Published on *The National Law Review* https://natlawreview.com

The Pennsylvania Supreme Court Nixes a No-Poach Agreement Between Business Partners as Overbroad

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Employment, Labor, Workforce Management

As reported here and here, in December 2019 and January 2020, the United States Department of Justice brought its first criminal charges against employers who entered into "naked" wage fixing agreements and no-poach (*e.g.*, non-solicitation and/or non-hire) agreements with competitors. According to DOJ's 2016 Antitrust Guidance for HR Professionals, such agreements are "naked," and, therefore, illegal *per se*, because they are "separate from or not reasonably related to a larger legitimate collaboration between competitors." Although DOJ recognized that such agreements may not be illegal *per se* when made in furtherance of legitimate joint ventures or business, it provided scant guidance on what it would deem to be a legitimate joint venture or collaboration. The Pennsylvania Supreme Court recently addressed the issue in *Pittsburgh Logistics Systems v. Beemac Trucking*, 2021 WL 1676399, at *1 (Pa. Apr. 29, 2021). Relying in part on DOJ's Guidance, the Court found that the no-poach agreement was unenforceable because it was overbroad and contrary to public policy.

Plaintiff, a third-party logistics provider, sought to enforce a no-poach agreement that prohibited the defendant, who supplied trucking services to the plaintiff, from hiring or soliciting any of the plaintiff's employees. The Supreme Court found that the no-poach agreement was ancillary to the services agreement between plaintiff and defendant. Therefore, it reviewed the agreement under the "rule of reason," test included in the Restatement (Second) of Contracts, which requires that the restraint be no greater than necessary to protect the plaintiff's legitimate business interest and that the plaintiff's need not be outweighed by the hardship to the defendant and the likely injury to the public. The Supreme Court found that this test was consistent with DOJ's Guidance, but concluded that the no-poach restraint was unreasonable.

Although the Supreme Court acknowledged that the plaintiff "had a legitimate business interest in preventing its business partners from poaching" its employees, it found that the no-poach agreement was overbroad because it prohibited the defendant from hiring plaintiff's employees for two years after the collaboration ended, regardless of whether they had ever worked with the defendant. The Court also found that the agreement was likely to harm the public by: (1) impairing the mobility of plaintiff's employees, who were not parties to the contract; (2) depriving several named individual defendants of their livelihood; and (3) undermining overall competition in the labor market for the shipping and logistics industry, which would suppress wages and harm the public generally. Along the way, the Court recognized that DOJ has "taken a strong stand against no-hire restrictions," and

that fourteen states had recently reached a settlement agreement requiring four national franchisors to cease using no-poach agreements restricting employee mobility.

The Supreme Court's decision reflects increasing skepticism toward no-poach agreements. Indeed, as reported here, President Biden has indicated that he favors eliminating non-compete and no-poach agreements that suppress wages, and state legislatures and law enforcement authorities seem to be ready to regulate this area. As reported here, New York is considering legislation that would prohibit no-poach clauses in franchise agreements and would create a private right of action for any employee subject to such an agreement, along with potential punitive damages and attorney's fees. Similarly, in 2019, Maine enacted a law prohibiting no-poach agreements between employers.

Notwithstanding these developments, employers who are involved in legitimate joint ventures can still take steps to protect their legitimate interest in ensuring effective business collaborations while protecting their trade secrets, goodwill and workforce. The *Pittsburgh Logistics* case provides important guideposts for businesses involved in legitimate joint ventures. First, like non-solicitation clauses in agreements with employees, the restraints in no-poach agreements between partners should be no greater than necessary. Thus, no-poach agreements between business partners should either end when the joint venture or collaboration ends or reflect the geographic and temporal limits recognized as enforceable in employment agreements in the relevant jurisdiction. Second, businesses should consider requiring employees to agree to refrain from seeking positions with any business partner for whom they have worked while they are employed or for a reasonable period after their employment ends. Indeed, the Pennsylvania Supreme Court found it significant that the employees were not aware of the no-poach agreement between the business partners and were not parties to the agreement, thus raising the question if the outcome would have been different had the plaintiff included a similar restriction in its employment agreements.

As shown by the DOJ's recent criminal enforcement actions and the *Pittsburgh Logistics* case, the law in this area is rapidly developing. However, each situation is unique and there is no one-size-fits-all approach to navigating this thicket. Employers who wish to protect their workforces to ensure effective collaborations should review both their agreements with their business partners and their employees to ensure that their agreements can withstand scrutiny.

National Law Review, Volume XI, Number 152