Lawyer Insights

A Tale Of Two Cases: Lessons In No-Poach Litigation

By Craig Lee, Kevin Hahm and Christopher Brewer
Published in Law360 | January 6, 2022



Over the past five years, the enforceability of employee no-poach agreements has garnered considerable attention in antitrust circles.

These agreements by companies not to hire each other's employees were thrust into the spotlight in October 2016, when both the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission issued joint guidance announcing their decision to investigate and prosecute no-poach agreements as criminal matters — a change from the agencies' prior practice of investigating such agreements as civil violations.

Assistant Attorney General Jonathan Kanter noted during a recent workshop on labor market competition jointly hosted by the FTC and the DOJ that investigating no-poach agreements that "steal from workers" will continue to be a focus for the agency.

The DOJ did not bring its first criminal no-poach charges until the beginning of 2021 — although the agency brought four cases last year alone: U.S. v. Surgical Care Affiliates Inc., U.S. v. Hee, U.S. v. DaVita Inc. and U.S. v. Patel.

But private civil suits challenging these agreements — along with enforcement by state attorneys general — have been on the rise, leaving private practitioners and in-house counsel alike searching for guidance on how best to avoid or combat potential liability.

Yet despite the uptick in litigation in this area, we have learned surprisingly little about the framework of these claims. As is common in antitrust litigation, most civil no-poach cases are dismissed or settled shortly after surviving a motion to dismiss, creating a dearth of guidance from courts on how these claims will be substantively analyzed.

Moreover, inconsistent outcomes in cases that do address the substance of these claims only muddy the waters further.

Nonetheless, comparing and contrasting the outcomes of these cases still yields valuable insights on the contours — and potential future outcomes — of no-poach litigation.

Take for example, two recent decisions from the U.S. Court of Appeals for the Ninth Circuit and the Supreme Court of Pennsylvania that dealt with seemingly similar provisions, but reached different results.

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Aya Healthcare Services v. AMN Healthcare

In the Aug. 19, 2021, Aya Healthcare Services Inc. v. AMN Healthcare Inc. decision, the Ninth Circuit addressed a nonsolicitation agreement between two healthcare staffing agencies.[1]

The case arose out of an arrangement between AMN Healthcare Inc. and Aya Healthcare Services Inc., through which Aya would cover certain staffing assignments from AMN's hospital customers that AMN was unable to fulfill on its own.[2]

The arrangement was memorialized in a 2010 agreement between the parties, which included a provision prohibiting Aya from soliciting AMN's employees.[3]

In December 2015, AMN terminated the arrangement after Aya began soliciting AMN's recruiters.[4] Aya then filed suit in February 2017, alleging that the nonsolicitation provision in their agreement violated the Sherman Act.[5] Following the U.S. District Court for the Southern District of California's granting of AMN's motion for summary judgment, Aya appealed to the Ninth Circuit.[6]

On appeal, Aya argued that the nonsolicitation provision constituted a naked no-poach restraint that is per se unlawful under Section 1 of the Sherman Act.[7] In response, AMN asserted that the provision is not the type of restraint found to be per se unlawful, and therefore, the district court properly applied the "rule of reason" standard, which Aya was unable to satisfy.[8]

The Ninth Circuit recognized that horizontal restraints, such as the nonsolicitation provision at issue, are typically deemed to be per se unlawful.[9] In particular, the court noted that naked restraints, which have "no purpose except to stifle competition" are always analyzed under the per se rule.[10]

However, under the "ancillary restraints" doctrine, a horizontal restraint is exempt from the per se rule, and therefore analyzed under the rule of reason, if it meets two requirements:

- The restraint is "subordinate and collateral to a separate, legitimate transaction"; and
- It is reasonably necessary to achieving that transaction's pro-competitive purpose.[11]

Thus, the threshold question was whether the nonsolicitation provision was a naked or ancillary restraint, and in turn, whether it is per se unlawful or subject to the rule of reason.[12]

On this question, the panel affirmed the district court's finding that the nonsolicitation provision was an ancillary restraint that was reasonably necessary to the parties' legitimate "collaboration agreement to fulfill the demand of hospitals for travel nurses, which constitutes a procompetitive purpose."[13]

According to the Ninth Circuit, the provision "promotes competitiveness in the healthcare staffing industry" because it allows AMN to fulfill the needs of its hospital customers without endangering its established network of recruiters.[14] Accordingly, the restraint must be analyzed under the "rule of reason" analysis.[15]

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The Ninth Circuit then applied the rule of reason's three-step, burden-shifting framework:

> The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.[16]

Again, the Ninth Circuit agreed with the district court that Aya had failed to meet the first step of the analysis because it failed to provide sufficient evidence of anti-competitive effects of the nonsolicitation provision.[17] As such, the Ninth Circuit affirmed that the nonsolicitation provision was an ancillary restraint that does not violate the rule of reason.

Notably, the DOJ filed an amicus brief "to explain its views on the law applicable to nonsolicitation agreements between competing employers."[18] The DOJ argued that the "ancillary restraint" doctrine requires an additional step beyond the two-prong approach taken by the district court.

According to the DOJ, after determining that a restrain has satisfied both prongs of the "ancillary restraint" doctrine, the court must then "engage in a distinct reasonable necessity analysis to determine whether an otherwise per se unlawful restraint is ancillary before it proceeds to the rule of reason."[19]

This "reasonable necessity" analysis would require a court to assess whether the pro-competitive benefit of a collaboration "can be achieved through means significantly less restrictive of competition than the challenged restraint," which requires considering the scope and duration of the restraint. While the Ninth Circuit rejected the DOJ's argument, the fact that the DOJ advocated for this additional step is an interesting development discussed further below.

Pittsburgh Logistics Systems v. Beemac Trucking

In Pittsburgh Logistics Systems Inc. v. Beemac Trucking LLC, the Supreme Court of Pennsylvania took up a challenge to a no-poach provision included in an agreement between a third-party logistics provider, Pittsburgh Logistics Systems Inc. and one of its shipping carriers, Beemac Trucking LLC.[20]

The provision restricted Beemac from hiring or soliciting any of PLS' employees during the term of the contract and for two years after the agreement was terminated.[21] PLS filed suit in 2016 to enforce the no-poach agreement after Beemac hired four PLS employees.[22] Thus, the issue before the court was not whether the provision violated federal antitrust law, but rather whether such a restrictive covenant could be enforceable under Pennsylvania law.

In addressing the no-poach provision, the trial court noted that "while some states have found such provisions to be void against public policy ... others have deemed them to be a permissible restraint on trade."[23] Ultimately, the court concluded such provisions should be struck down as "void against public policy because they essentially force a noncompete agreement on employees of companies without their consent, or even knowledge, in some cases."[24]

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The case reached the Pennsylvania Supreme Court, which took the appeal to address whether "contractual no-hire provisions which are part of services contracts between sophisticated business entities" are enforceable.[25]

According to the court, Pennsylvania law treats restrictive covenants as restraints on trade that are void against public policy unless they are ancillary to an otherwise valid contract. If the restraint is ancillary — like the provision at issue — the court must then apply "a balancing test to determine the reasonableness of the restraint in light of the parties' interests that the restraint aims to protect and the harm to other contractual parties and the public."[26]

This includes considering the reasonableness of the restraint's duration and geographic scope.[27] Notably, the court remarked in a footnote that this approach was consistent with the DOJ's approach to analyzing no-poach agreements under federal antitrust law.[28]

Applying this analysis, the court concluded that PLS had "a legitimate interest in preventing its business partners from poaching its employees," but that the no-poach provision was "both greater than needed to protect PLS's interest and creates a probability of harm to the public."[29]

The court found that the provision was overbroad as to the scope of employees that were covered because it applied to all PLS employees regardless of whether they had ever worked with Beemac.[30] The court further suggested that the provision was overbroad as to duration because the restraint extended for two years after the end of the contract.

Finally, the no-poach provision creates a likelihood of harm to the public because "it impairs the employment opportunities and job mobility of PLS employees, who are not parties to the contract, without their knowledge or consent and without providing consideration in exchange for this impairment."[31] As such, the court affirmed that the no-poach provision was an unreasonable restraint of trade, and therefore, was unenforceable.[32]

Takeaways

At face value, Aya and Beemac come off as vastly different cases. However, a closer look at these cases and how they contrast can provide interesting insights that can help guide companies in avoiding or combating no-poach issues.

For one, the cases' differing outcomes illustrate the need to be cognizant of both federal and state approaches to no-poach issues when considering entering into a no-poach provision.

For instance, the nonsolicitation agreement in Aya, which withstood federal scrutiny, likely would have failed the analysis in Beemac due to its unlimited duration, which could be found as overbroad. The provision would also likely fail under Beemac because it impairs employees' job mobility without their knowledge and consent, and without providing consideration in exchange for that impairment.

While consideration of whether an employee's future employment is impaired without their consideration does not factor into a federal antitrust analysis, such issues are regularly addressed in state law cases. Indeed, the Beemac court's recognition that other states have struck down no-poach agreements for

similar reasons further illustrates the risk of having a no-poach provision declared unlawful under state law despite withstanding federal scrutiny.

Thus, a company considering entering into a no-poach agreement must carefully navigate the minefield of both federal and state enforcement regimes.

Another interesting point is the DOJ's argument in Aya that courts must engage in a "reasonable necessity" analysis to determine whether a restriction's pro-competitive benefit can be achieved through a less restrictive means before declaring the restraint as ancillary.

While the Ninth Circuit disagreed with the DOJ, it is conceivable that — had it not — the door would have been open for the court to engage in the same level of scrutiny regarding the scope and duration of the restraint that led the Beemac court to finding the provision unlawful. Moreover, should the DOJ continue to advocate for this position, it is possible that state courts grappling with no-poach issues will look to, and potentially adopt, this approach —similar to the approach taken by the Beemac court.

Moreover, the "reasonable necessity" analysis advocated by the DOJ is substantially similar to the third step of the "rule of reason" analysis, which shifts the burden to the plaintiff to "demonstrate that the procompetitive efficiencies [of the agreement] could be reasonably achieved through less anticompetitive means." Thus, had Aya been able to survive the first two steps of the "rule of reason" analysis, the court may have ultimately struck down the provision for issues related to duration and effect on employees, as the court did in Beemac.

Both cases, and in particular, Beemac, also raise the question of whether companies should consider relying on noncompete agreements as an alternative to no-poach agreements. In many cases, a noncompete agreement avoids many of the pitfalls of no-poach agreements.

For instance, noncompete agreements are vertical in nature, and therefore, are generally not subject to per se treatment. Noncompetes also avoid many of the issues raised in Beemac, such as ensuring employees consent to restraints on their mobility and receive adequate consideration in exchange for that restraint, assuming the noncompete is included in their employment agreement.

That said, recent comments by both the FTC and the DOJ suggest that noncompetes may be next in the crosshairs. For instance, FTC Chair Lina Khan recently remarked at the same joint workshop referenced above that the agency was investigating whether it has the power to regulate noncompetes.

During the same workshop, a DOJ official noted that, like other vertical restraints, noncompetes are harmful, "especially for low income and other workers ill positioned to negotiate" the restraints "or later challenge them in court." Thus, companies and practitioners should be mindful of future developments regarding noncompetes in addition to no-poach agreements.

These points illustrate the perils of no-poach agreements and other similar restraints in light of the increased focus by regulators and enforcers. Thus, from a practical perspective, it is imperative that companies be mindful of the following considerations when drafting no-poach agreements:

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Ensure that the no-poach provision is ancillary and subordinate to a legitimate pro-competitive agreement.

Carefully articulate the "legitimate business interest" of the pro-competitive agreement and how the restraint is "reasonably necessary" to achieving that interest.

Narrowly tailor the provision to ensure that it is not overbroad as to the scope of employees that are covered, duration or effect on employees.

Consider whether the employee consent and considerations issues raised in Beemac can be addressed through an employment agreement between the employer and the employee.

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Notes

1. Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.

2. Id. at 1106.

3. Id.

4. Id.

5. Id.

6. Id. at 1107.

7. Id.

8. Id. at 1108.

9. Id. The trial court had questioned whether a non-solicitation agreement was the equivalent of a no-poaching agreement that should be subject to per se treatment. Notably, others have advanced the same theory, arguing that non-solicitation agreements are materially different from no-poach agreements because they do not restrict an employee's mobility. See Defendants' Joint Motion to Dismiss at 6, United States v. DaVita, Inc., et al., No. 21-299 (D. Colo. Sept. 14, 2021), ECF No. 49. While it seems that in some circumstances a non-solicitation agreement may not amount to market-allocation, DOJ argued in an amicus brief filed in Aya that the distinction is not determinative and the Ninth Circuit agreed. Aya, 9 F.4th at 1109 n.3.

10. Id. at 1109.

11. Id.

12. Id.

13. Id. at 1110.

14. Id.

15. Id.

16. Id. at 1111.

17. Id. at 1112.

18. Id. at 1108.

19. Id. at 1111.

20. Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC

21. Id. at 921.

22. Id.

23. Id. at 922. Both the trial court and the Supreme Court of Pennsylvania engaged in a lengthy analysis of how other states address no-poach restrictions. The Supreme Court's discussion, in particular, highlights the lack of a common thread through the states' divergent approaches. See Id. at 924–930.

24. Id.

25. Id. at 924.

26. Id. at 935.

27. Id.

28. Id. at n.8

29. Id. at 936.

30. Id.

31. Id.

32. Id.

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