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BLOG

First Federal Appellate Court Confirms Rule-of-Reason Analysis Applies to Ancillary No-Poach Agreements

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On August 19, 2021, a Ninth Circuit panel confirmed that a full rule-of-reason analysis—as opposed to the more truncated *per se* treatment—applies to non-solicitation provisions in otherwise procompetitive collaborative agreements. In *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, the Ninth Circuit affirmed the Southern District of California's grant of summary judgment because the non-solicitation provision at issue was reasonably necessary to protect the defendant healthcare staffing agency's business, while enabling it to collaborate on spillover traveling nurse assignments with the plaintiff, another healthcare staffing agency. No. 20-55679, 2021 U.S. App. LEXIS 24794, at *3-4 (9th Cir. Aug. 19, 2021). Despite this provision, the plaintiff began soliciting the defendant's travel nurse recruiters, prompting the defendant to suspend the plaintiff's access to its spillover assignments. *Id.* at *4-6. The plaintiff then filed suit, asserting that the non-solicitation provision was unlawful. *Id.*

Against this backdrop, the Ninth Circuit determined that the non-solicitation provision was not a naked restraint. Rather, the court found that the provision was ancillary and "reasonably necessary to the parties' pro-competitive [spillover staffing] collaboration" because it "allow[ed] [defendant] to give spillover assignments to [plaintiff] without endangering its established network of recruiters, travel nurses, A[ssociate] V[endor]s, and of course, hospital customers.'" *Id.* at *12 (quoting *Aya Healthcare Servs. v. AMN Healthcare, Inc.*, No. 17cv205-MMA (MDD), 2020 U.S. Dist. LEXIS 139286, at *14 (S.D. Cal. May 12, 2020)). Accordingly, the Ninth Circuit affirmed the district court's application of the rule of reason—as opposed to evaluating the provision *per se*—and thus concluded that summary judgment on the no-poach claim was appropriate.

As we previously noted in the franchise context, there is still some debate amongst various federal district courts as to whether a *per se* theory should apply to no-poach provisions within an otherwise procompetitive collaboration. And after litigations and investigations, many companies that previously employed no-poach provisions in franchise agreements have since abandoned the provisions nationally, or otherwise agreed to refrain from enforcing them. Notwithstanding these elections, various chains faced private litigation from employees whose wages were allegedly suppressed by intra-brand no-poach provisions.

For instance, in *Arrington v. Burger King Worldwide, Inc.*, the Southern District of Florida dismissed with prejudice the workers' putative class action without deciding on the appropriate standard of review because it found that there was sufficient economic unity among the Burger King franchisor and franchisees that any no-poach provision constituted unilateral—and not concerted—action under Section 1 of the Sherman Act. The workers appealed the

dismissal to the Eleventh Circuit, prompting the Department of Justice (DOJ) to file an *amicus* brief in December 2020. In its *amicus* brief, the DOJ did not support either party, but argued that the case raises important questions concerning the distinction between unilateral and concerted conduct. The DOJ also sought—and the Eleventh Circuit recently granted—leave to argue the point during the upcoming oral argument. *See* Order on Unopp. Mot. of the United States for Leave to Participate in Oral Arg. as Amicus Curiae, *Arrington v. Burger King Worldwide, Inc.*, No. 20-13561 (11th Cir. Aug. 30, 2021).

Though *Aya Healthcare* represents the first federal appellate court applying the rule of reason—rather than *per se* treatment—to no-poach arrangements ancillary to otherwise procompetitive collaborations, the Ninth Circuit also confirmed that truly naked restraints still warrant *per se* condemnation. *Id.* at *11. Indeed, the DOJ's first criminal no-poach actions seek *per se* condemnation of alleged naked restraints on hiring for in-home physical therapy staff and for senior-level employees in medical centers.

In the DOJ's first-ever criminal no-poach case, the defendant, Neeraj Jindal, recently challenged the agency's theory by filing a motion for a bill of particulars, claiming that the DOJ failed to present any evidence beyond "panicky messages that went nowhere and produced no agreement," and adding that the DOJ failed to show the creation or implementation of the alleged agreement, let alone the effect on wages. *See* Def.'s Mot. & Inc. Mem. for a Bill of Particulars, at 2, *United States v. Jindal*, No. 4:20-CR-358-ALM/KPJ (E.D. Tex. Aug. 20, 2021). Accordingly, the defendant in that action seeks exact wage amounts that the DOJ contends were depressed, as well as details of the alleged agreements, including the identities of his "unindicted co-conspirators." *Id.* at 7.

Jindal's motion follows on an *amicus* challenge to *per se* condemnation in the second-ever criminal no-poach case. There, in a stark rebuke of the DOJ's action, the U.S. Chamber of Commerce recently filed an *amicus* brief challenging the constitutionality of the *per se* no-poach indictment.

While the appropriate rule for review of ancillary no-poach agreements is not settled, the prevailing trend—especially now with the Ninth Circuit endorsement—generally favors the more intensive rule-of-reason analysis, which requires plaintiffs to allege (and courts to assess) the relevant market and the alleged restraint's overall competitive effects on that market.

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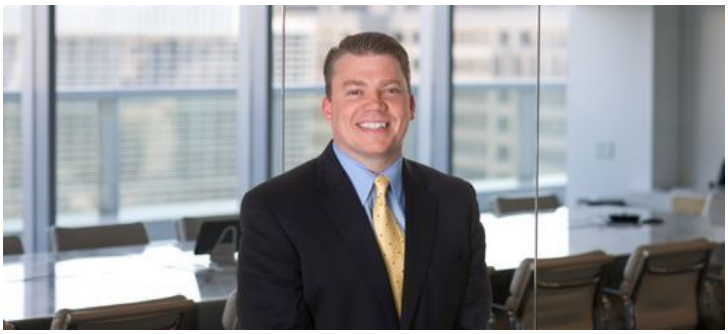

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