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Disagreeing Over Agreements: A Cross-Sectional Analysis of No-Poaching Agreements in the Franchise Sector

Catherine E. Schaefer
Fordham University School of Law

DISAGREEING OVER AGREEMENTS: A CROSS-SECTIONAL ANALYSIS OF NO-POACHING AGREEMENTS IN THE FRANCHISE SECTOR

*Catherine E. Schaefer**

In October 2016, the Department of Justice Antitrust Division announced its intent to proceed criminally against parties to no-poaching agreements, or agreements between or among employers not to hire each other's workers. Consequently, a wave of class action antitrust lawsuits has raised questions about the legality of no-poaching or no-hire provisions that certain franchised food businesses use. Fast-food restaurant chains, including McDonald's, Carl's Jr., and Pizza Hut, have recently found themselves embroiled in such litigation. This Note examines prior antitrust litigation involving no-poaching agreements between companies and discusses the differences and similarities between these cases and the cases involving franchised businesses. In analyzing the key issues that courts must confront to resolve current and future cases specific to franchises, this Note proposes that courts should employ a per se rule against no-poaching agreements among franchisors and franchisees.

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* J.D. Candidate, 2020, Fordham University School of Law; M.P.S., 2017, Cornell University; B.A., 2009, Wellesley College. I am grateful to Aditi Bagchi for her guidance and the editors and staff of the *Fordham Law Review* for their hard work and editing. A special thanks to my partner Fran for her unwavering love and support, and my family, particularly my parents and sister, for their encouragement. Without the groundbreaking work of Alan B. Krueger, this Note would not have been possible. Rest in peace, Professor Krueger.

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INTRODUCTION

According to a 2018 study conducted by Jobvite,[1] 82 percent of workers in the United States are currently seeking new job opportunities.[2] Yet, to seamlessly switch jobs is not feasible for all employees in the U.S. job market. Imagine for a moment that you are a manager at a McDonald's franchise. Every day you travel to work by bus, but your shift routinely runs so late that you miss the last bus home, leaving you no choice but to walk five miles home. After being promised, yet passed up for, promotion after promotion, you finally decide to apply for a job at a different McDonald's closer to your home. However, you are barred from this opportunity because of the franchise's rule against intracompany hiring. This is the reality that

1. Jobvite is a recruiting and software corporation. *See We Eat, Sleep, and Think About Recruiting*, JOBVITE, https://www.jobvite.com/company/ [https://perma.cc/3UPC-J8JH] (last visited Mar. 15, 2019).

2. *2018 Job Seeker Nation Study: Researching the Candidate-Recruiter Relationship*, JOBVITE (2018), http://www.jobvite.com/wp-content/uploads/2018/04/2018_Job_Seeker_Nation_Study.pdf [https://perma.cc/J6AT-HVFG].

workers in the fast-food industry, such as Leinani Deslandes, must endure.[3] In 2017, Deslandes filed a class action complaint alleging that the no-solicitation and no-hiring agreement[4] between and among McDonald's USA, LLC, McDonald's Corporation, and their franchisees is a violation of section 1 of the Sherman Antitrust Act.[5]

While employers can only take limited measures to restrict competition in the labor market,[6] some employers, like McDonald's, have been able to take advantage of no-poaching agreements.[7] No-poaching or no-hire agreements are agreements between or among employers not to hire each other's workers.[8] Deslandes alleged in her complaint that these agreements are intended to prohibit other franchisees from hiring away their employees.[9] Additionally, these agreements may restrict competition for potential employees between franchisees and company-owned stores in violation of section 1 of the Sherman Act.[10]

The U.S. Department of Justice (DOJ) reserves criminal antitrust prosecutions for horizontal, per se agreements, which include price-fixing and market-allocation agreements.[11] In October 2016, the DOJ Antitrust Division announced its intention to proceed criminally against those engaged in naked no-poaching and wage-fixing agreements.[12] These cases, particularly in the fast-food industry, raise additional questions about mobility restriction and wage suppression in already low-wage industries.[13]

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3. Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. TIMES (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html [https://perma.cc/WT9Y-7R2A].

4. *See* Michael Lindsay et al., *Employers Beware: The DOJ and FTC Confirm That Naked Wage-Fixing and "No-Poaching" Agreements Are Per Se Antitrust Violations*, ANTITRUST SOURCE, Dec. 2016, at 1, 1 n.2.

5. *See* Amended Class Action Complaint ¶ 1, Deslandes v. McDonald's USA, LLC, No. 17-4857, 2018 WL 3105955 (N.D. Ill. Sept. 18, 2017), ECF No. 32 [hereinafter *Deslandes* Complaint].

6. Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues in Labor Markets*, 26 ANTITRUST, Summer 2012, at 73, 73–74.

7. David K. Haase & Darren M. Mungerson, *Agreements Between Employers Not to Hire Each Other's Employees: When Are They Enforceable?*, 21 LAB. LAW. 277, 277 (2006); *see also* Lindsay et al., *supra* note 4, at 1 n.2.

8. *See* Lindsay et al., *supra* note 4, at 1 n.2. "No-poaching agreements are also called no-hire, no-interference, non-solicitation, or no-switching agreements, depending on the circumstances." *Id.* This Note uses the terms "no-poaching" and "no-hire" interchangeably.

9. Paul M. Eckles et al., *Spotlight on No-Poach Agreements Continues, Expands to New Industries*, SKADDEN ARPS SLATE MEAGHER & FLOM LLP (Oct. 17, 2018), https://www.skadden.com/insights/publications/2018/10/spotlight-on-no-poach-agreements-continues [https://perma.cc/V7JC-8KZU].

10. *Id.*; *see also* Rochella T. Davis, *Talent Can't Be Allocated: A Labor Economics Justification for No-Poaching Agreement Criminality in Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 279, 282 (2018).

11. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-12 (5th ed. 2018).

12. *See* DEP'T OF JUSTICE & FTC, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf [https://perma.cc/7W63-ZX4R].

13. *See* ALAN B. KRUEGER & ERIC A. POSNER, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION, HAMILTON PROJECT 4 (2018),

In the franchise context, these practices stifle the labor market and prevent workers from achieving their full earnings.[14]

The question remains whether no-poaching agreements are ancillary to franchise agreements or are illegal under the Sherman Act.[15] Furthermore, if a franchise system is not exempt from section 1 despite technically being a single corporate entity, can it then demonstrate legitimate business goals for wage suppression and similar anticompetitive behavior?[16] The answers to these questions are not obvious, in part due to disagreements among legal scholars and economists over the overarching purpose of U.S. antitrust laws. Some argue that proscribing private power, rather than promoting efficiencies, is the primary impetus behind American antitrust laws.[17] This distrust of private power is the "one central and common ground that over time has unified support for antitrust statutes."[18] Conversely, the Federal Trade Commission (FTC)—an executive agency responsible for enforcing antitrust laws—states that the purpose of U.S. antitrust laws is to "promote vigorous competition and protect consumers from anticompetitive mergers and business practices."[19]

In the no-poaching context, Joseph Harrington, professor of business economics and public policy at the Wharton School, has stated that in terms of suppressing competition, "companies agreeing not to compete for each other's employees is the same as companies agreeing not to compete for each other's customers."[20] Professor Harrington goes on to say that, "[i]n the latter case, it results in customers paying higher prices because of the lack of competition, and in the former case it results in workers receiving lower wages because of the lack of competition."[21] The solution to the no-poaching

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http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf [https://perma.cc/LS8N-SMU6].

14. Letter from Senators Elizabeth Warren and Cory A. Booker to Jeff Sessions, U.S. Att'y Gen. 2 (Nov. 21, 2017), http://www.scribd.com/document/365092277/2017-11-21-Letter-to-Sessions-on-No-Poach-Agreements [https://perma.cc/DR8L-P22J].

15. Barbara T. Sicalides & A. Christopher Young, *Fast-Food Chains Agree to End Franchise No-Poach Restrictions*, PEPPER HAMILTON LLP (July 13, 2018), https://www.pepperlaw.com/publications/fast-food-chains-agree-to-end-franchise-no-poach-restrictions-2018-07-13/ [https://perma.cc/485S-Q5QL].

16. KRUEGER & POSNER, *supra* note 13, at 4–5.

17. *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1153 (1981).

18. *Id.*

19. *Guide to Antitrust Laws*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws [https://perma.cc/R5AH-JRLR] (last visited Mar. 15, 2019); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) ("Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors* . . . ."). *See generally* Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253 (2013) (discussing the Court's shift of emphasis from competition to consumer welfare and evaluating other prominent antitrust propositions).

20. *Silicon Valley's No-Poaching Case: The Growing Debate Over Employee Mobility*, WHARTON U. PA. (Apr. 30, 2014) [hereinafter *Silicon Valley's No-Poaching Case*], http://knowledge.wharton.upenn.edu/article/silicon-valleys-poaching-case-growing-debate-employee-mobility/ [https://perma.cc/S2GC-52B2].

21. *Id.*

issue in franchise systems, therefore, turns on which interests ought to be promoted and protected.

This Note addresses antitrust issues with respect to no-poaching agreements by exploring the economic impact of these types of agreements in the Silicon Valley technology industry, where gentlemen's agreements, or anti-poaching and wage-fixing agreements, have become common practice among U.S. employers.[22] A recent study reveals that no-poaching agreements are similarly common in the franchise sector, particularly in the fast-food industry, which raises a host of issues regarding their legality.[23]

This Note proceeds in four Parts. Part I provides a historical and legal backdrop of antitrust law and describes the basic principles of a violation under section 1 of the Sherman Act—including the different categorizations of trade restraints—and the methods courts use to analyze alleged violations.

Part II then discusses the history of no-poaching agreements. This discussion includes a detailed analysis of *In re High-Tech Employee Antitrust Litigation*,[24] which provides a contemporary exemplar of how no-poaching agreements in the unfranchised technology industry impede competition by artificially suppressing wages and restraining employee mobility.

Using the analysis outlined in Part II, Part III demonstrates how no-poaching agreements in the franchise sector,[25] such as the one at issue in *Deslandes v. McDonald's USA, LLC*,[26] differ from unfranchised industries with respect to legal, economic, and public policy perspectives. Part III also shows how no-poaching agreements in the franchise sector produce anticompetitive effects similar to the agreements used in unfranchised industries. It addresses the defenses franchisors proffer and the technically vertical arrangements involved; yet Part III argues that these characterizations should not be dispositive in the antitrust analysis.

Finally, Part IV further argues that, depending on the nature of the agreement, and the amount of coordination and control involved in the franchise system, no-poaching agreements in the franchise industry are akin to horizontal customer-allocation agreements and that no-poaching agreements interfere with competition in the labor market in many of the same ways. As a result, courts should consider these types of agreements to

22. *See infra* Part II.B.

23. *See* Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, IZA INST. LAB. ECON. 2–4 (July 2018), http://ftp.iza.org/dp11672.pdf [https://perma.cc/SC4D-QTAV]; *see also How Fair—or Legal—Are Non-Poaching Agreements?*, WHARTON U. PA. (July 17, 2018), http://knowledge.wharton.upenn.edu/article/how-fair-or-legal-are-non-poaching-agreements/ [https://perma.cc/33HX-NAUU].

24. 856 F. Supp. 2d 1103 (N.D. Cal. 2012); *see infra* Part II.B (providing an in-depth analysis of the types of agreements made by technology companies).

25. Other franchised industries under scrutiny include hotels, convenience stores, and the following services: car repair, home health care, cleaning, tax preparation, parcel, electronic repair, child care, custom window covering, travel, and insurance adjustment. *See* Eckles et al., *supra* note 9.

26. No. 17-4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018); *see infra* Part III.B (using *Deslandes* as a case study for the effects of no-poaching agreements in a franchised system).

be per se illegal and look at the actual harm to employees rather than the technically vertical and single-entity designations of the companies that employ them.[27]

I. SHERMAN ACT SECTION 1: A PRIMER

This Part outlines basic antitrust law concepts and definitions, as well as principles specific to section 1 of the Sherman Act. Part I.A begins with an introduction to restraints of trade and the different categorizations of restraints. Part I.B introduces the two threshold questions associated with a violation of section 1 of the Sherman Act. Part I.C describes the single-entity defense as an exemption to a section 1 violation and details its applicability to franchises with a focus on the current legal doctrine. Finally, Part I.D reviews the three different modes of analysis that federal courts use to determine whether an agreement unreasonably restrains trade.

A. Restraints of Trade

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[28] In other words, the Sherman Act prohibits competitors from entering into agreements with one another that would restrain competition.[29] Although most claims under section 1 involve the restraint of trade in product markets, section 1 also applies to restraints of trade in labor markets.[30] In the labor market, employers are purchasers and employees are sellers of labor.[31]

In the October 2016 Antitrust Guidance for Human Resource Professionals, the DOJ averred that it will continue to criminally pursue per se violations of section 1.[32] At the same time, it announced it would begin to characterize no-poaching agreements as per se violations.[33] Naked horizontal agreements, which include agreements among competitors to fix prices or to divide markets, are per se unlawful.[34] The DOJ also characterizes

27. *See infra* notes 41–47 and accompanying text (discussing vertical—as opposed to horizontal—restraints and the single-entity defense).

28. 15 U.S.C. § 1 (2012). Passed by Congress in 1890, the Sherman Act was the first antitrust law—a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Guide to Antitrust Laws: The Antitrust Laws*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/BCQ8-LQK8] (last visited Mar. 15, 2019).

29. Davis, *supra* note 10, at 284.

30. Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 639 (2009).

31. *See, e.g.*, Eichorn v. AT & T Corp, 248 F.3d 131, 140–41 (3d Cir. 2001) (acknowledging that the labor market is a market for antitrust purposes).

32. DEP'T OF JUSTICE & FTC, *supra* note 12, at 3; *see also* Davis, *supra* note 10, at 288.

33. Davis, *supra* note 10, at 288.

34. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 434–36 (1990) (explaining that a horizontal agreement among lawyers to refuse to represent criminal defendants until their fees

naked no-poaching agreements as per se violations, and it therefore intends to prosecute these types of agreements criminally.[35]

Courts will find a violation of section 1 if a no-poaching agreement (1) serves no legitimate purpose, or (2) serves a legitimate business purpose but is not narrowly tailored to its purpose.[36] Conversely, courts will evaluate the nature of the restraint if it is ancillary as opposed to naked.[37] Ancillary restraints are "those that are part of a larger endeavor whose success they promote."[38] For example, a restraint is ancillary if it is reasonably necessary to achieve increased productivity and output.[39] Ancillary restraints, unlike naked restraints, are analyzed under the rule of reason and typically survive this analysis.[40]

Another distinction is whether the restraint is horizontal or vertical. Whether the restraint is horizontal—among companies competing at the same level of the production and distribution process—or vertical—between companies competing at different levels—has been a key issue because courts almost invariably apply the per se rule to horizontal agreements.[41] A horizontal agreement not to hire competitors' employees is an example of market division.[42] Thus, the DOJ has warned employers that it considers naked horizontal no-poaching agreements per se unlawful.[43]

However, not all horizontal restraints are per se illegal.[44] A court must distinguish between "naked" and "ancillary" restraints because this distinction determines which analytical test will be applied to the restraint.[45] Some horizontal restraints are considered ancillary if they are pro-competitive, especially when they increase efficiency.[46] For instance, no-poaching agreements that are ancillary to the sale of a business can have pro-

increased was a naked restraint and per se unlawful); *infra* notes 100–02 and accompanying text (describing, in detail, the per se rule of illegality).

35. DEP'T OF JUSTICE & FTC, *supra* note 12, at 1–2.

36. *See* Mark L. Krotoski & Richard G. S. Lee, *DOJ Antitrust Division Announces Imminent Criminal Prosecution for 'No Poaching' Agreements*, MORGAN LEWIS & BOCKIUS LLP (Feb. 6, 2018), https://www.morganlewis.com/pubs/doj-antitrust-division-announces-imminent-criminal-prosecution-for-no-poaching-agreements [https://perma.cc/5G7G-GEL9].

37. *See In re* Wholesale Grocery Prods. Antitrust Litig., 722 F. Supp. 2d 1079, 1093–94 (D. Minn. 2010) ("Determining whether an agreement is ancillary requires a court to consider whether, at the time the agreement was made, it was necessary to promote the enterprise and productivity of an underlying arrangement.").

38. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1221 (2008).

39. *See id.*; *see also* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986); Polk Bros. v. Forest City Enters., 776 F.2d 185, 188–89 (7th Cir. 1985).

40. Lemley & Leslie, *supra* note 38, at 1221; *see infra* Part I.D (explaining the modes of analysis courts employ).

41. Davis, *supra* note 10, at 291–92.

42. *See* United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013).

43. DEP'T OF JUSTICE & FTC, *supra* note 12, at 3.

44. *See, e.g.*, *Polk Bros.*, 776 F.2d at 190.

45. *Id.* at 188–89; *see infra* Part I.D (discussing the modes of analysis).

46. *Polk Bros.*, 776 F.2d at 188–89 ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote.").

competitive effects, so such agreements are not automatically considered violations of section 1 of the Sherman Act.[47]

B. Threshold Questions

Courts determine whether a particular restraint violates section 1 of the Sherman Act by answering two threshold questions.[48] The first issue a court considers involves interstate commerce—"whether there is an effect on trade or commerce among more than one state."[49] It must be proved either that the defendants' conduct was in interstate commerce or substantially affected interstate commerce.[50] The second threshold issue is whether there is sufficient agreement among two or more parties to constitute a "contract, combination . . . or conspiracy."[51] If both elements are proven, the court then employs one of three modes of analysis—the per se test, the rule of reason test, or the quick-look approach (an abbreviated rule of reason test)—to determine whether a particular agreement unlawfully restrains trade.[52] Courts have interpreted restraint of trade to refer to only "unreasonable restraints."[53]

In no-poaching cases, the question of whether the alleged restraint affects interstate commerce is rarely in dispute.[54] In franchise no-poaching agreements in particular, the interstate element is straightforward because the employers in question operate either nationally or in multiple states, and the agreements cover the individual franchises in multiple states across the United States.[55]

What is less straightforward is whether no-poaching agreements in franchise systems involve an unlawful contract, combination, or conspiracy (often referred to as an "agreement") among two or more parties.[56] To prove a Sherman Act section 1 violation the plaintiff must demonstrate that an unlawful agreement has been made.[57] However, the law has not been conclusive in stating whether a franchisor and its franchisees are capable of agreeing for purposes of establishing a violation of section 1 of the Sherman

47. Eichorn v. AT & T Corp, 248 F.3d 131, 144 (3d Cir. 2001). Ancillary restraints are reviewed either under the rule of reason or under the quick-look approach. See *infra* Part I.D for a detailed delineation of the modes of analysis.

48. Edelman, *supra* note 30, at 640.

49. *Id.*

50. *See, e.g.*, Hosp. Bldg. Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 743–44 (1976); Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n, 658 F.3d 500, 507–08 (5th Cir. 2011).

51. Edelman, *supra* note 30, at 640.

52. *Id.* at 640–41; *see* Lemley & Leslie, *supra* note 38, at 1213.

53. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

54. *See, e.g.*, *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1115 n.10 (N.D. Cal. 2012).

55. *See, e.g.*, *Deslandes* Complaint, *supra* note 5, ¶ 15.

56. *See* Barry M. Block & Matthew D. Ridings, *Antitrust Conspiracies in Franchise Systems After* American Needle, 30 FRANCHISE L.J. 216, 216–17 (2011).

57. Mary N. Strimel et al., *No-Poach Agreements Land Franchisors in Hot Water*, BLOOMBERG BNA (Apr. 10, 2018), https://www.bna.com/nopoach-agreements-land-n57982090975/ [https://perma.cc/2VDY-LXFY].

Act.[58] Nor is it settled law that a unilateral contract constitutes an agreement.[59] The U.S. Supreme Court held in *Copperweld Corp. v. Independence Tube Corp.*[60] that a parent company and its wholly owned subsidiary, as a single economic unit, were incapable of conspiring under the Sherman Act.[61] The Court reasoned that because the parent corporation and subsidiary shared a complete "unity of interest"—meaning the parent could assert full control over the subsidiary—their collusion did not deprive the market of the "independent centers of decisionmaking that competition assumes and demands."[62]

C. The Single-Entity Defense: A Sherman Act Section 1 Exemption

Courts disagree about the application of section 1 to agreements between separate legal entities under the same corporate umbrella, which most commonly involve a parent corporation and its less than wholly owned subsidiary.[63] Joint ventures, or "entities created by two or more firms for the purpose of jointly engaging in some economic activity," pose similar issues with respect to the applicability of section 1.[64] At first glance, joint ventures appear to operate as a single firm in the market.[65] Upon further review, however, it becomes clear that joint ventures are often managed by multiple separate firms that compete against one another.[66] This creates the possibility for joint ventures to collude in violation of section 1.[67]

1. History and Evolution of the Single-Entity Doctrine

Following the *Copperweld* decision, franchisors began to argue that a franchisor and its franchisees are technically a single economic entity and, as such, are incapable of entering into agreements in violation of section 1.[68] The Ninth Circuit weighed in on this very issue in the case *Williams v. I.B. Fischer Nevada*.[69] In *Williams*, the plaintiff alleged that his employer's franchise agreements, which barred Jack-in-the-Box managers from moving from one Jack-in-the-Box restaurant to another for six months without permission from the previous restaurant owner, violated section 1.[70] The

58. *Id.*
59. *Id.*
60. 467 U.S. 752 (1984).
61. *Id.* at 777.
62. *Id.* at 769–71; *see also* Nathaniel Grow, American Needle *and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L.J. 449, 451 (2011).
63. Grow, *supra* note 62, at 450–51.
64. *Id.* at 451.
65. *Id.*; *see also* Texaco, Inc. v. Dagher, 547 U.S. 1, 7–8 (2006) (holding that the per se standard did not apply to the companies because they were involved in a joint venture and, therefore, were not competing with one another).
66. Grow, *supra* note 62, at 451.
67. *Id.*
68. *See* Strimel et al., *supra* note 57.
69. 999 F.2d 445 (9th Cir. 1993) (per curiam).
70. Williams v. I.B. Fischer Nev., 794 F. Supp. 1026, 1029 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993) (per curiam); *see also* Lindsay et al., *supra* note 4, at 10–11.

district court held that the franchisor's control over the franchisees and their shared economic goals "ma[d]e them a single enterprise, incapable of competing for purposes of Section 1 of the Sherman Act."[71] The Ninth Circuit affirmed, holding that "[t]o be capable of conspiring, corporate entities must be 'sufficiently independent of each other.'"[72] The court concluded that the district court correctly held that the franchisor and its franchisees are clearly a "common enterprise."[73]

Following *Williams*, other federal courts outside the Ninth Circuit reached similar conclusions. These courts held that franchisees and franchisors are not capable of conspiring to restrain trade, either because they are a single economic entity or, alternatively, because the franchise agreement was unilaterally imposed by the franchisor.[74] However, in 2010, the U.S. Supreme Court held in *American Needle, Inc. v. National Football League*[75] that the National Football League (NFL), which is comprised of thirty-two separately owned, franchised football clubs, was "not categorically beyond the coverage of § 1."[76] When the NFL granted an exclusive license to Reebok to manufacture trademarked headwear for all thirty-two teams, former licensee American Needle claimed that the agreement violated the Sherman Act.[77] In rejecting the league's single-entity defense and determining that the teams could be capable of a section 1 agreement, the Supreme Court held that "the NFL's licensing activities constitute[d] concerted action that [wa]s not categorically beyond the coverage of § 1."[78] Here, the Court concluded that the *Copperweld* doctrine did not apply but rather that "[t]he legality of th[e] concerted action [by the NFL teams and the licensing entity] must be judged under the Rule of Reason."[79] The Court remanded the case to the lower court for further consideration.[80] Despite this outcome, franchisors continue to rely on the single-entity defense, but this reasoning has become increasingly questionable, as co-franchisees operate in a competitive relationship with each other for some purposes, including the hiring of employees.[81]

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71. *Williams*, 794 F. Supp. at 1032.
72. *Williams*, 999 F.2d at 447 (quoting Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617 (9th Cir. 1979)).
73. *See id.*
74. *See, e.g.*, Search Int'l, Inc. v. Snelling & Snelling, Inc., 168 F. Supp. 2d 621, 625 (N.D. Tex. 2001), *aff'd*, 31 F. App'x 151 (5th Cir. 2001); Hall v. Burger King Corp., 912 F. Supp. 1509, 1548 (S.D. Fla. 1995).
75. 560 U.S. 183 (2010).
76. *Id.* at 186.
77. *See* Grow, *supra* note 62, at 470–71.
78. *Id.* at 475.
79. *Am. Needle*, 560 U.S. at 186.
80. *Id.* at 204.
81. 3 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 16:43 (4th ed. 2017).

2. Current Applicability to No-Poaching Franchise Cases

Because *American Needle* did not adopt a clear single-entity standard, a court could find that a franchisor and franchisee are separate economic actors and subject to liability under section 1 of the Sherman Act.[82] However, a franchise system can still argue that it should be treated as a single economic enterprise.[83] A court's analysis will vary based on the facts and circumstances of each case, namely based on the structure and operation of each franchise.[84] The single-entity defense is more likely to prevail the "greater the amount of control of the franchise system that the franchisor exercises and the more the franchisor limits competition between the franchisor and the franchisees and among franchisees."[85] This defense has been applied differently by both federal and state courts, and as a result, the current doctrine remains open to interpretation.[86]

The single-entity defense has gained significance in no-poaching cases that involve franchised systems.[87] A 2018 study revealed that more than half of all companies with more than 500 franchise stores in the United States impose some kind of lateral recruiting restriction.[88] Citing this study,[89] Senators Cory Booker and Elizabeth Warren charged that "fully 58 percent of the 156 largest franchisors operating around 340,000 franchise units used some form of anti-competitive 'no-poach' agreements."[90] Further, they noted that these agreements were particularly prevalent in low-wage, high-turnover industries.[91] The study highlighted that these agreements are common in franchise companies in industries with high labor turnover like quick service restaurants.[92] In response to these developments, a number of private plaintiffs have filed class action complaints against their fast-food franchisor employers challenging the restrictive hiring and solicitation terms in their franchise agreements by alleging restraints of competition.[93] The complaints in these cases argue that franchisees are not joint employers;

82. *See* Strimel et al., *supra* note 57.
83. Block & Ridings, *supra* note 56, at 223–24.
84. *Id.*
85. *Id.* at 221.
86. *Id.*
87. *See id.* at 216.
88. *See* Krueger & Ashenfelter, *supra* note 23, at 4; *see also* Abrams, *supra* note 3.
89. *See generally* Krueger & Ashenfelter, *supra* note 23 (finding that no-poaching agreements are more commonly used by franchises in low-wage and high-turnover industries). Franchises outside of the fast-food restaurant industry using similar no-poaching agreements include Jiffy Lube, H&R Block, and Anytime Fitness, LLC. *Id.* at 5–6.
90. *See* Letter from Elizabeth Warren and Cory A. Booker to Jeff Sessions, *supra* note 14, at 1.
91. *See id.*
92. Krueger & Ashenfelter, *supra* note 23, at 4–5, 9.
93. *See, e.g.*, Class Action Complaint ¶ 1, Butler v. Jimmy John's Franchise, LLC, No. 18-133 (S.D. Ill. Jan. 24, 2018), ECF No. 1 [hereinafter *Butler* Complaint]; Class Action Complaint ¶ 1, Ion v. Pizza Hut, LLC, No. 17-788 (E.D. Tex. Nov. 3, 2017), ECF No. 1 [hereinafter *Ion* Complaint]; *Deslandes* Complaint, *supra* note 5, ¶ 1; Class Action Complaint ¶ 1, Bautista v. Carl Karcher Enters., No. BC 649777 (Cal. Super. Ct. Feb. 8, 2017) [hereinafter *Bautista* Complaint].

franchisees are third-party beneficiaries of the no-poaching agreements and other terms; franchisees compete against each other and against company-owned stores; and, most notably, the no-poaching agreements restrict franchisees from hiring employees of other franchisees.[94] The complaints further assert that the no-poaching provisions are horizontal restraints that are per se unlawful under the Sherman Act.[95] In *Deslandes v. McDonald's USA, LLC*, the court found a no-hire provision in a McDonald's franchise agreement to be a horizontal restraint of trade.[96] The court applied the quick-look approach to analyze the defendant's claim, despite finding that the parties were a single enterprise.[97]

D. Modes of Analysis

Federal courts utilize one of three modes of analysis to determine whether a particular agreement unreasonably restrains trade: the per se rule, the rule of reason, or the quick-look approach.[98] Agreements that are considered per se illegal are condemned without further inquiry. If the rule of reason applies, a court will balance all of the circumstances to determine whether there is an unreasonable restraint on competition. The quick-look approach is an abbreviated rule of reason analysis, whereby a court may categorize a restraint without conducting a full-blown economic analysis.[99]

The per se rule applies to restraints "that would always or almost always tend to restrict competition and decrease output."[100] If the restraint reduces output or increases prices but is unrelated to any joint economic activity, courts will typically deem it per se illegal.[101] The per se category is narrow and reaches only conduct that is proved to be consistently anticompetitive through extended experience, such as "price fixing, bid rigging, and customer and territorial allocations."[102]

Conversely, if a restraint makes economic activity possible that would otherwise be impossible without the restraint, or if it contributes to an economically efficient outcome, then courts will typically review the

94. *See generally Butler* Complaint, *supra* note 93; *Ion* Complaint, *supra* note 93; *Deslandes* Complaint, *supra* note 5; *Bautista* Complaint, *supra* note 93.

95. *See Butler* Complaint, *supra* note 93, ¶¶ 19, 172; *Ion* Complaint, *supra* note 93, ¶¶ 1, 10, 103; *Deslandes* Complaint, *supra* note 5, ¶¶ 12, 133.

96. Deslandes v. McDonald's USA, LLC, No. 17-4857, 2018 WL 3105955, at *6 (N.D. Ill. June 28, 2017); *see infra* Part III.B (discussing, in detail, the facts and issues of the case).

97. *Deslandes*, 2018 WL 3105955, at *5.

98. Lemley & Leslie, *supra* note 38, at 1213–16.

99. *Id.* at 1215.

100. Leegin Creative Leather Prods., Inc., v. PSKS, Inc., 551 U.S. 877, 886 (2007) (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp. 485 U.S. 717, 723 (1988)).

101. *See* Lemley & Leslie, *supra* note 38, at 1221 (outlining the approaches courts take in analyzing agreements under section 1).

102. U.S. DEP'T OF JUSTICE, *supra* note 11, at III-12 (2018); *see, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212–13 (1940) (citing *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), and *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), as examples of early cases holding that price-fixing agreements are per se violations); *see also* ABA SECTION OF ANTITRUST LAW, ANTITRUST HANDBOOK FOR FRANCHISE AND DISTRIBUTION PRACTITIONERS 4 (2008).

restraint under the more flexible rule of reason standard.[103] Unlike the per se rule, there is no bright-line test for whether a restraint is illegal under the rule of reason.[104] In applying the rule of reason, courts will "balance the pro-competitive benefits of conduct against its potential for anticompetitive harm."[105]

In some cases involving horizontal agreements with pro-competitive justifications, courts will utilize a modified rule of reason analysis known as the quick look.[106] Under this approach, the court will determine whether "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[107] Using the quick-look approach, the court may determine whether conduct that appears to be anticompetitive on its face is per se illegal by considering the defendant's pro-competitive justifications for the conduct.[108] If the defendant can offer plausible economic reasons that the conduct is pro-competitive, the court will weigh the defendant's competitive justifications against the alleged antitrust harms under the rule of reason.[109] But if the defendant cannot offer sufficient justifications, the conduct is deemed illegal.[110]

II. A LEGAL AND ECONOMIC ANALYSIS OF NO-POACHING ANTITRUST CASES

Courts have traditionally analyzed no-poaching agreements under antitrust laws because the market for employee labor and skills is a market subject to the Sherman Act.[111] That is, the labor market is a market for antitrust purposes, and no-poaching agreements can restrain competition among employers for workers.[112] Part II.A chronicles the precedent of no-poaching cases, beginning with the case that first addressed the issue and ending with a more modern application. Part II.B explores a contemporary no-poaching case involving Silicon Valley technology companies. This analysis emphasizes both the legal and economic implications of no-poaching agreements and the anticompetitive harm they produce.

103. Lemley & Leslie, *supra* note 38, at 1223; *see* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (declaring and articulating the rule of reason standard); Standard Oil Co. v. United States, 221 U.S. 1, 59–60 (1911).

104. ABA SECTION OF ANTITRUST LAW, *supra* note 102, at 5.

105. Lemley & Leslie, *supra* note 38, at 1251.

106. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

107. *Id.*

108. Lemley & Leslie, *supra* note 38, at 1215.

109. *Id.*

110. *Id.*

111. *See, e.g.*, Eichorn v. AT & T Corp, 248 F.3d 131, 140–41 (3d Cir. 2001); Cesnik v. Chrysler Corp., 490 F. Supp. 859, 864 (M.D. Tenn. 1980).

112. *Eichorn*, 248 F.3d at 140–41.

A. Development of Antitrust Scrutiny of No-Poaching Agreements

Historically, courts have applied the rule of reason to no-poaching agreements.[113] In *Union Circulation Co. v. FTC*,[114] one of the first cases concerning no-poaching agreements, the Second Circuit applied the rule of reason and found that the "no-switching" agreements unreasonably restrained trade.[115] In this case, the court assessed the legality of an agreement among magazine and periodical subscription companies to refrain from hiring each other's employees for specified periods of time, often one year.[116] The companies claimed the agreements were created to promote professional conduct among salesmen in response to fraudulent practices in the industry.[117] The companies argued that the agreements had a legitimate business justification—that without the agreements in place, the salesmen would be able to switch to another employer in the industry easily and companies would be less likely to curtail and eliminate fraudulent practices.[118] The Second Circuit held that the companies had violated section 1 because the agreements harmed competition by "freez[ing] the labor supply."[119] The court reasoned that the agreement was not sufficiently tailored to deter fraudulent practices because it pertained to all salesmen; therefore, the agreement's reach extended beyond what was reasonably necessary.[120]

Although naked no-poaching agreements, like the one in *Union Circulation Co.*, violate section 1, there are instances in which no-poaching agreements may be considered lawful ancillary restraints aimed at a legitimate business purpose.[121] However, "businesses must carefully execute the agreements to ensure that they are narrowly tailored by scope, duration, job function, product type, geography, or a combination of these limits."[122] In 2001, the Third Circuit applied the rule of reason to a no-poaching agreement in *Eichorn v. AT & T Corp*.[123] Here, the court evaluated a no-poaching agreement between a parent company (AT&T) and one of its affiliates following a divestiture.[124] The agreement in question applied only to employees who earned $50,000 or more annually and also included a time

113. Davis, *supra* note 10, at 287.
114. 241 F.2d 652 (2d Cir. 1957).
115. *Id.* at 658.
116. *Id.* at 654–55.
117. *Id.* at 655.
118. *Id.* at 657.
119. *Id.* at 658.
120. *Id.*
121. *See* Cesnik v. Chrysler Corp., 490 F. Supp. 859, 866–67 (M.D. Tenn. 1980). For an example of an ancillary restraint in the joint-venture context, see generally Texaco, Inc. v. Dagher, 547 U.S. 1 (2006).
122. Davis, *supra* note 10, at 297; *see* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
123. 248 F.3d 131, 144–45 (3d Cir. 2001) (rejecting per se analysis and applying the rule of reason).
124. *Id.* at 139 (noting that "[i]t was not until AT & T divested all of its stock in [a subsidiary] . . . that the two companies became completely separate entities").

restriction of eight months.[125] The court held that the limitation on both scope and duration was sufficient to make the agreement a reasonable and ancillary restraint.[126] The court further stated that the agreement lacked a "significant anti-competitive effect" on labor in the industry by fixing wages.[127]

B. Case Study: In re High-Tech Employee Antitrust Litigation

In 2010, no-poaching agreements were the subject of litigation once again, this time involving several technology companies.[128] The DOJ brought civil enforcement actions against technology companies for entering into no-poaching agreements with one another.[129] In these cases, the competitors agreed not to cold-call each other's employees.[130] Since the cases settled, the companies avoided public disclosure of their recruiting practices.[131] However, these cases had the residual effect of provoking discourse on the harm that no-poaching agreements can cause.[132]

1. Factual Background and Nature of the Agreements Made

In September 2010, the DOJ filed a complaint against six high-tech companies—Adobe, Apple, Google, Intel, Intuit, and Pixar—alleging that their hiring-practice agreements violated antitrust laws.[133] These agreements were not clearly pure no-switching agreements; instead they restricted the companies from cold-calling each other's employees.[134] For example, the companies in this case[135] had entered into a series of bilateral "Do Not Cold Call" agreements from 2005 to 2007, whereby each company's recruiting department refrained from cold-calling the employees of the other company.[136]

In December 2010, the DOJ filed a second complaint against Lucasfilm and Pixar alleging that the two companies had agreed to restrictions beyond

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125. *Id.* at 136–37.
126. *Id.* at 148.
127. *Id.*
128. Lindsay et al., *supra* note 4, at 6–8.
129. *Id.*
130. *Id.*
131. *Silicon Valley's No-Poaching Case*, *supra* note 20.
132. *Id.*
133. A consolidated class action lawsuit brought by employees of the high-tech companies followed the DOJ investigation. *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1108 (N.D. Cal. 2012).
134. "Cold-calling" is the practice of contacting another firm's employee who has not otherwise applied for a job opening. This form of solicitation can be done orally, in writing, telephonically, or electronically. *See id.* at 1111; *see also* Consolidated Amended Complaint ¶ 42, *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (No. 11-CV-02509-LHK), ECF No. 65 [hereinafter *High-Tech* Complaint].
135. Competitive Impact Statement at 1–2, United States v. Adobe Sys., Inc., No. 10-cv-01629 (D.D.C. Mar. 18, 2010), ECF No. 2 [hereinafter *Adobe* Competitive Impact Statement].
136. *In re High-Tech Emp.*, 856 F. Supp. 2d at 1110; *see also* Lindsay & Santon, *supra* note 6, at 75.

recruiting.[137] The court found that the agreement between Lucasfilm and Pixar that was at issue[138] contained the following terms:

> 59. First, each agreed not to cold call each other's employees.
> 60. Second, each agreed to notify the other company when making an offer to an employee of the other company, if that employee applied for a job notwithstanding the absence of cold calling.
> 61. Third, each agreed that if either made an offer to such an employee of the other company, neither company would counteroffer above the initial offer. This third agreement was created with the intent and effect of eliminating "bidding wars," whereby an employee could use multiple rounds of bidding between Pixar and Lucasfilm to increase her total compensation.[139]

In both cases, the DOJ argued that the agreements were per se illegal.[140] The cases settled and the court did not decide whether to apply the per se rule or the rule of reason, but the court accepted the government's arguments that the restraint had depressed wages and restricted employee mobility.[141] The court reasoned that a quiet "handshake agreement" between competing technology companies was adequate grounds for a per se antitrust claim.[142]

2. Labor-Economics Perspective and Restraint on Labor Markets

If, for example, no-poaching agreements are restrictions on customers and not employees, the per se antitrust violation becomes clearer.[143] From this viewpoint, the agreements would prohibit employers from calling each other's customers, from requiring notice when offering to sell a product to another company's customers, and from offering a lower price than what the other companies were offering.[144] This type of agreement would result in higher prices for consumers due to the lack of competition.[145] As an analog to workers receiving lower wages because of the lack of competition, this is a direct example of a market-allocation and price-fixing agreement, which is a per se violation.[146]

In *United States v. Adobe Systems, Inc.*,[147] the DOJ argued, "There is no basis for distinguishing allocation agreements based on whether they involve input or output markets. Anticompetitive agreements in both input and

137. *In re High-Tech Emp.*, 856 F. Supp. 2d at 1111; *see also* Lindsay at al., *supra* note 4, at 6.
138. Competitive Impact Statement, United States v. Lucasfilm Ltd., No. 10-cv-02220 (D.D.C. June 3, 2011), ECF No. 2 [hereinafter *Lucasfilm* Competitive Impact Statement].
139. *High-Tech* Complaint, *supra* note 134, at 11; *see* Davis, *supra* note 10, at 281.
140. *In re High-Tech Emp.*, 856 F. Supp. 2d at 1117.
141. *See id.* at 1123.
142. *Id.* at 1109; *see* Davis, *supra* note 10, at 281.
143. Lindsay & Santon, *supra* note 6, at 75.
144. *Id.*
145. *See Silicon Valley's No-Poaching Case*, *supra* note 20.
146. Lindsay & Santon, *supra* note 6, at 75; *see supra* Part I (discussing the types of agreements proscribed by section 1 of the Sherman Act and the per se rule generally).
147. No. 1:10-cv-01629 (D.D.C. filed Mar. 18, 2011).

output markets create allocative inefficiencies."[148] The DOJ applied a similar analysis to employment markets in *United States v. Lucasfilm Ltd.*[149] by stating that "[a]ntitrust analysis of downstream customer-related restraints applies equally to upstream monopsony restraints on employment opportunities."[150] The DOJ correctly focused on the direct restraint that the agreements imposed on labor markets rather than the effects they have in a downstream market.[151] This is because the anticompetitive effect of the agreements restrained competition for the services of highly skilled technology employees and deprived them of better job opportunities and potentially higher compensation.[152] In analyzing the defenses, the DOJ acknowledged that, given the collaboration and business relationships between the companies, some of the restraints might have been justified.[153] However, the DOJ noted that even though the restrictions protected business interests, such as the investment in and training of employees, they were not sufficiently tailored to protect the interests of the employees.[154]

III. ANALYSIS OF LEGAL ISSUES WITH RESPECT TO NO-POACHING AGREEMENTS IN THE FRANCHISE SECTOR

The use of no-poaching agreements in the franchise sector raises various issues—both legal and economic. Using the analysis from Part II, Part III.A compares no-poaching agreements used in franchised and unfranchised industries to show that, while there are distinctions, the anticompetitive effects are similar. Then, Part III.B analyzes the arguments proffered against no-poaching agreements in a pending case involving the fast-food franchise McDonald's. Part III.C discusses additional pending cases, and Part III.D reviews the validity of the complaints, weighing the defendants' justifications against the harm caused.

A. Comparison of No-Poaching Agreements in Franchised and Unfranchised Industries

No-poaching cases in the franchise sector differ from unfranchised cases, such as the high-tech cases, in two primary respects.[155] One is a factual

148. *Adobe* Competitive Impact Statement, *supra* note 135, at 8.

149. No. 1:10-cv-02220 (D.D.C. June 3, 2011).

150. *Lucasfilm* Competitive Impact Statement, *supra* note 138, at 5–6. Monopsony is often referred to as the inverse of monopoly, or one buyer of a product. In the labor-market context, firms are the consumer, and as they grow in size, they are capable of dominating local labor markets. *See* KRUEGER & POSNER, *supra* note 13, at 6.

151. Lindsay et al., *supra* note 4, at 75. Wharton professor of legal studies and business ethics Janice Bellace has described the labor market: "[E]mployers buy labor on that market, and job seekers sell their labor. Supply and demand then serves to set the price for a given type of labor." *Silicon Valley's No-Poaching Case*, *supra* note 20.

152. *Silicon Valley's No-Poaching Case*, *supra* note 20.

153. *Adobe* Competitive Impact Statement, *supra* note 135, at 8–9 ("Restraints that are broader than reasonably necessary to achieve the efficiencies from a business collaboration are not ancillary and are properly treated as per se unlawful.").

154. *Id.* at 8.

155. Strimel et al., *supra* note 57.

distinction regarding the nature of the entities that utilize the agreements at issue.[156] In *Adobe* and in *Lucasfilm*, the agreements were among independent companies, whereas in franchise cases, franchisors mandate these agreements with their franchisees to prevent employees from leaving one franchise to work at another within the same corporate chain.[157] The second distinction is a policy one—the former involves highly skilled technical workers and the latter involves lower-skilled workers in high-turnover industries.[158]

In fast-food restaurant franchise no-poaching cases, a franchisor and its franchisees have joint economic goals, including providing a uniform product, service, brand, and quality of service to the customer.[159] In a recent settlement of a no-poaching agreement case outside the franchise context, the DOJ permitted the parties to enter into reasonable no-solicitation agreements, which were considered ancillary to a legitimate business collaboration.[160] Franchise cases differ to the extent that franchisees operate under a common corporate umbrella, yet they may also compete against one another in a variety of areas.[161]

The range of competition between a franchisor and its franchisees will vary from one franchise system to another depending on factors such as "whether the franchisor operates company outlets, whether the franchisees are granted exclusive territories, and the geographic locations of the various outlets."[162] The major factors in evaluating whether a franchisor-franchisee relationship is a single economic enterprise are revenue allocation, the level of coordination between the franchisor and franchisees, and the amount of control the franchisor exerts over the franchisee.[163] While it is generally true that the franchisor and its franchisees share a common interest in promoting the franchise system, individual franchises are separately owned entities.[164] In many cases, individual franchise outlets, particularly in highly concentrated geographic areas, compete for customers and employees.[165] Courts must balance the arguments for (e.g., promoting the franchise

156. *Id.*

157. *See How Fair—or Legal—Are Non-Poaching Agreements?*, *supra* note 23; *supra* Part II.B (discussing the agreements at issue in *In re High-Tech Employee Antitrust Litigation*).

158. Krueger & Ashenfelter, *supra* note 23, at 4. *See generally* KRUEGER & POSNER, *supra* note 13 (addressing the issues of wage stagnation and increasing inequality, which particularly affect low-income workers).

159. Strimel et al., *supra* note 57.

160. *See* United States v. Knorr-Bremse AG, No. 18-cv-00747-CKK, 2018 WL 4386565, at *2 (D.D.C. July 11, 2018). The defendants entered into a settlement with the DOJ relating to their respective employee recruiting, solicitation, and hiring practices following a federal civil antitrust complaint alleging that the two companies "entered into agreements that restrained cold calling, soliciting, recruiting, hiring, or otherwise competing for employees (collectively, 'no-poach agreements') in violation of section 1 of the Sherman Act." *Id.* at *7–8.

161. *See* Strimel et al., *supra* note 57.

162. *See* Block & Ridings, *supra* note 56, at 221.

163. *Id.*

164. *Id.* at 220.

165. *Id.*

system's efficiency) and against (e.g., limiting employees' options) no-hire or no-poaching agreements.[166] A recent wave of cases involving no-poaching agreements among franchises demonstrates this tension.

B. Case Study: Deslandes v. McDonald's USA, LLC

Leinani Deslandes started as an entry-level crew member and was initially paid $7.00 per hour at a McDonald's franchise in Apopka, Florida, where she worked her way up into management.[167] After years of working at the same location, Deslandes applied for a position with a competing McDonald's restaurant in Orlando, Florida, that offered a higher salary and better working conditions.[168] Deslandes received an offer from the Orlando McDonald's; however, the following day, she received a call from the McDonald's corporate office informing her that, due to a provision in the company's franchise agreement, the restaurant could not hire her unless she was released by the Apopka McDonald's.[169] Since Deslandes could not be hired by another McDonald's, she ultimately quit her job and was forced to take an entry-level position in another industry for lower pay.[170] Deslandes brought a class action suit against McDonald's claiming that the provision violated section 1 of the Sherman Act and state law.[171]

The relevant provision from the McDonald's franchise agreement, which is invisible to McDonald's employees,[172] stated:

> Interference With Employment Relations of Others. During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated if such person has left

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166. *See* Strimel et al., *supra* note 57.

167. *See Deslandes* Complaint, *supra* note 5, ¶¶ 59–69. After about three months working at the Apopka McDonald's, Deslandes was promoted to Shift Manager earning $10.00 per hour, and in 2011, Deslandes was promoted to Department Manager of Guest Services earning $12.00 per hour. *Id.* ¶¶ 61–62.

168. *Id.* ¶¶ 66–67. The complaint alleges that the Apopka McDonald's violated overtime laws and cancelled Deslandes's managerial training upon learning that she was pregnant. *Id.* ¶¶ 64–65.

169. *Id.* ¶ 68.

170. *Deslandes* Complaint, *supra* note 5, ¶ 71. Deslandes took a job at Hobby Lobby, a retail store at a rate of $10.25 per hour. *Id.*

171. *Id.* ¶ 121.

172. These provisions are invisible to the employee because they are included in contracts between the franchisors and franchisees. Evan Starr, assistant professor of management and organization at the Robert H. Smith School of Business at the University of Maryland, explains:

> The worker does not agree to this [agreement]. If they don't get along with their manager, or if they learn that it's not a good work environment, or perhaps they have to move locations for some reasons, and their skills are basically perfectly transferable to another franchise within that same company, then they're not able to do that.

How Fair—or Legal—Are Non-Poaching Agreements?, *supra* note 23 (alteration in original).

> the employ of any of the foregoing parties for a period in excess of six (6) months.[173]

McDonald's argued that agreements in a franchise arrangement, like the one in question, are technically "vertical" rather than "horizontal," which, if accepted, provides them more latitude under antitrust statutes and the mode of analysis courts decide to apply.[174] However, the court here found that the agreement was horizontal and not entirely vertical—that the alleged restraint was ancillary to the McDonald's franchise agreements and was horizontal with "vertical elements."[175] While the McDonald's franchise agreement included a time restriction of six months, unlike some other franchise business models, it did not impose additional tailored restrictions, such as exclusive grants, exclusive territorial rights, protected territory, or any right to exclude or control.[176] It also failed to tailor its conditions to the location or development of future McDonald's restaurants at any time.[177]

The district court granted the defendant's motion to dismiss the Illinois state law claims, but it denied the motion to dismiss the Sherman Act section 1 violation allegations.[178] The court rejected the defendant's argument that the no-poaching provision was necessary to protect itself from horizontal competition for employees because the legal issue "is not about competition for the sale of hamburgers to consumers."[179] Instead, "[i]t is about competition for employees."[180]

From a policy standpoint, the court also recognized that because most individuals in the low-skill employment market do not have the luxury of not working for a six-month period, "the no-hire provision effectively prevented competing McDonald's franchises (as well as the company-owned stores) from competing for experienced, low-skill employees."[181] But the court ultimately concluded that the restraint did not constitute a per se unlawful restraint because the agreement was ancillary to otherwise pro-competitive franchise agreements as a whole.[182] In other words, despite the restraint appearing to be facially anticompetitive, the court found that McDonald's had successfully claimed an output-enhancing effect of a no-poaching

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173. *Deslandes* Complaint, *supra* note 5, ¶ 87 (alteration in original). McDonald's has since removed the no-hire and no-solicit provisions from its franchise agreement. The plaintiff seeks damages for the opportunities she may have missed to switch franchises previously despite the fact that those opportunities are available now. *Id.*

174. *Deslandes*, 2018 WL 3105955, at *6; *see also* KRUEGER & POSNER, *supra* note 13, at 11.

175. *Deslandes*, 2018 WL 3105955, at *6.

176. *Id.* at *1.

177. *Id.*; *see also Deslandes* Complaint, *supra* note 5, ¶ 75.

178. *Deslandes*, 2018 WL 3105955, at *1.

179. *Id.* at *8. McDonald's argued that the no-poaching provision promoted *interbrand* competition between McDonald's and other fast-food chains, such as Burger King, rather than *intrabrand* competition between two McDonald's franchises. *Id.*

180. *Id.* at *8.

181. *Id.* at *1.

182. *Id.* at *7.

agreement, which was sufficient to defeat a claim of a per se violation.[183] The court permitted the employee's antitrust claim to proceed under a quick-look analysis.[184] As of this writing, this case has been appealed, though many legal experts believe that it is unlikely that the court's ruling will be reversed.[185] Due to the increased legislative and administrative pressure[186] to eliminate no-poaching provisions across the board, franchisors may ultimately decide that litigation is not worth the cost.[187]

C. Other Recent Relevant Cases

Recently, additional franchises faced similar antitrust allegations resulting from their no-poaching provisions.[188] In February 2017, two former shift leaders at Carl's Jr., Luis Bautista and Margarita Guerrero, brought a putative class action suit against Carl Karcher Enterprises LLC (CKE), the parent company of fast-food chain Carl's Jr.[189] The plaintiffs' complaint alleged that Carl's Jr. Restaurants LLC and CKE required all franchisees to agree to

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183. *Id.*; *see also* Fawn Johnson, *Fair Play: McDonald's, Little Caesars Suits Tee Up Worker Questions*, BLOOMBERG BNA (Sept. 16, 2018), https://www.bna.com/fair-play-mcdonalds-b73014482562/ [https://perma.cc/3AFQ-8Q65]. The output effect was producing more burgers and fries.

184. *Deslandes*, 2018 WL 3105955, at *7–8.

185. Rupert M. Barkoff, *No-Poaching and Non-Compete Provisions: Long-Time Practices Go Under the Microscope*, N.Y.L.J. (Sept. 17, 2018, 2:40 PM), https://www.law.com/newyorklawjournal/2018/09/17/no-poaching-and-non-compete-provisions-long-time-practices-go-under-the-microscope/ [https://perma.cc/9GLF-8UY9].

186. *Id.* In March 2018, Senators Elizabeth Warren and Cory Booker introduced federal legislation prohibiting no-poaching agreements (the End Employer Collusion Act). The Justice Department's Antitrust Division likewise has begun investigations into several large franchisors that utilize no-poaching provisions. *Id.*

187. *Id.* There are many franchisors that have voluntarily and preemptively abandoned their no-poaching provisions. McDonald's, for example, has eliminated the provision from new franchise agreements and indicated that it would not enforce such provisions contained in older agreements. *See supra* note 173 and accompanying text. Recently, four fast-food chains—Dunkin' Donuts, Arby's, Five Guys Burgers and Fries, and Little Caesars—also agreed to end their no-poaching provisions. *See* Hailey Konnath, *4 More Fast-Food Chains Vow to End No-Poach Agreements*, LAW360 (Mar. 12, 2019, 10:55 PM), https://www.law360.com/competition/articles/1138135 [https://perma.cc/QWT7-MCKG].

188. *See, e.g.*, *Butler* Complaint, *supra* note 93, ¶ 1; *Ion* Complaint, *supra* note 93, ¶ 2. There is also an effort at the state level to eliminate no-poaching provisions. Washington State Attorney General Bob Ferguson filed a lawsuit against national sandwich chain Jersey Mike's after the company refused to remove no-poaching provisions from its franchise agreements. The complaint alleges a violation of state competition laws, but the anticompetitive arguments are comparable. *See AG Ferguson Announces Major Milestones in Initiative to Eliminate No-Poach Clauses Nationwide, Files Lawsuit Against Jersey Mike's*, WASH. ST. OFF. ATT'Y GEN. (Oct. 15, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-major-milestones-initiative-eliminate-no-poach-clauses [https://perma.cc/5GKQ-XAG5].

189. Braden Campbell, *CKE Restaurants Hit with Antitrust Class Action*, LAW360 (Feb. 8, 2017, 4:26 PM), https://www.law360.com/articles/889807/cke-restaurants-hit-with-antitrust-class-action [https://perma.cc/8HL2-PKHD]. Carl Karcher Enterprises, LLC, through its subsidiaries, owns, operates, and franchises a chain of fast-food restaurants in the United States and internationally. The company operates under the name Carl's Jr. *See Company Overview of Carl Karcher Enterprises, LLC*, BLOOMBERG, https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=896644 [https://perma.cc/2S7C-FTQL] (last visited Mar. 15, 2019).

a no-hire provision that prevents one franchisee from hiring employees at the level of shift leader or higher from other franchisees without the franchisor's advance written consent.[190]

The CKE complaint deals exclusively with California state law.[191] The no-hire provisions are alleged to be naked restraints of trade, which depress employee wages, restrict employee mobility, and reduce benefits and job growth opportunities for employees.[192] The relevant provision from a CKE franchise agreement states:

> (2) Accordingly, Franchisee covenants and agrees that, except with CKE's prior written consent, during the term of this Agreement, and for a period of 2 years following its expiration, transfer, or termination, Franchisee shall not, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with, any person, firm, partnership, corporation, or other entity:
>
> . . .
>
> (b) *Knowingly employ or seek to employ any person then employed by CKE or any franchisee of CKE as a shift leader or higher, or otherwise directly or indirectly induce such person to leave his or her employment.*[193]

The terms of this agreement are narrower than the terms at issue in *Deslandes* because the terms only apply to those employed as a "shift leader or higher,"[194] whereas the McDonald's agreement pertained to "any person" employed.[195] But the CKE agreement is also broader in that it does not specify a restricted time duration.[196] The defendants allege that the CKE franchise model is designed to encourage franchise competition—by not providing exclusive geographic territories for its franchisees, each franchisee is encouraged to compete for both customers and employees.[197] Notwithstanding the no-hire agreement, CKE franchisees have publicly claimed that they have complete discretion over hiring decisions.[198] Other recent lawsuits include similar allegations designed to show that the franchisees operate in competition against each other, as well as against company-owned stores, which rebuts the franchises' single-entity defenses.[199]

190. *Bautista* Complaint, *supra* note 93, ¶¶ 2, 47–49.
191. *Id.* ¶¶ 15–17.
192. *Id.* ¶ 2.
193. *Id.* ¶ 52.
194. *Id.*
195. *See Deslandes* Complaint, *supra* note 5, ¶ 87.
196. *See id.* The no-poaching provision in a McDonald's franchise agreement was limited to a six-month period. *Id.*
197. *Bautista* Complaint, *supra* note 93, ¶¶ 40–41, 45–47.
198. *Id.* ¶ 46. The complaint notes that one CKE franchisee was quoted in a *Wall Street Journal* article stating that he "cho[oses] whom to hire." *Id.* (alteration in original).
199. Strimel et al., *supra* note 57; *see, e.g.*, *Butler* Complaint, *supra* note 93, ¶¶ 60, 77; *Ion* Complaint, *supra* note 93, ¶¶ 74–75.

D. Validity of Recent Complaints

As these cases are currently pending, a court has not yet ruled on this issue as a matter of law. Although the rulings of the aforementioned no-poaching suits in the franchised food industry cannot be fully predicted, these suits are likely to multiply.[200] This section examines the defendants' pro-competitive justifications and explains why these justifications may be insufficient to evade a section 1 violation.

1. Defenses and Pro-Competitive Justifications

Franchises may have valid legal justifications to defend the use of no-poaching agreements if they are reasonably tailored to further pro-competitive justifications.[201] Some of these justifications, as discussed in *Deslandes* and other recent cases, include promoting interbrand competition among competing franchise chains and encouraging investment in employee training.[202] Although the district court in *Deslandes* rejected both of these arguments, it made clear that narrowly tailored no-poaching provisions could serve the pro-competitive purpose of improving franchise investment in employee training by limiting the clause's applicability to employees above a certain level or to employees who receive additional management training.[203] Therefore, no-poaching agreements that are limited in scope, duration, geography, the category of employees to whom they apply, or some or all of these are likely to face less scrutiny with respect to antitrust issues compared to blanket no-poaching agreements that apply to all employees.[204]

Defenders of no-poaching agreements have also argued that no-hire agreements are essential to the franchise model as they prevent free riding on training investments by the franchisees.[205] For example, defendants contend that franchisees incur costs to provide specialized training to management-level employees.[206] This training may include sending the employees to corporate classes and providing one-on-one proprietary training for skills specific to the franchise system.[207] The argument here is that franchisees could free-ride on these specialized investments by poaching employees after another franchisee incurs the training costs.[208] This could effectively deter franchisees from providing the specialized training in the first place, which

200. *See* Strimel et al., *supra* note 57.

201. Paul Eckles et al., *The Fight Against No-Poach Agreements Is Expanding*, LAW360 (Oct. 23, 2018, 1:09 PM), https://www.law360.com/articles/1094204/the-fight-against-no-poach-agreements-is-expanding [https://perma.cc/H9BE-F35V].

202. *Id.*; *see also* Deslandes v. McDonald's USA, LLC, No. 17-4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018). The court further recognized that McDonald's continued to sign franchise agreements even after it removed the no-hire provision in 2017, which suggested that "the no-hire provision was not necessary to encourage franchisees to sign" the franchise agreement. *Deslandes*, 2018 WL 3105955, at *7.

203. *Deslandes*, 2018 WL 3105955, at *8.

204. Eckles et al., *supra* note 201.

205. *Id.*

206. *See* KRUEGER & POSNER, *supra* note 13, at 13.

207. *See* Strimel et al., *supra* note 57.

208. *See id.*

would be detrimental both to the company and the workers who are deprived of the training.[209]

In addition to promoting intrabrand competition, or competition between two or more McDonald's restaurants in different locations, defendants in these cases have argued that no-poaching provisions also promote interbrand competition, or competition with direct, horizontal competitors, such as Burger King and other fast-food restaurant chains.[210] The court in *Deslandes*, however, found this argument unpersuasive.[211] There, plaintiffs asserted that McDonald's "divided the market for employees" by prohibiting restaurants from hiring each other's current or former employees.[212] In the labor market context, the individual franchises are competing brands.[213] Therefore, instead of promoting interbrand competition, the court found that dividing the market restrains intrabrand competition.[214] If the labor market extends beyond just one franchise chain—including all fast food, all restaurants, or even all low-wage jobs in a particular geographic market—then the market harm is broader than the alleged harm from a single no-poaching agreement.[215]

Whichever level of scrutiny the court applies in the franchise fast-food cases—be it per se, rule of reason, or quick-look[216]—plaintiffs will likely demonstrate harms resulting from the lack of competition among franchisees for their labor and the potential for lost mobility and depressed wages.[217] Ultimately, franchisors currently using no-poaching agreements or considering doing so should examine their own franchise structure in terms of its coordination and control over its franchisees.[218] Furthermore, franchisors should assess whether their valid pro-competitive justifications for the agreement outweigh any anticompetitive effects.[219]

2. Economic and Social Policy Considerations

Many employers have reiterated the defense of no-poaching agreements as a mode of protecting their investments in their employees.[220] While this defense carries some validity in higher-skill and lower-turnover industries, it

209. *See id.* (explaining that this argument is rooted in allowing franchisees to reap the benefits of their investments).
210. *See, e.g.*, Deslandes v. McDonald's USA, LLC, No. 17-4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018) (citing McDonald's and Burger King as examples of direct, interbrand competitors).
211. *See supra* Part III.B (explaining the court's reasoning).
212. *See, e.g.*, *Deslandes*, 2018 WL 3105955, at *8.
213. *See id.*
214. *See id.*
215. *See id.*
216. *See supra* Part I.D (describing the different modes of analysis).
217. Strimel et al., *supra* note 57.
218. *Id.*
219. *Id.*
220. *See* KRUEGER & POSNER, *supra* note 13, at 13.

is insufficient for blanket agreements in the fast-food industry.[221] Furthermore, there are a variety of more efficient ways to protect investments—such as employee incentive plans and a plethora of retention tools—which do not impede labor market competition in the same way no-poaching agreements do.[222] According to Wharton professor of management Peter Cappelli, "A no-poaching pact 'benefits the companies at the expense of their employees. Companies could achieve the same results by making it attractive enough for employees not to leave.'"[223] An analogous argument can be made for no-poaching agreements between franchisors and franchisees.[224] As noted, franchisors likewise have argued that no-poaching agreements within the franchise are critical for investment in their employees and lead to more specific training, but it is not clear whether the training would be lost to the franchise if no-poaching agreements were banned.[225] If this defense holds true, then the companies concede that they are, in fact, separate economic actors.[226] Otherwise, an employee who benefits from the training provided by one franchisee would be able to transfer those same skills to another franchisee without the franchisor losing out on its investment.[227]

IV. A PROPOSAL FOR CURRENT AND FUTURE FRANCHISE CASES

Labor economics principles, along with no-poaching antitrust precedent and the current state of the single-entity doctrine, support the conclusion that no-poaching agreements in franchise systems operate in the same way as agreements in unfranchised systems. Namely, no-poaching agreements in franchises similarly stagnate wages and restrict worker mobility.[228] Based on the current state of the single-entity doctrine, this Part proposes that no-poaching agreements in the franchise sector should be considered per se illegal. In other words, regardless of categorization, no-poaching agreements should be banned entirely.

American Needle challenges the *Copperweld*[229] analysis employed in *Williams* and leaves the door open for litigation in the franchise sector.[230]

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221. *Id.*; *see also supra* Parts II.B, III.B (using two case studies—one in the technology industry and the other in the fast-food industry—to demonstrate the differences).

222. KRUEGER & POSNER, *supra* note 13, at 13.

223. *Silicon Valley's No-Poaching Case*, *supra* note 20.

224. *Id.*

225. *Id.*

226. *See id.*

227. *See id.*

228. *See supra* Parts II.B, III (comparing no-poaching agreements in unfranchised and franchised systems).

229. *See supra* Part I.C. The *Copperweld* doctrine holds that a parent company and its wholly owned subsidiary are incapable of conspiring because they share a community of interests. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777 (1984). The NFL is an example of a franchised enterprise that does not fall under the *Copperweld* doctrine. The NFL was deemed to not be a single enterprise because it consisted of thirty-two teams that competed with one another, were independently managed, and held separate economic power. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 201 (2010).

230. Davis, *supra* note 10, at 300 & n.137.

The Supreme Court has defined single entities as a parent company together with its wholly owned subsidiaries or, at a minimum, companies with "a complete unity of interest."[231] Franchises, like NFL football teams, are fully capable of conspiring with one another.[232] Likewise, co-franchisees exist in a competitive relationship with each other for some purposes, including the hiring of employees.[233] *American Needle* does not clarify whether *Williams* remains good law after the Supreme Court narrowed the definition of a "single economic entity," which suggests that franchises may be viewed as independent companies that can conspire in violation of the Sherman Act.[234]

The FTC and DOJ's October 2016 guidance makes clear that companies that "compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services."[235] It is therefore unlawful for competitors to expressly or implicitly agree not to compete with one another.[236] As noted, individual franchises compete with one another both for employees and customers.[237] Following this line of analysis, economists have proposed that no-poaching agreements be uniformly banned regardless of whether they are used outside or within franchises.[238] These proponents believe that a per se approach is appropriate because a franchise model can operate just as efficiently without imposing these types of hiring restrictions.[239] From an economic point of view, no-poaching agreements violate section 1 of the Sherman Act regardless of the circumstances surrounding their use.[240] Much like the agreements the Silicon Valley technology companies made, the no-poaching agreements in a franchise system harm workers by restricting their mobility across the labor market and preventing them from receiving higher wages and potentially better working conditions.[241] As such, a per se rule against these agreements is appropriate.

Plaintiffs in the foregoing class action franchise cases have relied on the government's October 2016 guidance[242] in arguing in support of a per se approach to no-poaching agreements.[243] However, the DOJ recently stated

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231. *Copperweld*, 467 U.S. at 771.

232. Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 893 (2008).

233. 3 ALTMAN & POLLACK, *supra* note 81, § 16:43.

234. *See Am. Needle*, 560 U.S. at 188; *see also* KRUEGER & POSNER, *supra* note 13, at 11.

235. DEP'T OF JUSTICE & FTC, *supra* note 12, at 2.

236. *Id.*

237. *See supra* Parts I.C, III.A (describing competition broadly in the single-entity context and also in the franchise context).

238. *See* KRUEGER & POSNER, *supra* note 13, at 13.

239. *See id.*

240. *Id.*

241. Letter from Elizabeth Warren and Cory A. Booker to Jeff Sessions, *supra* note 14, at 2; *see supra* Part II.B (discussing the *In re High-Tech* cases).

242. DEP'T OF JUSTICE & FTC, *supra* note 12.

243. Bryan Koenig, *DOJ Gives Fast-Food Chains Ammo Against No-Poach Suits*, LAW360 (Jan. 29, 2019, 9:11 PM), https://www.law360.com/articles/1123203 [https://perma.cc/7F6D-JYBT].

that it intends to intervene to clarify that its guidance is inapplicable to franchise systems.[244] By advocating for a stricter standard, the DOJ is essentially countering the argument that franchise no-poaching agreements are per se illegal.[245] It must be noted, though, that the DOJ's opinion is not binding on the judges who decide which standard is most appropriate to apply.[246] The fate of these cases will turn on the facts specific to each case.[247] If courts decide to forgo a per se application, they should, in the alternative, employ a case-by-case heightened quick-look approach whereby they would scrutinize these types of agreements and balance the justifications against the harm to the employees. In many cases, especially in the fast-food industry, the pro-competitive justifications do not outweigh the economic harm to already low-income workers.[248] Under this approach, courts should rule in favor of the employees of these franchises given the broader economic and public policy implications.[249]

CONCLUSION

The Court in *American Needle* did not provide a clear framework for courts to use when dealing with the single-entity defense to liability under section 1 of the Sherman Act. While *American Needle* did not explicitly overrule the *Copperweld* decision, it opened the door for litigation in the franchise industry. Courts should use this period of evolution and uncertainty to set out clear violations of no-poaching agreements in the franchise sector because their effects are substantially similar to no-poaching agreements between separate corporate entities. This Note advocates for a per se rule against no-poaching agreements among franchisors and franchisees.

244. *Id.*
245. *Id.*
246. *Id.*
247. Bryan Koenig, *Can No-Poach Class Actions Beat the Rule of Reason?*, LAW360 (Jan. 30, 2019, 9:15 PM), https://www.law360.com/articles/1123789 [https://perma.cc/BNY6-HL68].
248. *See* KRUEGER & POSNER, *supra* note 13, at 14 (addressing the issues specific to low-income workers).
249. *See supra* Part III.D.2 (discussing, in detail, the economic and public policy considerations).