Overview
This month has so far seen two significant actions taken by the Department of Justice (DOJ) Antitrust Division (Antitrust Division) on wage-fixing and no-poach litigation and enforcement matters, which has shed additional light in an enforcement area that has needed it. Over the last few weeks, the Antitrust Division both served up its first indictment in a criminal wage-fixing case, and filed an amicus brief in a "no-poach" case to clarify its view of how the law should be interpreted relating to franchise agreements.

First Wage-Fixing Indictment
After years of anticipation, the first indictment following DOJ's issuance of its "no poach" guidance over four years ago has been handed down. A federal grand jury in Texas charged Neeraj Jindal, the former owner of a physical therapy staffing company, with conspiring to lower the rates paid to physical therapists and physical therapy assistants.

In October 2016 the Antitrust Division and the Federal Trade Commission (FTC) issued guidance (HR Guidelines) warning that "naked" wage-fixing and no-poach agreements would be criminally investigated and prosecuted. Prior to this time, these types of agreements had been pursued and challenged through only civil enforcement and private actions. Since the HR Guidelines were issued, the Antitrust Division has stated numerous times that these issues are a priority and has hinted at active investigations relating to wage-fixing and no-poach agreements. Despite these repeated pronouncements, however, no indictments or settlements were announced. There has been much speculation over the years that the Antitrust Division was waiting for the right set of facts before wading into this new area for criminal enforcement.

It now appears that the Antitrust Division has found such a case. On December 9, an indictment was filed in the Eastern District of Texas charging Neeraj Jindal, the former owner of a therapist staffing company, with conspiring to lower the rates paid to physical therapists and physical therapy assistants in the Dallas-Fort Worth metropolitan area in violation of Section 1 of the Sherman Act. According to the allegations in the indictment, from about March to April 2017 Jindal and his co-conspirators reached an agreement through a series of text messages to pay lower pay rates to physical therapists and physical therapist assistants. In these text exchanges, Jindal and his co-conspirators shared non-public pay rates and discussed and implemented rate decreases. The indictment alleges that Jindal reached out to five other therapist staffing companies to discuss paying lower pay rates. In addition to the antitrust violation, Jindal is also charged with obstruction of proceedings in front of the FTC for making false or misleading statements during an FTC investigation into whether Jindal's company or other staffing companies violated Section 5 of the Federal Trade Commission Act. The statements were made in emails and telephone calls to the FTC and during an investigational hearing. Jindal's company, Integrity Home Therapy, reached a settlement with the FTC in 2018.

In announcing the indictment, Assistant Attorney General (AAG) Makan Delrahim stressed the importance of ensuring that American workers, especially health care workers, be able to be fairly compensated.
This case was likely appealing to the Antitrust Division as its first foray into wage-fixing agreements for a number of reasons. First, as AAG Delrahim noted, the case involves health care workers, a particularly sympathetic segment of the workforce in the context of the COVID-19 pandemic. In addition, this case includes text messages that the Antitrust Division will argue are incontrovertible evidence of the wage-fixing conspiracy, making a win right out of the starting blocks more likely. The indictment provides a number of examples of text messages setting up the conspiracy, including one exchange where a co-conspirator states that "the therapists are overpaid" and later responds "[y]es I agree" and "[I]ll do it with u [sic]" when asked to match the Jindal's company's wages. Such evidence will likely make for a less complicated trial. Bringing as its first case one based on wage-fixing, as opposed to a no-poach agreement, also makes the case an easier one to prove, as it allows the Antitrust Division to present a straightforward theory of anti-competitive conduct with more easily quantifiable harm, and avoids a trial that is encumbered with non-compete provisions, trade secret concerns, and complex theories of consumer harm that would complicate issues for a jury hearing a no-poach prosecution. Finally, the ability to charge Jindal with obstruction in addition to the antitrust charges likely also bolstered the appeal of this case since it will give the Antitrust Division the ability to point to evidence of Jindal's efforts to hide his activities.

While this case is the first wage-fixing prosecution, other cases will likely follow. In a January 2018 speech regarding wage-fixing and no-poach cases, AAG Delrahim said he was "shocked about how many of these there are, but they're real." We expect other indictments from this case as well as in other investigations relating to wage-fixing and no-poach agreements to come. It is also worth noting that the US Attorney's Office for the Eastern District of Texas recently joined the Department of Justice's Procurement Collusion Strike Force. In a statement issued after the indictment was announced, US Attorney Stephen Cox stated "[o]ur District has been eager to partner with the Antitrust Division in protecting the marketplace, and today's announcements are just the beginning of what we hope will be a terrific relationship." We expect more involvement from the US Attorney's Office in antitrust enforcement cases going forward.

Amicus Filing in Burger King No-Poach Litigation

Earlier this month the Antitrust Division also filed an amicus brief in a "no-poach" antitrust case brought against Burger King by three former employees now on appeal in the Eleventh Circuit.[1] The brief does not formally support either party; instead, the Antitrust Division chimed in to clarify what it views as the district court's misapplication of antitrust conspiracy law to no-poach arrangements between a franchisor and its franchisee. The Antitrust Division's efforts to shape the analytic framework for assessing no-poach agreements continues its on-going efforts to protect competition among employers in labor markets.

Since issuing the HR Guidelines in 2016, the Antitrust Division has continued to challenge no-poach agreements[2] and has intervened in several private and state government no-poach lawsuits against franchisors and franchisees. In particular, the Antitrust Division intervened in several lawsuits brought by the Washington attorney general to make clear its position that because franchisors and franchisees operate at different levels of the market, they are "vertically" rather than "horizontally" related. Therefore, no-poach agreements between franchisors and franchisees should be evaluated according to the more lenient "rule of reason" standard rather than be deemed per se illegal.[3] Most recently, however, the Antitrust Division's amicus brief in Burger King takes the position that—dependent of the whether per se or rule of reason treatment is warranted—no-poach agreements among franchisor and franchisee are not categorically protected from antitrust liability merely because of the corporate relationship between the parties.

The Burger King plaintiffs claim that the "no-hire" provision in the standard Burger King franchise agreement represents a collusive effort to artificially limit employees' wages, in violation of the Section of 1 of the Sherman Act.[4] The Southern District of Florida dismissed the case, holding that under the "Copperweld doctrine," Burger King could not — as a matter of law —conspire with its franchisees.

By way of background, in Copperweld Corp. v. Indep. Tube Corp., the Supreme Court held that parent corporations and their wholly owned subsidiaries are incapable of conspiring in violation of Section 1 of the Sherman Act, because coordination between the two does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests.[5] Subsequently, in American Needle v. NFL,[6] the Supreme Court held that the licensing activities of NFL teams constituted concerted action within the meaning of Section 1 of the Sherman Act. The Court concluded that "[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned.[7] Thus, rather than categorically applying Copperweld, courts should adopt a "functional" approach turning on whether the allegedly conspiring entities have "independent centers of decisionmaking."[8]

In its amicus brief in Burger King, the Antitrust Division argues that by categorically immunizing franchisors-franchisee no-poach agreements from antitrust liability under Copperweld, the district court failed to apply correctly the "functional, fact-specific" analysis of Burger King's "no-hire" provision that American Needle requires. The Antitrust Division asserts that because the franchisees are independently owned rather than subsidiaries of Burger King, this blanket prohibition is not appropriate. Instead, the court should have evaluated whether the franchise agreement "joins together independent centers of decisionmaking."[9] Further, the Antitrust Division contends that the cases cited by the court in support of its application of Copperweld are either distinguishable or no longer good law after American Needle.
The Eleventh Circuit’s decision on whether Copperweld shields franchisor-franchisee no-poach agreements from antitrust liability as a matter of law could have significant implications for enforcement going forward. If the Eleventh Circuit leaves the door open for no-poach defendants to invoke Copperweld protection, it will severely limit the Antitrust Division’s and private plaintiffs’ ability to challenge such agreements. But regardless of the outcome, the Antitrust Division’s amicus brief in Burger King underscores its continued interest in no-poach and other agreements among employers. Companies, including — importantly — their human resource professionals, should continue to be mindful of the potential antitrust risks posed by agreements that may limit competition among employers with respect to job opportunities, wages, salaries, benefits, or other terms of employment.


[2] See e.g., Final Judgment, United States v. Knorr-Bremse AG, No. 18-cv-0747 (D.D.C. July 11, 2018) (obtaining a consent decree against rail supply companies that had entered “naked” no-poach agreements that were unrelated to any larger business collaboration) available here.


[7] Id. at 193.

[8] Id. at 194.


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