that, much like horizontal price-fixing and bid-rigging, the challenged no-poach conduct is illegal and merits criminal prosecution regardless of the agreement's actual or likely detrimental effects on any competitive markets for labor, and regardless of whether the agreement may result in procompetitive benefits that outweigh any such effects.[133]

DOJ's position presents serious concerns for potential wrongdoers who do not seek to lower wages but instead use written employment agreements to protect legitimate interests already recognized under state law.[134] Companies may seek to protect against the theft of trade secrets in sensitive industries,[135] to collaborate and innovate in order to develop new

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[131] Keck, et. al, *supra* note 129.

[132] *Surgical Care Affiliates, LLC* Indictment, *supra* note 104; *Hee* Indictment, *supra* note 111; *DaVita Inc.* Indictment, *supra* note 117; *Patel* Indictment, *supra* note 123.

[133] *Surgical Care Affiliates, LLC* Indictment, *supra* note 104; *Hee* Indictment, *supra* note 111; *DaVita Inc.* Indictment, *supra* note 117; *Patel* Indictment, *supra* note 123.

[134] Steve Blonder, *Protecting Trade Secrets Is Part of Maintaining a Competitive Edge*, BLOOMBERG L. (June 28, 2021), https://news.bloomberglaw.com/us-law-week/protecting-trade-secrets-is-part-of-maintaining-a-competitive-edge [https://perma.cc/E5AY-JEDS].

[135] *Id.*

products or services,[136] or to end costly and time-consuming litigation when a key employee takes knowledge and goodwill from a former employer to that employer's competitor.[137]

A no-poach agreement thus lessens the risk that a competitor will freeride on an employer's training investments and disrupt employee longevity by waiting until employees are fully trained and then poaching the best ones.[138] For this reason, courts have held that non-solicitation and non-compete agreements between employers and their employees are generally enforceable, and an agreement not to invite a competitor's employees to breach those agreements avoids unnecessary and burdensome litigation over tortious interference with contract and related theories.[139] In fact, courts have upheld reciprocal no-hire agreements when executed for the purpose of avoiding litigation arising from violations of the companies' respective non-compete agreements.[140] Some may argue direct agreements between employers and their employees can achieve the same benefits in a less restrictive manner while providing employees with more opportunities to engage in the negotiation of such provisions.[141] But this process is merely a waste of resources because the agency and transaction costs could be substantially lessened if a firm is

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[136] Siri Bulusu, *Antitrust Regulators Eye Criminal Enforcement in No-Poach Deals*, BLOOMBERG L. (May 17, 2021), https://news.bloomberglaw.com/health-law-and-business/antitrust-regulators-eye-criminal-enforcement-in-no-poach-deals [https://perma.cc/B385-H6JR].

[137] Alex Malyshev & Jeffrey S. Boxer, *With DOJ's focus on wage fixing and no poach agreements, non-compete and antitrust laws collide*, REUTERS (Aug. 23, 2021), https://www.reuters.com/legal/legalindustry/with-dojs-focus-wage-fixing-no-poach-agreements-non-compete-antitrust-laws-2021-08-23/ [].

[138] Benjamin R. Dryden & Elizabeth A. N. Haas, *Antitrust Scrutiny of No-Poaching Agreements Continues to Pick Up Steam*, FOLEY LAB. & EMP. L. PERSPS. BLOG (Sept. 24, 2018), https://www.foley.com/en/insights/publications/2018/09/antitrust-scrutiny-of-nopoaching-agreements-contin [https://perma.cc/BMA2-74FU].

[139] Teresa Lewi et al., *Recent Federal and State Laws Restrict Use of Employee Non-Competition Agreements by Government Contractors and Other Employers*, COVINGTON: INSIDE GOV'T CONTS. (Aug. 19, 2021), https://www.insidegovernmentcontracts.com/2021/08/recent-federal-and-state-laws-restrict-use-of-employee-non-competition-agreements-by-government-contractors-and-other-employers/ [https://perma.cc/M8S5-SC38].

[140] *See, e.g.*, Hangar v. Berkley Grp., Inc., 2015 WL 3439255, at *7 (W.D. Va. May 28, 2015); *cf.* Aydin Corp. v. Loral Corp., 718 F.2d 897, 900 (9th Cir. 1983) (analyzing noninterference agreement and recognizing interest in "preserving trade secrets and protecting investments in personnel").

[141] *See, e.g.*, Russell Cawyer, *Competitors Beware – No-Hire Agreements May Draw Unwanted Attention from the Feds*, KELLY HART (Jan. 5, 2011), https://www.texasemploymentlawupdate.com/2011/01/articles/noncompetes-and-restrictive-covenants/competitors-beware-no-hire-agreements-may-draw-unwanted-attention-from-the-feds/ [https://perma.cc/4MSQ-JN77].

required to oversee and enforce only one agreement with its competitor, rather than hundreds of agreements with each individual employee.[142]

Because courts have found some circumstances in which no-poach and other related agreements are permissible, it follows that these agreements cannot be per se illegal without further evaluation and adjudication.[143] After all, "[t]he per se rule is based on the premise that particular restraints are unreasonable as a class."[144] DOJ's stated position that no-poach agreements are per se illegal leaves concerningly little room for arguments that such agreements protect vital procompetitive business interests because even if a defendant can introduce evidence that it is ancillary, there is a strong presumption against it from the outset. Thus, given the trend of criminal indictments, DOJ should proceed with caution to properly determine which restraints are indeed ancillary and which are naked so as to not suppress what may otherwise be beneficial agreements.

The recent jury verdict in the DaVita case may signal additional complications for DOJ as well.[145] Even in a case with arguably bad facts and a blatant agreement not to hire one another's employees – an agreement that likely qualifies as naked – the jury still found that DOJ failed to show beyond a reasonable doubt that the agreement resulted in any real harm to competition.[146] Not only does DOJ need to be mindful of underlying procompetitive benefits, but they must also now reevaluate how truly anticompetitive no-poach agreements are to the labor market, and whether these effects should warrant a possible ten years in prison.[147]

B. Circumventing Notice and Precedent

The Fifth Amendment's Due Process Clause prohibits enforcement of a criminal statute that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[148] To make the warning fair, the line establishing criminal conduct "should be clear."[149] Fair notice typically comes from the criminal statute itself.[150] But unlike

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[142] Lewi, et. al, *supra* note 139.

[143] *See, e.g.*, *Aydin*, 718 F.2d at 900.

[144] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 1910b (4th ed. 2020).

[145] Keck, et. al, *supra* note 129.

[146] *Id.*

[147] *See Sanchez*, Brief for the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae, *supra* note 5, at 19–20.

[148] United States v. Williams, 553 U.S. 285, 304 (2008).

[149] United States v. Bass, 404 U.S. 336, 348 (1971) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)).

[150] *See* F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation

most traditional criminal statutes, the Sherman Act does not clearly identify the conduct it proscribes.[151] Instead, courts have expounded on the imprecise language of the Sherman Act through common-law adjudication to determine which conduct falls within the Sherman Act's ambit.[152]

Consequently, litigants must necessarily rely on courts to provide notice of which conduct is subject to criminal prosecution under the Sherman Act. But, because courts applying the rule of reason address individual restraints after the fact based on a complicated and case-specific economic record, it is difficult "to tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures."[153] Courts thus provide adequate advance notice for criminal purposes only when they first declare certain conduct to be per se illegal in civil actions regardless of the factual record or economic effects in any given case.[154]

Of course, whether the Supreme Court will ultimately interpret the Sherman Act such that no-poach agreements fall within the scope of its criminal prohibitions is unclear. An added difficulty comes into play when considering the Supreme Court's prior history of creating and subsequently dismantling the per se rule for other types of agreements – all in accordance with what it believes to be the sound economic principles of the day.[155] For example, the Court originally found that resale price maintenance agreements between manufacturers and distributors were per se illegal,[156] and thus DOJ criminally prosecuted them as such.[157] And yet

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under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited . . . .'" (quoting *Williams*, 553 U.S. at 304); Rabe v. Washington, 405 U.S. 313, 315 (1972) (per curiam) ("To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed.").

[151] United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978).

[152] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute."); Northwest Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 98 n.42 (1981) ("In antitrust, the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute.").

[153] *U.S. Gypsum Co.*, 438 U.S. at 439.

[154] *Cf*. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 n.10 (1972); *Leegin Creative Leather Prods., Inc.*, 551 U.S. at 917 (Breyer, J., dissenting) ("Are there special advantages to a bright-line rule? Without such a rule, it is often unfair . . . for enforcement officials to bring criminal proceedings.").

[155] Connolly, *supra* note 41, at 126 (discussing how over its history, the Supreme Court has created, and later repealed, per se rules for vertical price fixing, maximum resale price maintenance, vertical non-price restraints, boycotts and tying).

[156] *See* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 405 (1911).

[157] *See, e.g.*, In re Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 29–30 (2d Cir. 1981).

nearly one hundred years later the Court reversed its position, finding the rule of reason analysis more appropriate given the well-recognized procompetitive benefits created by vertical price agreements.[158] The nature of modern-day commerce and the lack of any substantive legislative updates call into question whether the Act sufficiently informs potential defendants of the conduct that could subject them to criminal punishment.[159] No-poach agreements were not always considered an inherently unreasonable restraint of trade,[160] and once they were, they were still only enforced by civil remedies until the 2016 Antitrust Guidance declared that they warranted criminal sanctions.[161] And who is to say that no-poach agreements will not someday fall into the same category as vertical price agreements, subject once again to a rule of reason analysis based simply upon the whims of the courts or the White House. After all, President Biden's labor agenda is a core driver of this priority.[162] The next president could dismantle it through non-enforcement at DOJ, and people should not be expected to follow this inconsistency, especially when criminal liability is at stake.

Whether a non-binding Guidance document constitutes sufficient notice that no-poach agreements are a crime at all is highly debatable. But regardless, when courts first criminally prosecuted individuals for other antitrust offenses, the penalties were much less severe and rarely enforced.[163] Now armed with harsher penalties,[164] it should follow that the agencies, courts, and legislature be required to adhere to greater notice standards as well. Without judicial intervention, it seems inappropriate for the executive branch to unilaterally define what conduct gives rise to criminal liability.[165] For this reason, interpretative documents like the Antitrust Guidance have fashioned unlegislated crimes, signaling that the Act may not provide fair notice.[166] And even if a court does someday find

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[158] *Leegin Creative Leather Prods., Inc*., 551 U.S. at 886–87; *see also* Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom*, 63 ANTITRUST L.J. 59, 59–62 (1994).

[159] Robert E. Connolly, *The Sherman Act is Unconstitutional as a Criminal Statute: (Part 1)*, CARTEL CAPERS (July 6, 2017), http://cartelcapers.com/blog/sherman-act-unconstitutional-criminal-statute-part-1/#_ftnref [https://perma.cc/342D-RK2S].

[160] ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, *supra* note 7.

[161] *Id.*

[162] *See generally* Promoting Competition in the American Economy, Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

[163] *See supra* Part II-B.

[164] *See supra* Part II-B.

[165] ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, *supra* note 7.

[166] Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae at 8–13, United States v. DaVita, Inc., No. 1:21-cr-00229 (D. Colo. filed July 14, 2021).

such agreements are illegal, it cannot happen for the first time in a criminal case without violating due process.[167]

From the time enforcers brought the first federal civil no-poach cases in 2010,[168] antitrust practitioners have learned surprisingly little about the boundaries of labor market claims from civil lawsuits. In fact, most civil cases addressing no-poach agreements are dismissed,[169] settled after surviving a motion to dismiss,[170] or dismantled when the court declines to certify a class of plaintiffs to pursue the case.[171] This is not uncommon among antitrust cases in general, but given that nearly 100 antitrust cases relating to no-poach agreements have been filed against various employers since 2012,[172] it is startling that more law has not developed on the topic.

As a result, the limited category of per se offenses cannot be expanded unilaterally by the antitrust enforcement agencies and applied for the first time in the context of a criminal prosecution without raising overwhelming due process hurdles.[173] To be sure, DOJ and the FTC share concurrent responsibility for enforcing antitrust laws.[174] Those agencies' methods, priorities, experience, and guidance are all important tools that help consumers, companies, and courts develop their view of the scope of antitrust laws.[175] Indeed, the Antitrust Division's own manual states that "[t]here are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be appropriate."[176] These situations include cases where: (1) the case law is unsettled or uncertain; (2) there are novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of

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[167] *Id.*

[168] *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements*, *supra* note 62.

[169] *See, e.g.*, Fonseca v. Hewlett-Packard Co., No. 19-cv-1748, 2020, WL 4596758 (S.D. Cal. Aug. 11, 2020), *aff'd*, No. 20-56161, 2021 WL 4796540 (9th Cir. Oct. 14, 2021).

[170] *See, e.g.*, *In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019); Seaman v. Duke Univ., No. 1:15-cv-462, 2019 WL 4674758 (M.D.N.C. Sept. 25, 2019).

[171] *See, e.g.*, Weisfeld v. Sun Chem. Corp., 84 F. App'x 257 (3d Cir. 2004).

[172] BLOOMBERG, https://www.bloomberglaw.com/product/blaw/search/results/4e39f79e05b1711adae5ee70269208c4/?utm_source =ANT&utm_medium=ANP [https://perma.cc/96UU-W863] (last visited Jan. 19, 2022) (search in search bar under all U.S. District Court Dockets [agree! AND employee! /s (no-poach OR no-hire], filing type complaint/petition, nature of suit antitrust).

[173] Brief for the U.S. Chamber of Commerce as Amicus Curiae at 5, United States v. Surgical Care Affiliates, No. 3:21-cr-00011 (N.D. Tex. filed Jan. 5, 2021).

[174] *Id.*

[175] *Id.*

[176] ANTITRUST DIVISION MANUAL, *supra* note 25.

the investigation were not aware of, or did not appreciate, the consequences of their action.[177]

Unlike well-adjudicated offenses on the sell-side of the market such as price-fixing, bid-rigging, and market allocation, no-poach agreements on the buy-side of the market have not undergone sufficient development in civil cases to warrant an outright classification as per se offenses. The long and careful judicial experience needed to determine that such agreements are inherently anticompetitive does not exist.[178] Judicial experience with no-poach agreements in the civil context is limited and has taught precisely the opposite: no-poach agreements can have procompetitive effects, and the parties to these agreements rarely have true market power over employees.[179]

V. CONCLUSION

No-poach agreements can harm competition among employers for labor and consequently result in lower wages or benefits for employees and harm to consumers in the form of reduced output or less innovation.[180] But at the same time, no-poach agreements have the procompetitive benefit of ensuring longevity and minimizing volatility in ways that make a company a better and more vigorous competitor.[181] While the FTC and DOJ should pursue unlawful no-poach agreements using civil enforcement under the rule of reason, they should do so in a manner that is analytically sound and consistent with legislative and judicial precedent. Until then, the agencies' unilateral determination that no-poach agreements are criminal and per se illegal fails to satisfy these fundamental requirements.

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[177] *Id.*

[178] *See* Motion to Dismiss filed by DaVita at 8, United States v. DaVita Inc. et al., No 1:21-cr-229 (D. Colo. filed July 14, 2021).

[179] Motion to Dismiss filed by Surgical Care Affiliates at 8, United States v. Surgical Care Affiliates, No. 3:21-cr-00011 (N.D. Tex. filed Jan. 5, 2021).

[180] *See supra* Part II-C.

[181] Motion to Dismiss filed by Surgical Care Affiliates, *supra* note 179, at 13.