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ABSTRACT

As of late, labor markets have been a focal point in antitrust enforcement. In 2016, the Department of Justice (DOJ) announced that it will pursue no-poaching agreements criminally—an unprecedented policy. More recently, in January 2018, the DOJ's Attorney General indicated that the agency is following through on the policy. This Article argues that the DOJ's new policy is logical and prudent because the economic effects that no-poaching agreements have on labor markets mirror the anticompetitive effects of customer allocation agreements. It also shows that the policy is well-supported by labor economics and antitrust policies. In efforts to comply with the DOJ's policy, employers and their counsels should continue collaborations to ensure that their human resource practices comply with antitrust laws.

INTRODUCTION

Business professionals and scholars recognize that employees can be, and often are, a company's greatest asset.[1] This is especially true when it

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1. *See* Iveta Gabčanová, *The Employees – The Most Important Asset in The Organizations*, 5 HUM. RESOURCES MGMT. & ERGONOMICS 1 (2011), https://frcatel.fri.uniza.sk/hrme/files/2011/2011_1_03.pdf ("Whether it is called people, labor, intellectual capital, human capital, human resources, talent, or some other term, the resource that lies within employees and how they are organized is increasingly recognized as critical to strategic success and competitive advantage.") (citation omitted) (internal quotation marks omitted). Former CEO and chairperson of Xerox Corporation, Anne M. Mulchay, once said:

> Employees are a company's greatest asset—they're your competitive advantage . . . . You want to attract and retain the best; provide them with encouragement, stimulus, and make them feel that they are an integral part of the company's mission. Employees who believe that management is concerned about them as a whole person—not just an employee—are more productive, more satisfied, more fulfilled. Satisfied employees mean satisfied customers, which leads to profitability[.]

comes to top performers, highly skilled employees, and innovative employees in modern technology-based businesses.[2] When workforces increase and there are low-cost opportunities for mobility—as, for example, in concentrated technology centers, like Boston or Silicon Valley—employee retention methods become increasingly important for employers.[3] Understandably, after investing in their employees' skills and growth, it is difficult for employers to witness their employees' departure, especially if those employees move on to a competitor.[4] There are a few ways employers can increase employee retention, including enforceable non-compete agreements and "long-term compensation."[5]

LifeCare, Inc. Conference Features Xerox CEO Anne Mulcahy; Employers Challenged to Motivate and Engage Workforce, BUSINESS WIRE (May 16, 2003, 1:01 PM) (internal quotation marks omitted), http://www.businesswire.com/news/home/20030516005369/en/LifeCare-Conference-Features-Xerox-CEO-Anne-Mulcahy.

2. *See More Employers Finding It Difficult to Recruit for Highly Skilled Jobs, SHRM Survey Shows*, SOC'Y FOR HUM. RESOURCE MGMT. (Mar. 12, 2013), https://www.shrm.org/about-shrm/press-room/press-releases/pages/moreemployersfindingitdifficulttorecruitforhighlyskilledjobs,shrmsurveyshows.aspx (mentioning survey findings show "the most difficult positions to fill are highly skilled positions such as scientists, engineers, high-skilled technical (technicians and programmers) and high-skilled medical (nurses, doctors, specialists) [and] [s]ixty-six percent of respondents reported difficulty in hiring, an increase from 52 percent in 2011").

3. *See* John Dodge, *The War for Tech Talent Escalates*, BOSTON GLOBE (Feb. 19, 2016), https://www.bostonglobe.com/business/2016/02/19/the-war-for-tech-talent-escalates/ejUSbuPCjPLCMRYlRZIKoJ/story.html (describing the ease with which high-skilled employees can move to another company). "Once [software developers begin a job], they can get as many as 20 recruiting calls a day trying to convince them to leave for another company. And when they do, a 20 percent to 25 percent bump in salary is not unusual." *Id.*

4. *See id.* (stating Massachusetts technology executives describe the hiring environment for skilled technology employees as "brutal").

5. For the usual elements of an enforceable non-compete agreement, *see* Viad Corp. v. Cordial, 299 F. Supp. 2d 466, 477 (W.D. Pa. 2003).

> [T]o be enforceable under Pennsylvania law, a covenant not to compete must be: (1) ancillary to an employment contract or to a contract for the sale of goodwill or other subject property, (2) supported by adequate consideration, (3) reasonably necessary to protect legitimate interests of the purchaser and (4) reasonably limited in duration and geographic extent.

Id. See also Campbell Soup Co. v. Desatnick, 58 F. Supp. 2d 477, 488–89 (D.N.J. 1999).

> Under New Jersey law, an agreement restricting an employee's ability to compete with his employer after the termination of his employment will generally be found to be reasonable and, therefore, enforceable where it simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public.

Id. (internal quotations omitted). While states that allow the agreements vary on diction in setting forth the elements, the overall characteristic an enforceable non-compete agreement should have is reasonableness. *See Viad Corp.*, 299 F. Supp. 2d at 477; *see also Campbell Soup Co.*, 58 F. Supp. 2d at 488–89. For an explanation of long-term compensation packages, *see* MODERN CORPORATION CHECKLISTS § 17:8 (2017), Westlaw MCORPCHK. Also referred to as "long term incentive plans," long-term compensation plans include stock options and retirement plans. *See id.* (mentioning investment plans and appreciation plans are examples of long-term compensation); *Long Term*

Another method, and the one I will assess in this Article, circumvents employees entirely.[6] Namely, "no-poaching agreements," which employers use to combat employee migration without the financial cost of incentive pay or the possible reputational cost of enforceable non-compete agreements.[7] Commonly called "no-hire agreements," "no-switching agreements," or "no cold call agreements," no-poaching agreements are agreements between employers to refrain from hiring each other's employees.[8] These agreements may be express or implied, written or oral, and are most common among business competitors.[9] Unsurprisingly, there is a certain furtiveness that comes with these agreements.[10] For example, in *In re High Tech Employee Antitrust Litigation*,[11] the agreement was a quiet "handshake agreement" among competing Silicon Valley technology companies including Adobe, Apple, Google, Intel, and Pixar.[12]

Pursuant to a department policy, the United States Department of Justice (DOJ) reserves criminal antitrust prosecutions for horizontal, per se

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Incentive Plan – LTIP, INVESTOPEDIA, http://www.investopedia.com/terms/l/long_term_incentive-plan.asp (last visited Apr. 23, 2017) (referring to long-term compensation as long-term incentive plans and explaining retirement plans are one type of them).

6. *See, e.g.*, Consolidated Amended Complaint at 11, *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (No. 11–CV–02509–LHK) [hereinafter Amended Complaint] (describing a no-poaching agreement among technology companies).

7. *Id.* In *High-Tech Employee Antitrust Litigation*, the no-poaching agreement between Pixar and Lucasfilm consisted of 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.

Id.

8. *See* Michael Lindsay, Jaime Stilson & Rebecca Bernhard, *Employers Beware: The DOT and FTC Confirm That Naked Wage-Fixing and "No-Poaching" Agreements Are Per Se Antitrust Violations*, ANTITRUST SOURCE, Dec. 2016, at 12, n.2 ("No-poaching agreements are also called no-hire, no-interference, non-solicitation, or no-switching agreements, depending on the circumstances.").

9. *See, e.g.*, Interstate Circuit v. United States, 306 U.S. 208, 221 (1939) (finding an agreement existed among coconspirators from inferences drawn from their acts). Express agreements may come from circumstantial evidence. *See id.*

10. *See, e.g.*, *In re* Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1209–10 (N.D. Cal. 2015) (noting that the agreements between the companies were expressed orally).

11. Amended Complaint, *supra* note 6.

12. *See* Order Denying Plaintiffs' Motion for Preliminary Approval of Settlements with Adobe, Apple, Google, & Intel (No. 11-CV-02509-LHK), 2014 WL 3917126, at *12 (N.D. Cal. Aug. 8, 2014) [hereinafter Order Denying Approval of Settlements] ("Otellini stated in an email to another Intel executive regarding the Google–Intel agreement: 'Let me clarify. We have nothing signed. We have a handshake 'no recruit' between [E]ric and myself. I would not like this broadly known.'").

agreements, like price-fixing agreements, market allocation agreements, and bid-rigging agreements.[13] Because the effects of these agreements are so harmful to competition, for more than a century, evidence of such agreements has been sufficient to establish a violation of Section 1 of the Sherman Act.[14] Hence, it is alarming to the DOJ and antitrust experts alike when employers competing for employees in labor markets agree not to compete for each other's employees.[15]

Due to the uproar anti-poaching agreements have caused in some labor markets, such as the technology and healthcare markets, the DOJ and the Federal Trade Commission (FTC) announced in October 2016, that "[g]oing forward, the DOJ intends to proceed criminally against naked . . . no-poaching agreements," recognizing the seriousness of labor antitrust violations.[16] As a result, the DOJ has been actively reviewing potential per se anti-poaching violations; recently, at a conference hosted by the Antitrust Research Foundation on January 19, 2018, the DOJ's Assistant Attorney General, Makan Delrahim, noted that prosecutions adhering to the policy will

13. U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION MANUAL III-12 (5th ed. Apr. 2015) https://www.justice.gov/atr/file/761166/download [hereinafter ANTITRUST DIVISION MANUAL] ("In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations."). "Generally, the type of conduct will govern the civil/criminal determination (*e.g.*, merger matters are pursued civilly, *per se* price fixing is pursued criminally)." *Id.* at III-7.

14. Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1381 (Ct. Cl. 1971) (providing a brief explanation of the per se rule). The court explained:

> Courts impose . . . presumptions [of anticompetitive effect] where (1) they have had sufficient prior experience with a type of action to feel justified in concluding that previously discerned anticompetitive effects will always or nearly always be present once the existence of a practice is shown or (2) even without that actual experience the court reaches the same conclusion through analysis.

Id.

15. *See* DEP'T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (Oct. 2016), https://www.justice.gov/atr/file/903511/download [hereinafter HR GUIDANCE] (condemning naked anti-poaching agreements); *see also* Nick Grimmer, *How To (Legally) Keep Competitors From Poaching Your Key Employees: Antitrust Law And Non-Poaching/Non-Solicitation Agreements*, MCDERMOTT WILL & EMORY (Aug. 16, 2013), http://www.antitrustalert.com/2013/08/articles/joint-venturescompetitor-collaboration/how-to-legally-keep-competitors-from-poaching-your-key-employees-antitrust-law-and-non-poachingnon-solicitation-agreements/ (expressing no-poaching agreements are "likely *per se* illegal").

16. HR GUIDANCE, *supra* note 15 at 3–4 (providing antitrust guidance to human resources professionals and announcing that no-poaching agreements will be prosecuted criminally). The announcement mentioned a few cases in which the DOJ has addressed labor antitrust violations. For example, it mentions *U.S. v. Arizona Hospital*, in which hospitals in Arizona established a scheme to fix the wages of their temporary and per diem nurses. *See* United States v. Ariz. Hosp. & Healthcare Ass'n, Case No. CV07-1030-PHX (D. Ariz. May 22, 2007), *available at* http://www.usdoj.gov/atr/cases/f223400/223477.htm.

soon come to fruition.[17] Though the DOJ has argued that these agreements are per se violations prior to the announcement, they pursued the agreements via civil prosecution only.[18] Considering this policy statement and Delrahim's announcement, it is imperative that companies and their human resource and corporate professionals carefully tailor any anti-poaching agreements they choose to enter.[19] In doing so, companies' officials, especially their human resource professionals, must have a good grasp of antitrust analyses and implications.[20]

This Article intends to show that labor economics strongly supports the DOJ's new policy of pursuing anti-poaching agreements criminally. Specifically, it will show that the economic effects that no-poaching agreements have on labor markets are undoubtedly analogous to the recognized effects that market allocation agreements have on economic markets—which has supported the per se condemnation of market allocations

17. *See* Eleanor Tyler, *Justice Dept. Is Going After 'No-Poach' Agreements*, BLOOMBERG NEWS (Jan. 19, 2018), https://www.bna.com/justice-dept-going-n73014474358/.

> "We've been very active" in reviewing potential violations of the antitrust law that take the form of agreements not to compete for workers, said Makan Delrahim, the DOJ's assistant attorney general for the antitrust division, at a conference sponsored by the Antitrust Research Foundation at George Mason University in Virginia.

Id.; Dee Bansal, Howard Morse & Jacqueline Grise, *10 Antitrust Developments and Trends to Watch in 2018*, LAW360 (Jan. 24, 2018, 4:02 PM), https://www.cooley.com/~/media/cooley/pdf/reprints/2018/2018-01-29-10-antitrust-developments-and-trends-to-watch-in-2018.ashx?la=en ("Based on Delrahim's comments, criminal prosecutions are on the horizon."); Timothy F. Haley & Ashley K. Laken, *DOJ To Announce Criminal Enforcement Actions For "No-Poach" Agreements*, SEYFARTH SHAW (Jan. 25, 2018), http://www.seyfarth.com/publications/MA012518-LE ("Criminal prosecution of 'no-poaching/no-hire' agreements appears imminent.").

18. *See, e.g.*, Plaintiff's Motion for Application of the Per Se Standard, *In re High-Tech Employee Antitrust Litig.,* 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (No. 11-CV-2509-LHK) [hereinafter Plaintiff's Motion for Application].

19. *See* HR GUIDANCE, *supra* note 15 (mentioning scenarios in which no-poaching agreements may serve a legitimate purpose).

20. *See New Guidance for Human Resource Professionals to Avoid Antitrust Violations*, TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP (2016), http://www.thsh.com/documents/December_2016/New-Guidance-for-Human-Resource.pdf (warning employers to be cautious about entering agreements with competitors regarding employment). The law firm states:

> In light of this new guidance, employers must be sure HR professionals are kept abreast of antitrust compliance issues and receive necessary training. Employers must ensure HR and other personnel are cautious in their communications with competitors and avoid agreeing to any arrangements that restrict competition on terms of employment or provide for the exchange of competitively sensitive information. In particular, employers must not enter into naked no-poaching or wage-fixing agreements that could subject the employer and culpable individuals to criminal liability.

Id.; Christopher H. Wood, *U.S. Antitrust Authorities Now Characterize Employee Wage-Fixing & No-Poaching Agreements Between Competitors as Criminal Behavior*, MONDAQ, http://lewisbrisbois.com/newsroom/legal-alerts/u.s.-antitrust-authorities-now-characterize-employee-wage-fixing-no-poaching-agreements-between-co?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original (last updated Nov. 9, 2016) (cautioning employers about the DOJ's HR Guidance).

for centuries. Part I of this Article will provide a historical explanation of antitrust development in labor markets. Part II will then discuss one per se violation—horizontal market allocations (i.e., customer allocation). Part III will identify anti-poaching agreements that are squarely per se violations, running the risk of criminal prosecution, and then identify anti-poaching agreements that courts would likely analyze under the rule of reason, possibly surviving the analysis. Thereafter, Part IV summarizes the basic economics of the labor market. Finally, Part V will argue that naked anti-poaching agreements are akin to horizontal customer allocation agreements and interfere with competition in the labor market in ways that restrict all competition (including wage competition), just as market allocation agreements restrict not only price competition, but all competition.

I. HISTORICAL DEVELOPMENTS IN ANTITRUST LAW AND THE RECOGNITION OF THE LABOR MARKET AS AN ANTITRUST MARKET

Antitrust law was designed to create fair market competition for the benefit of consumers.[21] It promotes consumer choice and price competition.[22] Since the creation of the Sherman Act in 1890, 15 U.S.C. § 1 et seq., Section 1 deemed it illegal for competitors to enter into agreements with each other that would restrain competition.[23] For example, price-fixing agreements certainly violate Section 1 because they result in a lack of price competition among competitors, and consequently, higher prices for consumers.[24] Section 1 provides, in relevant part: "*Every 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."[25] The term "every" within the statute was initially interpreted based on its plain meaning

21. *See About the Division*, U.S. DEP'T OF JUST., ANTITRUST DIVISION, https://www.justice.gov/atr/mission (last updated July 20, 2015) ("The goal of the antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace.").

22. Thomas B. Leary, The Economic Routes of Antitrust, Outline Prepared for a Presentation at the International Seminar on Antitrust Law and Economic Development (July 1, 2004) *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/economic-roots-antitrust-outline./040706rootsofantitrust.pdf ("Consumer welfare is defined primarily to mean competitive prices and freedom of choice . . . .").

23. 15 U.S.C. § 1 (2012) (providing conspiracy to restrain competition is illegal).

24. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (recognizing that price-fixing agreements have been per se violations since the late 1800s). The Court stated:

> [F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

Id.

25. 15 U.S.C. § 1 (emphasis added).

by the Supreme Court of the United States.[26] Later, Justice William Howard Taft designed the ancillary restraint doctrine in *Addyston Pipe & Steel*, which provides that Section 1 does not prohibit all restraints; rather, it condemns naked restraints and allows ancillary restraints.[27] Consequently, the *Standard Oil* Court—recognizing that only unreasonable restraints on trade are illegal—announced the rule of reason.[28]

After the announcement of the rule of reason, courts generally began to analyze restraints on trade under either the per se rule or the rule of reason.[29] The per se rule is rigid; it presumes that the alleged conduct or agreement is unreasonable.[30] Courts only apply the per se rule when the effects of a restraint are "immediately obvious;" the rule is usually applied to agreements that courts have long known to negatively impact competition in markets, such as horizontal price-fixing.[31] If a court applies the per se standard, only

26. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312 (1897) (opining that Section 1 should be interpreted literally).

27. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 211 (1899) (affirming the ancillary restraints doctrine set forth by Justice William Howard Taft's Sixth Circuit decision); United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

> [N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.

Id.

28. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 41 (1911) (creating the rule of reason standard); *see also* Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (articulating how to perform a rule of reason analysis consisting of market determinations and anticompetitive effect analyses). Note that before *Standard Oil*, Justice White, in his *Trans-Missouri* dissenting opinion, expressed that only unreasonable restraints violated Section 1 of the Sherman Act. *Trans-Missouri Freight Ass'n*, 166 U.S. at 327–28 (White, J., dissenting).

29. *See, e.g.*, Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1213–16 (2008) (providing a detailed summary of approaches courts take in analyzing agreements under Section 1). There is also the quick-look analysis (also referred to as the truncated rule of reason analysis), which courts use when the conduct is not a per se violation but is so sufficiently anticompetitive that the court can simply take a quick glance. *See* California Dental Ass'n v. FTC, 526 U.S. 756, 757 (1999); *see also* Lemley & Leslie, *supra*, at 1215–16 (discussing the quick-look approach). In *California Dental*, the Supreme Court of the United States announced that an "abbreviated or 'quick-look' analysis is appropriate when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *California Dental Ass'n*, 526 U.S. at 757. However, it is still difficult to ascertain when to apply a quick-look analysis. *See* Geoffrey D. Oliver, *Of Tenors, Real Estate Brokers and Golf Clubs: A Quick Look at Truncated Rule of Reason Analysis*, A.B.A. (2010), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oliver_Anti_Spring2010_8.authcheckdam.pdf (explaining that courts apply quick-look inconsistently and are generally unclear regarding when the test should apply).

30. *See, e.g.*, *Standard Oil Co.*, 221 U.S. at 65 (ceasing analysis under the rule of reason when it discovered price-fixing because there is "a conclusive presumption" that price-fixing violates Section 1).

31. *See, e.g.*, Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343–45 (1982) (explaining the rationale for the per se rule). The Court stated:

the action or restraint must be proven.[32] Courts need not make any further inquiry into the restraint's actual effect on the market (the precise harm) or business justification because they are already aware of the restraint's effect on the economy.[33] Owing to the rigidity of the per se rule, courts are hesitant to apply the per se rule to new types of agreements and have relieved certain agreements, such as vertical price restraints, from per se scrutiny.[34]

Courts analyze most business conduct and agreements under the rule of reason.[35] When the anticompetitive effects of the restraint are not immediately obvious, courts apply the rule of reason.[36] Under the rule of reason, courts perform a market analysis by looking at the "nature of the restraint . . . history of the restraint . . . purpose or end sought to be attained, [and] all relevant facts."[37] A plaintiff must show that a defendant's actions are unreasonably anticompetitive and the defendant has market power.[38] The defendant can offer business justifications showing that the conduct is procompetitive or the defendant can offer evidence to show that the restraint is narrowly tailored to achieve a business purpose.[39] The restraint may be tailored in scope, duration, and purpose.[40]

> The costs of judging business practices under the rule of reason . . . have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. . . . For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.

Id. The policy behind the per standard is to achieve judicial economy. *See id.*

32. *See id.*

33. *See id.*; Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (The per se rule, "treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.").

34. *See Leegin Creative Leather Prod*., 551 U.S. at 886; State Oil Co. v. Khan, 522 U.S. 3, 7 (1997) (holding vertical arrangements to set maximum prices is no longer per se illegal); *Maricopa Cty. Med. Soc'y*, 457 U.S. at 343–45 (holding setting minimum sale prices vertically is no longer per se illegal).

35. *See* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (noting courts apply the rule of reason "for the majority of anticompetitive practices challenged under [Section] 1"); ROBERT G. VAN SCHOONENBERG & KAREN E. SILVERMAN, 5 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 79:34 (2017) (noting that courts analyze most agreements under "the more forgiving" rule of reason).

36. *See, e.g.*, *FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 458–59 (1986) (declining to apply the per se rule because the effects of the restraint were not "immediately obvious").

37. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); *see* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 211 (1899) (articulating the ancillary restraint doctrine). The *Addyston Pipe* Court made clear that Section 1 does not prohibit ancillary restraints. *Id.* at 211. Reasonable agreements created for a legitimate business purpose are ancillary. *See id.*

38. *See Chi. Bd. of Trade*, 246 U.S. at 236 (applying the rule of reason).

39. *Id.* at 237–38 (holding an agreement reasonable because it improved the market and limited operation). The Court considered three factors: nature, scope, and effects, by looking at the specific business industry, the nature of the restraint, and the history and purpose of the restraint. *Id.*

40. *Id.* (discussing the characteristics of an ancillary restraint).

A. HISTORY OF THE ANALYSIS OF NO-POACHING AGREEMENTS[41]

"The market for employee skills is a market subject to the provisions of the Sherman Act."[42]

It is a longstanding tradition for courts to analyze no-poaching agreements under antitrust laws.[43] The labor force is, for antitrust purposes, a market, and no-poaching agreements can restrain or eliminate competition among employers for talented employees.[44] Throughout antitrust history, no-poaching agreements have been analyzed under the rule of reason.[45] For instance, in *Union Circulation Co. v. FTC*,[46] one of the first cases involving no-poaching agreements, the court applied the rule of reason.[47] Courts have continued to apply the rule of reason to no-poaching agreements; for instance, in *Eichorn v. AT & T Corp.*, a 2001 decision, the Third Circuit Court of Appeals applied the rule.[48] However, through a series of prosecutions, the DOJ has focused on pursuing no-poaching agreements as per se violations, but the cases to date were settled before a decision could be made on whether

41. For a summary of the examination of no-poaching agreements through other legal avenues, such as covenants not to compete, *see generally* David K. Haase & Darren M. Mungerson, *Agreements Between Employers Not to Hire Each Other's Employees: When Are They Enforceable?*, 21 LAB. LAW. 277, 279 (2006) (laying out the different avenues through which courts scrutinize no-poaching agreements).

42. Cesnik v. Chrysler Corp., 490 F. Supp. 859, 864 (M.D. Tenn. 1980).

43. *See, e.g.*, Eichorn v. AT & T Corp., 248 F.3d 131, 140–41 (3d Cir. 2001).

44. *See, e.g.*, *Eichorn*, 248 F.3d at 140–41 (recognizing that the labor market is a market for antitrust purposes); *Cesnik*, 490 F. Supp. at 864 (same); *Silicon Valley's No-poaching Case: The Growing Debate over Employee Mobility*, KNOWLEDGE AT WHARTON, THE WHARTON SCHOOL (Apr. 30, 2014), http://knowledge.wharton.upenn.edu/article/silicon-valleys-poaching-case-growing-debate-employee-mobility/ (pointing out that competition in the labor market is just as important as competition in product markets). The article contains the following comment from a Wharton Professor, Joseph Harrington:

> 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 . . . . In 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.

Id. (internal quotations omitted). Employees typically have antitrust standing to sue an employer for no-poaching agreements that affect competition for their labor directly. *See* Roman v. Cessna Aircraft Co., 55 F.3d 542, 545 (10th Cir. 1995) (holding an airplane engineer plaintiff was directly affected by a no-poaching agreement and had antitrust standing because the agreement precluded the plaintiff from obtaining employment with another aircraft company).

45. *See, e.g.*, Union Circulation Co. v. FTC, 241 F.2d 652, 657 (2d Cir. 1957) (applying the rule of reason to a no-poaching agreement); *Cesnik*, 490 F. Supp. at 867–88 (applying the rule of reason).

46. *Union Circulation Co.*, 241 F.2d at 657.

47. *Id.* (distinguishing the no-poaching agreement at issue from group boycotts in that it dealt with hiring practices and "supervision of employee conduct" and subsequently applying the rule of reason).

48. *Eichorn*, 248 F.3d at 144 (applying rule of reason to no-poaching agreement and declining per se application).

the per se rule or the rule of reason applied to the agreements.[49] Most cases were settled by the payment of fines and a promise that the companies would cease effectuating no-poaching agreements.[50] In the October 2016 HR Guidance, the DOJ confirmed that it will continue to pursue no-poaching agreements as per se violations of Section 1.[51]

B. CRIMINAL PROSECUTION OF NO-POACHING AGREEMENTS

The DOJ's Antitrust Division has the authority to criminally prosecute antitrust cases.[52] With regard to criminal liability, Section 1 provides:

> Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[53]

The DOJ's Section 1 policy is to only prosecute agreements characterized as per se violations criminally, such as price-fixing, bid-rigging, and horizontal market allocation agreements.[54] The DOJ has now added "naked no-poaching agreements" to the list.[55] As mentioned in the

49. *See, e.g.*, Amended Complaint, *supra* note 6, at 19 (pursuing no-poaching agreements as per se violations); *see also In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1114–22 (N.D. Cal. 2012) (recognizing that it is a "false assumption" that the rule of reason should automatically apply to no-poaching agreements).

50. *See, e.g.*, Letter Re: Settlement, *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (2012) (No. e5:11-CV-02509-LHK), *available at* http://www.cand.uscourts.gov/filelibrary/1420/Letter_re_Settlement.pdf (informing the court that the parties reached a settlement agreement); *see also* Notice of Motion & Motion for Preliminary Approval of Settlement with The Walt Disney Co., Pixar, Lucasfilm & Two Pic MC, *In Re* Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175 (2015) (No. 5:14CV04062-LHK); Notice of Motion & Motion for Final Approval of Settlement with Sony Pictures Imageworks Inc., Sony Pictures Animation Inc., and Blue Sky Studios, Inc., *In Re* Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175 (2015) (No. 14-CV-4062-LHK).

51. HR GUIDANCE, *supra* note 15 at 3.

52. *See, e.g.*, Thomas O. Barnett, Assistant Attorney General, Address Presented at the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy (Sept. 14, 2006), *available at* https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model ("[I]n fiscal years 2004 and 2005, and so far in 2006, the Antitrust Division of the Department of Justice has obtained fines of $360 million, $338 million, and $473 million, respectively, and has brought criminal cases against 69 firms.").

53. 15 U.S.C. § 1 (2012).

54. *See* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886–87 (2007) ("[T]he *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.") (citations omitted). The *Leegin* Court pointed out that per se violations are usually horizontal restraints—not vertical restraints. *Id.* at 886; *accord* Bedi v. Hewlett–Packard Co., No. CV 07-12318-RWZ, 2008 WL 11226235, at *3 (D. Mass. Nov. 17, 2008) (holding HP and Staples' agreement that Staples would only sell ink made by HP and cease selling its own version of the ink was not per se illegal because the agreement was a vertical agreement that should be analyzed under the rule of reason).

55. *See* 15 U.S.C. § 1; HR GUIDANCE, *supra* note 15, at 3.

introduction of this Article, although the DOJ has argued that no-poaching agreements are per se violations, it previously pursued these agreements via civil prosecution only.[56]

As mentioned, courts analyze most antitrust violations under the rule of reason.[57] Hence, when it comes to most agreements, corporate officials are exposed to less risks when assessing them for antitrust compliance, and legal counsels can assist in preparing agreements that comply with the law.[58] However, with per se violations, corporate officials must simply refrain from the per se activity altogether.[59] Thus, human resource professionals must be well aware that: (1) the DOJ characterizes naked, no-poaching agreements as per se violations, and (2) the DOJ now intends to prosecute those agreements criminally.[60] Because corporate officers may be prosecuted criminally for violations under Section 1, human resource professionals may be on the hook for criminal liability if they facilitate naked, no-poaching agreements.[61]

The criminal prosecution of Section 1 violations come with greater penalties for defendants and require the DOJ to prove an additional element. To be successful in a criminal prosecution, in addition to the usual elements of an antitrust Section 1 claim, the DOJ must prove that the charged human resource professionals intended to commit the offense.[62] As the statute

56. *See, e.g.*, Plaintiff's Motion for Application, *supra* note 18, at 1–3, 13 (requesting application of the per se rule or a quick-look analysis); *see also* Lawrence E. Buterman et al., *The Department of Justice Will Criminally Prosecute Employee No-Poaching and Wage-Fixing Agreements*, LATHAM & WATKINS (Oct. 31, 2016), https://www.lw.com/thoughtLeadership/DOJ-will-criminally-prosecute-employee-no-poaching-and-wage-fixing-agreements ("This [decision to criminally prosecute individuals] signals an additional shift for the Antitrust Division, which in the recent past has only prosecuted companies for participating in anti-poaching and wage-fixing agreements.").

57. *See* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (noting courts apply the rule of reason "for the majority of anticompetitive practices challenged under [Section] 1").

58. *See id.*

59. *See, e.g.*, *Leegin*, 551 U.S. at 886 (making clear the per se rule "eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work . . . ."); Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343–44 (1982) (explaining the per se rule does not allow any business justifications to be offered).

60. *See* HR GUIDANCE, *supra* note 15, at 1 (stating the purpose of the guidance is to alert human resource professionals involved in hiring and compensation decisions about potential antitrust violations that may result from these decisions).

61. *See* United States v. Wise, 370 U.S. 405, 416 (1962). In terms of the meaning of "person" within the Act, the Supreme Court held regarding criminal prosecutions that "a corporate officer is subject to prosecution under [Section] 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime—regardless of whether he is acting in a representative capacity." *Id.*

62. *See* 15 U.S.C. § 1 (2012); *accord* Lee v. Life Ins. Co. of N.A., 829 F. Supp. 529, 535 (D.R.I. 1993), *aff'd*, 23 F.3d 14 (1st Cir. 1994).

> [T]o state a valid claim under § 1 of the Sherman Act, a plaintiff must allege three elements: (1) the existence of a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade under the per se or rule of reason analysis; and (3) that the restraint affected interstate commerce.

Id.; *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 435 (1978).

provides, human resource professionals found guilty of an antitrust violation may be imprisoned for up to ten years and may be fined for up to one million dollars.[63] These are crucial implications that one must understand to decipher the real-world implications of the DOJ's new policy to pursue anti-poaching agreements criminally.. While a remarkable volte-face on no-poaching agreement policy, as this Article will explain, the policy is strongly supported by well-established antitrust law and labor economics, as no-poaching agreements have clear anticompetitive effects on labor markets and closely mirror customer allocation agreements.

II. MARKET ALLOCATION: A PER SE VIOLATION CAPABLE OF CRIMINAL LIABILITY

Courts, as well as the DOJ, view market allocations[64] as one of the most dangerous anticompetitive agreements.[65] Market allocations are at the same anticompetitive level as price-fixing because they can restrain all competition, including price competition.[66] As the Seventh Circuit Court of Appeals articulated, "[i]t would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating

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> [W]e hold that a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.

Id.; *accord* United States v. Metro. Enters., Inc., 728 F.2d 444, 449 (10th Cir. 1984); *see also* Bob Nichols & Eric Schmitt, *Antitrust Violations*, 48 AM. CRIM. L. REV. 335, 337 (2011) ("In a criminal antitrust prosecution, the government must also prove the additional element that the defendant intended to restrain commerce.") (citing *Gypsum Co.*, 438 U.S. at 435); *see also Elements of the Offense*, OFF. OF THE U.S. ATT'Y (Nov. 2017), https://www.justice.gov/usam/antitrust-resource-manual-1-attorney-generals-policy-statement [hereinafter Antitrust Resource Manual (Web)] (listing the elements necessary for an antitrust claim to prevail).

63. 15 U.S.C. § 1. Corporations may be fined up to $100 million or may be fined under the "alternative fine statute." *Id.*; 18 U.S.C. § 3571(d) (2012).

64. The schemes are also referred to as market divisions or territorial allocation. *See* U.S. DEP'T OF JUSTICE, PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR, AN ANTITRUST PRIMER 3, https://www.justice.gov/sites/default/files/atr/legacy/2007/10/24/211578.pdf (last visited Oct. 24, 2017) [hereinafter, U.S. DEP'T OF JUSTICE, ANTITRUST PRIMER].

65. *See* Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995) (making clear that market allocations are very dangerous because they restrict "all competition"); ANTITRUST DIVISION MANUAL, *supra* note 13, at III-12 ("In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations.").

66. *Blue Cross & Blue Shield*, 65 F.3d at 1415; ANTITRUST DIVISION MANUAL, *supra* note 13, at III-12; *see also* Antitrust Resource Manual (Web), *supra* note 62 (listing the type of per se agreements the DOJ criminally prosecutes and listing territorial allocations as one of them).

price competition among them, but allowed them to divide markets, thus eliminating all competition among them."[67]

Market allocation occurs when two or more companies agree not to compete with each other in a market.[68] Companies may arrange the allocation agreements based on geography (a division by the Western Caribbean and Eastern Caribbean), customer-type (dividing customers by age group), or product-type (jewelry stores agreeing to divide the market by jewelry pieces—earrings, bracelets, rings, and so on).[69] Companies may also arrange the agreements with regard to specific customers.[70] To illustrate, if The Spa at Renaissance St. Croix Carambola, The Hideaway Spa & Salon at The Buccaneer Hotel, and the Surfside Spa at Divi Carina Bay, all located in St. Croix, U.S. Virgin Islands, each share their lists of resident clientele with one another and agree not to compete for each other's resident customers, the agreement would be customer allocation based on specific customers in a specific group.[71]

A. HORIZONTAL MARKET ALLOCATION VS. VERTICAL MARKET ALLOCATION

"[I]n the area of market allocations, because rule of reason analysis so often ultimately permits vertical market

67. *Blue Cross & Blue Shield*, 65 F.3d at 1415; ANTITRUST DIVISION MANUAL, *supra* note 13, at III-12; *see also* Antitrust Resource Manual (Web), *supra* note 62.

68. *See, e.g.*, Compact v. Metro. Gov't of Nashville & Davidson Cty., 594 F. Supp. 1567, 1576 (M.D. Tenn. 1984) ("A horizontal allocation of markets is characterized by three elements: (1) concerted action between two or more persons; (2) actual or potential competition between the participants in the conspiracy; and (3) an elimination of competition in the market serviced by the conspirators."); U.S. DEP'T OF JUSTICE, ANTITRUST PRIMER, *supra* note 64, at 3 ("Market division or allocation schemes are agreements in which competitors divide markets among themselves.").

69. *See, e.g.*, Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990) (holding geographic allocation between bar review course companies illegal); U.S. v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir. 1978) (holding customer allocation agreement illegal); U.S. DEP'T OF JUSTICE, ANTITRUST PRIMER, *supra* note 64, at 3 ("In [market division] schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves.").

70. *See Cadillac Overall Supply Co.*, 568 F.2d at 1090 (holding customer allocation agreement illegal).

71. The fact that the customer lists for spa services can be a trade secret, yet the spas are willingly sharing the lists with each other helps to show that such an agreement would be customer allocation. *See* Ruesch v. Ruesch Int'l Monetary Servs., Inc., 479 A.2d 295, 296–97 (D.C. 1984).

> The cases are legion in which customer lists have been held to be property in the nature of a 'trade secret' for which an employer is entitled to protection, independent of a non-disclosure contract, either under the law of agency or under the law of unfair trade practices. Equally true, however, is that the results vary from jurisdiction to jurisdiction, so that abundant authority may be found on either side of the issue.

Id. (citations and quotation marks omitted).

allocations, the horizontal/vertical determination may be the key issue in a case."[72]

A horizontal restraint occurs when companies who compete at the same level in a particular market or industry enter an anticompetitive agreement (e.g., Procter & Gamble and Colgate-Palmolive).[73] On the other hand, a vertical restraint occurs when "persons at different levels of the market structure[,] such as . . . a manufacturer and its distributor," or a distributor and retailer enter into an anticompetitive agreement (e.g., Lancôme and Nordstrom).[74] The distinction is that courts routinely apply the rule of reason to agreements that create vertical restraints, including vertical market allocations.[75] Whereas, courts usually condemn agreements that create horizontal restraints and almost always apply the per se rule to them.[76] Hence, this Section focuses on horizontal market allocations.

B. THE ANTICOMPETITIVE EFFECT OF HORIZONTAL MARKET ALLOCATIONS AND THE AGREEMENTS' TENDENCY TO RESTRICT ALL COMPETITION IN MARKETS

Horizontal market allocation agreements are almost always per se violations.[77] To understand why courts view these agreements as highly anticompetitive, it is important to understand perfect competition and the

72. Val D. Ricks & R. Chet Loftis, *Seeing the Diagonal Clearly: Telling Vertical from Horizontal in Antitrust Law*, 28 U. TOL. L. REV. 151, 155 (1996). *Compare Palmer*, 498 U.S. at 49 (analyzing a geographic market allocation under the per se rule), *with* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1997) (holding courts should judge non-price vertical restraints, like vertical geographical allocation, under the rule of reason).

73. U.S. DEP'T OF JUSTICE, ANTITRUST PRIMER, *supra* note 64, at 3 (explaining market allocations). One classic example of companies who compete with each other at the same level is Coca-Cola and PepsiCo competing in the beverage industry as beverage manufacturers. *See* Kim Bhasin, *COKE VS. PEPSI: The Amazing Story Behind the Cola Wars*, BUS. INSIDER (Nov. 2, 2011, 5:40 PM), http://www.businessinsider.com/soda-wars-coca-cola-pepsi-history-infographic-2011-11 (articulating the history of the Coke vs. Pepsi market competition).

74. ELGA A. GOODMAN ET AL., 50A NEW JERSEY PRACTICE, BUSINESS LAW DESKBOOK § 23:12 (2017–2018 ed.).

75. *Compare Palmer*, 498 U.S. at 49 (applying the per se rule to a horizontal territorial allocation agreement), *with Cont'l T. V., Inc.*, 433 U.S. at 36 (applying the rule of reason to a vertical allocation agreement).

76. *Compare Palmer*, 498 U.S. at 49, *with Cont'l T. V., Inc.*, 433 U.S. at 36.

77. *See* E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 4 (1st Cir. 2004) ("Almost the only important categories of agreements that reliably deserve [a per se] label today are those among competitors that amount to 'naked' price fixing, output restriction, or division of customers or territories."); *see, e.g.*, *Palmer*, 498 U.S. at 49 (analyzing a geographic market allocation under the per se rule); United States v. Topco Assocs., Inc., 405 U.S. 596, 596 (1972) (same); United States v. Sealy, Inc., 388 U.S. 350, 350 (1967) (same). But for an explanation of when the rule of reason might apply to horizontal allocations, *see, e.g.*, Rozema v. Marshfield Clinic, 977 F. Supp. 1362, 1374, 1378 (W.D. Wis. 1997) ("Market allocations that accompany and promote the success of larger endeavors are considered 'ancillary' trade restraints and warrant more in-depth analysis under the Rule of Reason."). Such ancillary restraints in relation to horizontal market allocations are rare, however. *See id.*

markers of a perfectly competitive market. A perfectly competitive market "is a hypothetical market where competition is at its greatest possible level[, and] . . . economists argue[] that perfect competition would produce the best possible outcomes for consumers, and society . . ." due to increased market efficiency.[78] An industry or market achieves perfect competition if

> the following five criteria are met: 1) All firms sell an identical product; 2) All firms are price takers . . . [—] they cannot control the market price of their product; 3) All firms have a relatively small market share; 4) Buyers have complete information about the product being sold and the prices charged by each firm; and 5) The industry is characterized by freedom of entry and exit.[79]

Though perfect competition is rarely ever achieved in the real world, antitrust law and economic theory discourage artificial alterations of perfect competition and market efficiency.[80] Now, having established the benchmarks of perfect competition, it is easier to recognize why courts characterize market allocation agreements as being just as problematic as price-fixing.

Antitrust analysis has made clear that horizontal market allocation agreements are anticompetitive because they eliminate or restrain competition.[81] These agreements eliminate customer competition (whether by region, product-type, or other allocation schemes) by eradicating freedom to enter into particular territories and so on.[82] Further, with market allocation agreements, companies are not price-takers because the agreements give them the power to restrict output and set high prices—in effect, eliminating price competition.[83] Moreover, the agreements are contrary to consumers'

78. *Perfect Competition*, ECONOMICS ONLINE, http://www.economicsonline.co.uk/Business_economics/Perfect_competition.html (last visited Apr. 27, 2017).

79. *Perfect Competition*, INVESTOPEDIA, http://www.investopedia.com/terms/p/perfectcompetition.asp#ixzz4fZvVTbT9 (last visited Apr. 27, 2017).

80. *See* Chris Gallant, *Does Perfect Competition Exist in the Real World?*, INVESTOPEDIA, http://www.investopedia.com/ask/answers/05/perfectcompetition.asp (last updated Feb. 1, 2018) (pointing out that perfect competition is seldom achieved in real world markets); *U.S. Antitrust Policy*, COUNCIL ON FOREIGN REL., http://www.cfr.org/corporate-regulation/us-antitrust-policy/p29984 (last updated Feb. 6, 2014) ("U.S. antitrust law aims to increase the economic efficiency of markets by preventing firms from unduly limiting competition.").

81. Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995) (making clear that market division eliminates all competition, including price competition).

82. *See id.*

83. *In re* Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279, 1313 (S.D. Fla. 2005) ("Horizontal agreements between competitors are antitrust's most 'suspect' classification, which as a group provoke closer scrutiny than any other arrangement. . . . As a general class, agreements between competitors to allocate markets are clearly anticompetitive, with the obvious tendency to diminish output and raise prices.") (citations omitted); U.S. DEP'T OF JUSTICE, ANTITRUST PRIMER, *supra* note 64, at 3.

freedom of choice, as they pre-select which consumers will have access to certain products in the market, which is contrary to antitrust policy.[84]

Hence, courts—recognizing that market allocation agreements artificially eliminate customer competition, price competition, and consumer choice, contrary to both antitrust and economic principles—have opined that these agreements are so anticompetitive that they warrant the application of the per se rule.[85] As such, courts believe these agreements are deserving of the rigid per se rule even where they remove only "some" competition.[86]

C. CRIMINAL PROSECUTION OF MARKET ALLOCATION AGREEMENTS

As horizontal market allocation agreements are almost always per se violations, they may be prosecuted criminally under Section 1.[87] *United States v. Suntar Roofing, Inc*.[88] is one case in which the DOJ prosecuted a market allocation agreement criminally.[89] There, two roofing companies and their presidents were charged with violating Section 1 due to an agreement among them allocating and dividing customers for their roof construction and installation services.[90] The Tenth Circuit Court of Appeals held that the agreement was a per se violation, there was sufficient evidence to show that the companies conspired with each other, and that the presidents had the requisite intent to satisfy a criminal antitrust claim.[91]

D. CUSTOMER ALLOCATIONS

Courts treat customer allocation agreements the same as any other market allocation agreement.[92] Hence, the per se rule applies to horizontal customer

84. *See, e.g.*, THOMAS J. COLLIN & MATTHEW D. RIDINGS, 12 BUS. & COM. LITIG. FED. CTS. § 129:54 (4th ed. 2017) (indicating that one of the reasons horizontal market allocations are per se violations is that "customers have no choice but to purchase from the seller that has rights in their territory").

85. *See, e.g.*, E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 4 (1st Cir. 2004); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990); United States v. Topco Assocs., Inc., 405 U.S. 596, 596 (1972); United States v. Sealy, Inc., 388 U.S. 350, 350 (1967).

86. *See, e.g.*, Blackburn v. Sweeney, 53 F.3d 825, 828 (7th Cir. 1995) (making clear a market allocation agreement only has to eliminate *some* competition to be treated as a per se violation). In *Blackburn*, the competitors, who were attorneys in Indiana, argued their agreement not to advertise in each other's territories only accounted for 90% of clients, and therefore, did not completely restrain competition. *Id.* The court made clear that whether advertising accounted for all their clients was immaterial; as long as allocation was intended, the per se standard applied. *Id.*

87. *See, e.g.*, United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1080 (5th Cir. 1978) (ruling on the appeal of a criminal prosecution for a customer allocation agreement).

88. United States v. Suntar Roofing, Inc., 897 F.2d 469 (10th Cir. 1990)

89. *Id.* at 471–72.

90. *Id.*

91. *Id.* at 476–81.

92. *See, e.g.*, United States v. Rose, 449 F.3d 627, 630 (5th Cir. 2006) (noting customer allocations are per se violations). In *Rose*, a corporate official was convicted of customer allocation. *Id.*; *see also* United States v. Goodman, 850 F.2d 1473, 1477 (11th Cir. 1988) ("[T]he government

allocation agreements and criminal liability is possible.[93] For instance, in *United States v. Consolidated Laundries Corp.*[94]—a criminal prosecution—the court applied the per se rule to a customer allocation agreement in which linen suppliers agreed not to compete for each other's established customers.[95] According to the court, it is immaterial whether a market allocation agreement is allocated by geography or customers; regardless, the per se rule would still apply.[96]

III. A CLOSER LOOK AT NO-POACHING AGREEMENTS

As explained in Part II, courts have been hesitant to apply the per se rule to no-poaching agreements.[97] This Section examines the kinds of no-poaching agreements that may be on the hook for per se liability and the types that courts may analyze under the rule of reason and likely uphold . Reviewing the characteristics of the per se rule and the rule of reason, no-poaching agreements will help to demonstrate that the anticompetitive effects of naked no-poaching agreements warrant the DOJ's policy to criminally pursue the use of no-poaching agreements.

A. NAKED NO-POACHING AGREEMENTS

If a no-poaching agreement (1) serves no legitimate business purpose, or (2) serves a legitimate business purpose but is *not* narrowly tailored to meet that purpose, courts will find a violation of Section 1.[98] The no-poaching agreement in *Union Circulation Co. v. Federal Trade Commission*,[99] for instance, was among magazine and periodical subscription companies that

is correct that a customer allocation agreement is a per se violation of the Sherman Act."); United States v. Coop. Theatres of Ohio, 845 F.2d 1367, 1371–72 (6th Cir. 1988) (applying the per se rule to movie theaters' agreement not to solicit each other's customers); *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 235 (E.D.N.Y. 2003) ("For more than a century, agreements between actual or potential competitors to allocate territories or customers have been considered *per se* violations of Section 1 of the Sherman Act.").

93. *See, e.g.*, United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1081 (5th Cir. 1978) (ruling on the appeal of criminal prosecution for a customer allocation agreement among garment supplier companies).

94. United States v. Consol. Laundries Corp., 291 F.2d 563 (2d Cir. 1961).

95. *Id.* at 574–75.

96. *Id.*

> Assuming that customers were allocated in the case at bar, no more need be proved; we agree that the per se rule should be applied. We fail to see any significant difference between an allocation of customers and an allocation of territory. . . . [T]heir agreement to suppress all competition as to one phase of their business, i.e., old customers, should be per se illegal irrespective of their competition for new customers.

Id.

97. *See supra* Part I (mentioning that no-poaching agreements have mostly been examined under rule of reason).

98. *See* Grimmer, *supra* note 15.

99. Union Circulation Co. v. FTC, 241 F.2d 652, 654 (2d Cir. 1957).

offered door-to-door service.[100] The companies agreed that they would refrain from hiring each other's employees for specific periods of time, often one year.[101] The business justification offered by the employers was that the agreements were created to promote good conduct because salesmen in their industry had been engaged in a number of dishonorable and fraudulent practices, including misappropriation of funds and the misrepresentation of magazine and periodical content.[102] The rationale was that without the agreements, the salesmen would be able to freely switch to another employer in the industry, and therefore, would be less likely to observe the employers' policies against fraudulent practices or respond to employer discipline for such behavior.[103] The Second Circuit Court of Appeals opined that the companies had violated Section 1 because the agreements harmed competition by freezing employee mobility.[104] The agreement—the court reasoned—was not sufficiently tailored to achieve the goal of deterring fraudulent salesmen, because the agreement affected *all* salesmen.[105] The agreement's reach to all salesmen was beyond what was reasonably necessary to prevent only those salesmen who engaged in fraudulent acts from escaping liability.[106]

No-poaching agreements like the agreement in *Union Circulation Co.* are naked restraints, which the Supreme Court of the United States has long held violate Section 1.[107] The DOJ has pursued certain anti-poaching agreements as per se violations on the premise that they are naked restraints.[108] For instance, in a complaint about an agreement among employers not to "cold call"[109] each other's employees, the DOJ argued that the purpose of the

100. *Id.* at 654.

101. *Id.* at 655.

102. *Id.*

103. *Id.* at 658; *see also* Haase & Mungerson, *supra* note 41, at 285 ("The focus of antitrust claims is on the effect an agreement has on the public, rather than the impacted employees. [If an agreement] . . . only affect[s] internal matters within the companies, there was no effect on the public, and thus, no antitrust implications.").

104. *Union Circulation Co.*, 241 F.2d at 658. The court also found the agreement to be an unfair method of competition under the Federal Trade Commission Act. *See id.*

105. *Id.* The court also mentioned that the agreement disadvantaged new competitors (e.g., start-ups) who needed sales representatives as employees. *Id.*

106. *Id.*

107. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 211 (1899) (affirming the ancillary restraints doctrine set forth by Justice William Howard Taft's Sixth Circuit decision, which provides that naked restraints violate the Sherman Act); *see also In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012). There, the court pointed out that the notion that all no-poaching agreements should be analyzed under the rule of reason is a "false assumption." *Id.* The naked vs. ancillary restraint analysis applies to no-poaching agreements. *See id.*

108. *See, e.g.*, Amended Complaint, *supra* note 6, at 19.

109. *See id.* at 8 (arguing that that "cold calling" is an effective recruitment method that promotes labor mobility and competitive wages, so the elimination of cold calling results in an elimination of competition). The Complaint mentions that "the recipient of the cold call has an opportunity to use competition among potential employers to increase her compensation and mobility." *Id.*

agreement was to restrict employee mobility and reduce wages.[110] Specifically regarding two companies, Apple and Pixar, the DOJ argued that the agreement applied to all of their employees and was not narrowly tailored by "geography, job function, product group, or time period, and [the agreement] was not ancillary to any legitimate collaboration between the companies."[111]

B. ANCILLARY NO-POACHING AGREEMENTS

> *"[C]ombinations, such as mergers, [and] joint ventures . . . hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason . . . to assess the combination's [sic] actual effect."*[112]

Though naked no-poaching agreements violate Section 1, there are instances in which no-poaching agreements may be ancillary restraints aimed at a legitimate business purpose.[113] Examples include no-poaching agreements in the context of intra-enterprises, joint ventures, and mergers and acquisitions (M&A) transactions.[114] Even in these contexts, 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.[115]

1. M&A Transactions and Divestitures

Courts give credence to no-poaching agreements made during an acquisition of a company or part of a company, because they serve to ensure that the acquirer obtains the benefits of its purchase, including the employees.[116] For instance, in *Cesnik v. Chrysler Corp.*,[117] Chrysler sold its Airtemp Division (Airtemp) to Fedders Corporation (Fedders). As part of the deal—to maintain Fedders' interest in purchasing Airtemp—Chrysler entered into a no-poaching agreement with Fedders not to rehire employees

110. *See id.* at 10 ("Defendants entered into the express agreements and entered into the overarching conspiracy with knowledge of the other Defendants' participation, and with the intent of accomplishing the conspiracy's objective: to reduce employee compensation and mobility through eliminating competition for skilled labor.").

111. *See id.* (mentioning the agreement between Apple and Pixar applied to all employees and was not narrowly tailored in duration or scope).

112. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984).

113. *See generally* Cesnik v. Chrysler Corp., 490 F. Supp. 859, 859 (M.D. Tenn. 1980).

114. *See id.*

115. *See id.*

116. *See, e.g.*, Coleman v. Gen. Elec. Co., 643 F. Supp. 1229, 1243 (E.D. Tenn. 1986), *aff'd*, 822 F.2d 59 (6th Cir. 1987) (applying the rule of reason to a no-poaching agreement entered into after the sale of a corporation); *Cesnik*, 490 F. Supp. at 868 (holding that a no-poaching agreement used to effectuate an acquisition was a reasonable ancillary restraint).

117. *Cesnik*, 490 F. Supp. at 862.

who worked with Airtemp at the time of the sale.[118] The employees who worked with Airtemp brought suit under Section 1.[119] Applying the rule of reason, the court ruled that the restraint was reasonable and ancillary to the sale of Airtemp because Airtemp's employees were considered to be its assets; therefore, the agreement secured Fedders' benefits in purchasing Airtemp.[120] The agreement was also appropriately tailored to effectuate the sale, as it only applied to the specific employees affected by the acquisition.[121]

Similarly, in *Eichorn v. AT&T Corp.*,[122] the court evaluated a no-poaching agreement between a parent company (AT&T) and one of its affiliates, after a divestiture.[123] The agreement only applied to employees who made $50,000 or more per year and had a restricted duration of eight months.[124] The court opined that this agreement was a reasonable and ancillary restraint that was appropriately limited in scope and duration. The court further stated that the agreement did not have a "significant anticompetitive effect" on labor in the industry by, for instance, fixing wages.[125]

2. "Legitimate Joint Ventures"

Narrowly tailored no-poaching agreements entered into during collaborations or joint ventures are reasonable under Section 1.[126] Agreements arising out of joint ventures between companies are agreements

118. *Id.*

119. *Id.* (The plaintiffs had standing.)

120. *Id.* at 868 (The court refused to apply the per se standard.)

121. *Id.* (The court also noted that the agreement was similar to a covenant not to compete.)

122. Eichorn v. AT & T Corp., 248 F.3d 131, 136 (3d Cir. 2001).

123. *Id.* at 141 (In sum, AT&T sold a subsidiary to an affiliate.)

124. *Id.* at 136–37.

125. *Id.* at 148 (holding under the rule of reason the agreement did not violate antitrust laws because it did not fix labor costs in the industry and did not interfere with the plaintiff's ability to freely seek employment in the industry); *see also* Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues in Labor Markets*, 26 ANTITRUST 3, 74 (2012), http://files.dorsey.com/files/Upload/eU_LE_antitrust_poaching_072412.pdf ("Although the *Eichorn* opinion does not clearly say so, the post-spin former affiliates were probably not significant competitors of each other, at least not as of immediately after the spin-off. Nevertheless, there was an efficiency-based justification for the restraint[.]").

126. *See* HR GUIDANCE, *supra* note 15; *accord* Buterman et al., *supra* note 56.

> The Antitrust Guidance explains that legitimate joint ventures, such as appropriate shared use of facilities, are not considered per se illegal under the antitrust laws. Accordingly, tailored agreements to restrict hiring that are "reasonably necessary" for legitimate collaborations may not violate the antitrust laws. In a blog post accompanying the Antitrust Guidance, FTC officials Debbie Feinstein, Geoffrey Green and Tara Koslov also identify "consulting services, outsourcing vendors, and mergers or acquisitions" as part of a non-exhaustive list of circumstances in which no-poaching agreements or other restraints on recruiting and compensation may not violate the antitrust laws.

Id.

between a single firm.[127] In a joint venture, the companies are not competing; rather, they are working toward a unified goal and have the same economic power in regard to the joint venture.[128] The DOJ has made it clear that agreements in furtherance of joint ventures are not the type of no-poaching agreements the Antitrust Division expects to prosecute as criminal per se violations.[129] The HR Guidance specifically provides that "[l]egitimate joint ventures . . . [between employers] are not considered per se illegal under the antitrust laws."[130]

3. Agreements between Intra-Enterprises

An agreement or conspiracy that violates Section 1 must be between two or more companies.[131] Under the *Copperweld* doctrine, coordination between a parent company and its wholly-owned subsidiary is the collaboration of a single enterprise, so long as common interests and objectives exist between the parent company and the subsidiary.[132] Under the doctrine, no-poaching agreements between parent companies and subsidiaries are reasonable because if there is a unity of interests, the conspiracy element of Section 1 is absent.[133] A single-enterprise's policy not to hire amongst its businesses is merely an internal decision that does not impact the general public.[134] For

127. *See* Texaco Inc. v. Dagher, 547 U.S. 2, 3 (2006). In *Texaco*, Texaco and Shell entered a joint venture company called Equilon Enterprises to sell oil in western states. *Id.* at 3. The companies decided to sell the oil under their original brands and sell the oil for the same price. *Id.* Gas station owners sued the companies claiming price-fixing, a per se violation of Section 1. *Id.* The Court held, though the companies set a single price, the per se standard did not apply because the companies were not competing as they were involved in a joint venture and the single price arose out of that joint venture. *Id.* at 6–8.

128. *See, e.g.*, *id.*

129. *See* HR GUIDANCE, *supra* note 15, at 3.

130. *Id.*; *see also Texaco*, 547 U.S. at 3.

131. *See* Lynch v. Magnavox Co., 94 F.2d 883, 889 (9th Cir. 1938) ("[A] combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.") (quoting Marino v. United States, 91 F.2d 691, 693 (9th Cir. 1937)).

132. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 755 (1984) (holding Copperweld Corp. and its subsidiary, Regal, were "incapable" of conspiracy because they shared a community of interests). A well-known example of an organization that does *not* meet the *Copperweld* doctrine is the National Football League (NFL). *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 184 (2010). In *American Needle*, the NFL was not a single enterprise because it consisted of 32 teams that, *inter alia*, competed, had different owners, were independently managed, and held separate economic power (rather than "a single aggregation of economic power"). *Id.* ("They compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel. . . ."). The Court also noted that when NFL teams license their intellectual property, they are "potentially competing." *Id.* To illustrate the Court's point, the Giants and the Patriots may compete for brands, such as Reebok or Nike, rather than come together as a unit to get deals with Reebok or Nike for *all* 32 teams in the NFL. *See id.* (supporting this example).

133. *See* Thomsen v. W. Elec. Co., Inc., 680 F.2d 1263, 1266 (9th Cir. 1982) (holding a company can restrict its employees from moving to its subsidiaries).

134. *See id.* at 1268.

instance, in *Thomsen v. Western Electric Co.*,[135] a phone company restricted its employees from moving between its subsidiary companies.[136] Upholding the district court's grant of summary judgment to the company, the Ninth Circuit Court of Appeals held that "actions of affiliated corporations which touch only on internal operations and have no anti-competitive consequences cannot violate [Section] 1."[137]

IV. UNDERSTANDING THE BASIC ECONOMICS OF THE LABOR MARKET

To fully grasp the effect that no-poaching agreements have on employees' wages and mobility, thereby restricting competition, a basic understanding of labor economics is necessary. This Section will describe the landscape of a perfectly competitive labor market. In addition, the Section will explain how no-poaching agreements affect each characteristic of perfect competition, contrary to antitrust policy to promote and assure competitive markets. Upon reviewing basic labor economic principles, it will become apparent that labor economics fully supports the DOJ's policy to pursue no-poaching agreements criminally.

"A perfectly competitive labor market has the following characteristics[:] (1) a large number of firms competing to hire a specific type of labor, (2)

135. *Id.* at 1265.

136. *Id.* at 1265–66. The subsidiaries were Western Electric and Pacific Telephone, and the parent company was American Telephone and Telegraph Company (referred to as AT&T). *Id.* at 1266.

137. *Id.* at 1266 (noting the practice of not hiring employees who are already part of the company as a whole was a "matter of internal management"). The *Thomsen* view has been applied in the franchise context. *See* Williams v. Nevada, 794 F. Supp. 1026, 1026 (D. Nev. 1992), *aff'd sub nom.* Williams v. I.B. Fischer Nev., 999 F.2d 445 (9th Cir. 1993). Following *Thomsen*, the United States District Court of Nevada held that a no-poaching agreement between franchisees did not restrain competition because franchisees operate as a single entity. *Id.* at 1031–32. The court reasoned:

> In a fast-food franchise the franchisor does everything to promote a uniform, non-competitive environment between the franchises: Each franchise serves substantially the same products; the products are served to the public in the same manner; the franchisor develops products and services for all franchises; the employees dress alike; the decor of each franchise is similar; the franchises are advertised as a single enterprise with a single logo; and the franchisor contracts with each franchise for exclusivity within a certain geographic area to minimize competition between the franchises.

Id. at 1031; *see also In re* Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 289 (E.D. Pa. 2009) ("[T]he plenary control of the franchisor and the common economic goals makes them a single entity . . . .") (citing *Williams*, 794 F. Supp. at 1032). The Ninth Circuit Court of Appeals upheld the decision on appeal. *Compare Williams*, 999 F.2d at 447 (agreeing that a single-enterprise existed and upholding the district court's grant of summary judgment). Louis Altman & Malla Pollack, 3 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 16:43 (4th ed. 2017) ("The reasoning in the Williams case is questionable, however, because cofranchisees are in a competitive relationship with each other for some purposes, including the hiring of employees."). However, with regard to franchisees, a counterargument exists. *Id.* (calling into question the soundness of the *Williams* court's reasoning). One commentator stated, "[t]he reasoning in the Williams case is questionable . . . because cofranchisees are in a competitive relationship with each other for some purposes, including the hiring of employees." *Id.*

numerous people with homogeneous skills who independently supply their labor services, (3) wage-taking behavior, and (4) perfect, costless information and labor mobility."[138] As previously mentioned, perfect competition will never be precisely achieved in traditional product markets, but the goal is to come as close as possible to perfect competition; the same principle applies to labor markets.[139]

In a perfectly competitive labor market, firms are forced to pay workers the equilibrium wage because if they offer lower wages, workers will seek employment in firms that pay the equilibrium wage.[140] Similarly, workers are forced to take the equilibrium wage rate[141] because their earning potential is uniform among firms.[142] This balanced interplay between the equilibrium wage, workers, and employers is the meaning of wage-taking behavior.[143] The equilibrium market wage is the meeting point for supply and demand in a specific labor industry; in other words, supply equals demand.[144] Consequently, disequilibrium in the labor market is common.[145] When labor supply is higher than labor demand, it creates disequilibrium, which results in a decrease in wage rate; this typically occurs in labor industries that do not

138. Survey of Labor Economics and Institutions Liberal Studies, B2D1: Course Lecture Notes and Interactive Graphs, Chapter 6: Wage Determination and the Allocation of Labor, Theory of a Perfectly Competitive Labor Market, IND. ST. U., http://isu.indstate.edu/conant/ecn351/ch6/chapter6.htm (last visited Apr. 10, 2017) [hereainfter Wage Determination and the Allocation of Labor].

139. *See* Gallant, *supra* note 80 (pointing out that perfect competition is seldom achieved in real world markets).

140. *See Wage Determination in Perfectly Competitive Labour Markets*, ECONOMICSHELP, http://www.economicshelp.org/labour-markets/wage-determination/ (last visited Apr. 6, 2017) (explaining how wages behave in a perfectly competitive market); *Demand for Labor*, ECONOMICSHELP, http://www.economicshelp.org/labour-markets/demand-labour/ (last visited Apr. 6, 2017) (explaining that firms are wage-takers in a perfectly competitive labor market).

141. Wage rate can also be referred to as the price or cost of labor. *See Cost of Labor*, INVESTOPEDIA, http://www.investopedia.com/terms/c/cost-of-labor.asp#ixzz4ekIud999 (last visited Apr. 19, 2017) ("The cost of labor is the sum of all wages paid to employees, as well as the cost of employee benefits and payroll taxes paid by an employer.").

142. *See Wage Determination in Perfectly Competitive Labour Markets*, *supra* note 140 (explaining wage behavior in a perfectly competitive market).

143. *See id.*

144. *Id.* At equilibrium, everyone—employers and workers—is satisfied with the labor market. *See* Wage Determination and the Allocation of Labor, *supra* note 138 ("If the quantity supplied does not equal the quantity demanded, someone (a labor buyer or seller) will be unable to realize their desires, and the wage will be bid up or down by these frustrated labor market participants."); GEORGE J. BORJAS, LABOR ECONOMICS 145 (7th ed. 1959), *available at* https://www.hks.harvard.edu/fs/gborjas/publications/books/LE/LEChapter4.pdf ("The wage w * is the market-clearing wage because any other wage level would create either upward or downward pressures on the wage; there would be too many jobs chasing the few available workers or too many workers competing for the few available jobs.").

145. *See* Gallant, *supra* note 80 (explaining that real world markets are imperfect); *see also Disequilibrium*, ECONOMICSHELP, http://www.economicshelp.org/concepts/disequilibrium/ (last visited Apr. 13, 2017) (explaining that disequilibrium occurs "when the markets fail to clear and find their final equilibrium point").

require highly skilled workers.[146] Further, when labor demand is higher than labor supply, creating disequilibrium, wage rates increase—typically occurring in industries that require highly skilled workers.[147]

In labor industries, elasticity in labor supply and demand can affect wage rates.[148] Labor elasticity refers to the way employers and workers respond to changes in wage rates.[149] The way workers respond to the wage rate represents the elasticity of labor supply.[150] If labor supply is elastic—having an abundance of workers—labor supply (workers) would be available at a constant wage rate.[151] For instance, the labor supply of Wendy's[152] workers remains relatively elastic because many people can perform the job.[153]

On the other hand, to enter highly skilled industries—for instance, the technology, medical, and legal fields—workers must have industry qualifications, such as specialized or professional degrees and training (e.g., residencies in medicine) and may need to sit for requisite exams (e.g., the Professional Engineer exam or the Bar exam).[154] The industry qualifications necessary in those fields create barriers to entering the industries, which results in low labor supply of skilled workers.[155] Because there is not an abundance of skilled workers, labor supply is inelastic in labor industries that require skilled workers, having little or no response to changes in wage rates.[156]

146. *See* BORJAS, *supra* note 144, at 164–79 (mentioning pressures on wages include an overabundance of supply where there are few jobs and high demand where there are not enough workers).

147. *Id.*

148. *See ECON 390 – Labor Economics, Labor Elasticity Concepts*, FORT LEWIS C., http://faculty.fortlewis.edu/walker_d/econ_390_-_handout_on.htm (last visited Apr. 16, 2017) [hereinafter *Labor Elasticity Concepts*] (explaining elasticity in the labor market).

149. *See id.*

150. *See id.*

151. *See id.*; *see also Wage Determination in Perfectly Competitive Labour Markets*, *supra* note 140.

152. Wendy's is an international fast food chain restaurant headquartered in the United States. *See About Us*, WENDY'S, https://www.wendys.com/en-us/about-wendys (last visited Feb. 4, 2018); *see also Find Jobs*, WENDY'S, https://careers.wendys.com/?_ga=2.134569784.897527081.1517099988-1690818642.1517099969 (last visited Feb. 4, 2018).

153. *See Wage Determination in Perfectly Competitive Labour Markets*, *supra* note 140 (explaining that McDonald's workers receive lower pay than lawyers because the supply of McDonald's workers is elastic).

154. *See e.g.*, *PE Exam*, NAT'L COUNCIL OF EXAMINERS FOR ENGINEERING AND SURVEYING, http://ncees.org/engineering/pe/ (last visited Apr. 14, 2017) (explaining the purpose of the PE exam and the necessary qualifications to sit for the exam); *Regular Admissions*, SUP. CT. OF THE U.S. V.I., http://www.visupremecourt.org/Professional_Regulation/Bar_Admission/Regular_Admissions/ (last visited Apr. 13, 2017) (explaining that an applicant must graduate from an American Bar Association accredited law school to sit for the U.S. Virgin Islands Bar Exam).

155. *See* Wage Determination and the Allocation of Labor, *supra* note 138 (pointing out that when a lot of training is required, labor supply decreases).

156. *Id.* ("[T]he more specialized the type of labor, the less elastic the labor supply curve.").

The way employers respond to changes in wage rates is the elasticity of labor demand.[157] It depends on "[l]abour costs as a % of total costs[,] . . . [t]he ease and cost of factor substitution[,] . . . [and,] [t]he price elasticity of demand for the final output produced by a business . . . ."[158] It is more difficult for firms to substitute highly skilled workers even though artificial intelligence exists; thus, demand for highly skilled workers is typically high.[159] The high demand for skilled workers typically increases wage rates as firms compete for the low supply of those workers.[160]

Having laid out the labor economics foundation necessary to comprehend and effectively discern that labor economics and the principles of antitrust support the DOJ's policy to pursue anti-poaching agreements criminally, let us turn to a thorough analysis of the policy's soundness.

V. EMPLOYEE ALLOCATION: PROVING NAKED NO-POACHING AGREEMENTS AS HIGHLY ANTICOMPETITIVE AND DESERVING OF PER SE CONDEMNATION AND CRIMINAL PROSECUTION

Labor economics and per se antitrust analysis overwhelmingly supports the DOJ's decision to prosecute naked no-poaching agreements criminally. . It is true that courts have traditionally applied the rule of reason to no-poaching agreements and when using the rule of reason, courts have

157. *See Labor Elasticity Concepts*, *supra* note 148 (explaining elasticity in the labor market).

158. *Elasticity of Labour Demand (Labour Demands)*, TUTOR2U, https://www.tutor2u.net/economics/reference/labour-market-elasticity-of-labour-demand (last visited Apr. 14, 2017) (explaining the factors that affect the demand for labor). The source provides:

> [Labor] costs as a % of total costs: When [labor] expenses are a high proportion of total costs, then labour demand is more elastic than a business where fixed costs of capital are the dominant business expense. In many service jobs such as customer service [centers] or gas boiler repairs, [labor] costs are a high proportion of the total costs of a business.
>
> The ease and cost of factor substitution: [Labor] demand will be more elastic when a firm can substitute quickly and easily between [labor] and capital inputs. When specialised [labor] or capital is needed, then the demand for labour will be more inelastic with respect to the wage rate. For example[,] it might be fairly easy and cheap to replace security guards with cameras but a hotel would find it almost impossible to replace hotel cleaning staff with machinery!
>
> The price elasticity of demand for the final output produced by a business: If a firm is operating in a highly competitive market where final demand for the product is price elastic, they may have little market power to pass on higher wage costs to consumers through a higher price. The demand for [labor] may therefore be more elastic as a consequence. In contrast, a firm that sells a product where final demand is inelastic will be better placed to pass on higher costs to consumers.

Id.

159. *See id.*

160. *See id.*

frequently upheld these agreements.[161] However, in such cases the no-poaching agreements in question were seemingly ancillary to a legitimate business purpose.[162]

Courts have enough experience with naked restraints and no-poaching agreements to identify when agreements constitute naked no-poaching agreements, especially if they are akin to the untailored, overbroad agreement that was at issue in *Union Circulation Co.*[163] Further, because no-poaching agreements are similar in nature to customer allocation agreements, a strong history of antitrust analyses and rationales support the per se characterization of naked no-poaching agreements. Given courts' experience with naked restraints and no-poaching agreements, along with the effect that naked no-poaching agreements have on labor markets, it is appropriate to characterize naked no-poaching agreements as per se violations.

A. NAKED NO-POACHING AGREEMENTS' EFFECTS ON LABOR MARKETS SUPPORT PER SE TREATMENT

While a perfectly competitive labor market is rarely ever achieved in the real world, the labor market's imperfections should not be the result of artificial manipulation by the market's players; rather, the labor market's imperfections should be organic.[164] Recall that in a perfectly competitive labor market, there are "(1) a large number of firms competing to hire a specific type of labor, (2) numerous people with homogeneous skills who independently supply their labor services, (3) wage-taking behavior, and (4) perfect, costless information and labor mobility."[165] No-poaching agreements among employers in specific industries artificially alter three characteristics of a competitive labor market—many firms competing to hire labor, wage-taking behavior, and labor mobility.[166]

First, there is no dispute that no-poaching agreements, by their nature, eliminate competition among employers for specific types of labor.[167] When

161. *See, e.g.*, Union Circulation Co. v. FTC, 241 F.2d 652, 657 (2d Cir. 1957) (applying the rule of reason to a no-poaching agreement); Cesnik v. Chrysler Corp., 490 F. Supp. 859, 867 (M.D. Tenn. 1980) (applying the rule of reason).

162. *See, e.g.*, *Cesnik*, 490 F. Supp. at 861 (holding that a no-poaching agreement used to effectuate an acquisition was a reasonably ancillary restraint); *see also supra* Part III, Section B (evaluating ancillary no-poaching agreements).

163. *See, e.g.*, *Union Circulation Co.*, 241 F.2d at 657 (holding a no-poaching agreement was illegal because it was not narrowly tailored toward the target employees engaged in fraudulent conduct, as it affected all employees).

164. *See* Gallant, *supra* note 80 (pointing out that perfect competition is seldom achieved in real world markets); *see also supra* Part IV (explaining the basic economics of the labor market).

165. Wage Determination and the Allocation of Labor, *supra* note 138.

166. *See, e.g.*, Amended Complaint, *supra* note 6, at 10 (explaining the cold call agreement restricts mobility and eliminates competition).

167. *See, e.g.*, *Union Circulation Co.*, 241 F.2d at 657 (holding a no-poaching agreement that makes no effort to limit its scope or duration violates antitrust laws); *see also* Amended Complaint, *supra* note 6.

employers agree not to poach each other's employees, they are saying, "I won't recruit your employees if you don't recruit mine."[168] This concept either eliminates or minimizes competition among employers competing for specific types of labor.[169]

Second, as previously mentioned, wage-taking behavior means that employers would be forced to pay employees the equilibrium wage rate for specific occupations.[170] No-poaching agreements among employers artificially alter this wage-taking behavior in industry labor markets.[171] Given that one way employers typically compete for each other's employees is to offer competitors' employees higher wages, no-poaching agreements decrease the likelihood of any employer offering employees higher wages, as they have agreed not to poach each other's employees.[172] This effect results in employees in similar positions at different companies all receiving the same or similar artificially lowered wages.[173] This is a wage-fixing effect created by employers altering the wage-taking behavior of a competitive labor market.[174]

The opposing argument is that employers who need to hire skilled employees might argue that the labor market is already imperfect because the low supply of highly skilled employees creates disequilibrium, and therefore, their no-poaching agreements do not have a large effect on already imperfect markets.[175] This argument is both immaterial and flawed because: (1) antitrust law does not permit business justifications for per se violations, like wage-fixing, and (2) antitrust law does not focus on natural disequilibrium in

168. *See, e.g.*, Amended Complaint, *supra* note 6, at 7–9 (explaining that agreeing not to cold call eliminates a big part of recruiting employees from competitors).

169. *See, e.g.*, *Union Circulation Co.*, 241 F.2d at 657 (holding competition was eliminated with regard to the employees' skills without a legitimate business purpose).

170. *See Wage Determination in Perfectly Competitive Labour Markets*, *supra* note 140 (explaining how wages behave in a perfectly competitive market); *Demand for Labor*, *supra* note 140 (explaining that individuals are wage-takers in a perfectly competitive labor market).

171. *See supra* note 140 and accompanying text.

172. *See, e.g.*, Giuseppe Moscarini & Fabien Postel-Vinay, *The Timing of Labor Market Expansions: New Facts and a New Hypothesis* 1–2 (unpublished manuscript) *available at* https://campuspress.yale.edu/moscarini/files/2017/01/bmdynamicNBER_MA-1nypi6q.pdf ("Firms offer higher wages only when they run out of cheap unemployed job applicants and find it profitable to steal employees from their competitors, who in turn fight back and start paying more to retain their workers.").

173. *See id.* If there is no competition for employees, firms have little desire and decreased pressures to increase wages. *Id.*

174. BORJAS, *supra* note 144, at 187–97 (discussing how wages respond to a lack of competition for employees in a labor market).

175. *Id.* at 145 ("The wage w * is the market-clearing wage because any other wage level would create either upward or downward pressures on the wage; there would be too many jobs chasing the few available workers or too many workers competing for the few available jobs."); *Disequilibrium*, *supra* note 145 (explaining disequilibrium takes "when the markets fail to clear and find their final equilibrium point").

the market; rather it focuses on restrictions on competition and artificial disruptions by players in the market.[176]

Lastly, no-poaching agreements restrict labor mobility and infringe on employees' freedom of choice.[177] Recruitment is one integral way that employers compete for talented employees.[178] Hence, when employers agree not to recruit or poach each other's employees, they are using the agreement as a tool to retain their best employees and prevent those employees from moving to competitors.[179] While employers may be well-intentioned with regard to looking out for their companies' best interests, no-poaching agreements are contrary to employees' mobility.[180] In a competitive market, employees should be able to freely move to other companies, but no-poaching agreements artificially interfere with that freedom.[181] Therefore, as no-poaching agreements artificially affect three major facets of the labor market (numerous firms competing to hire labor; wage-taking behavior; and labor mobility), no-poaching agreements that *do not* serve some legitimate purpose, for example, the effectuation of an M&A or a joint venture, violate Section 1.[182] Consequently, courts can apply the per se rule to naked no-poaching agreements, which serve no purpose other than to disrupt labor competition; no-poaching agreements' harmful effects on labor competition are apparent when analyzing their effects on a competitive labor market.[183]

176. *See, e.g.*, Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343–45 (1982) (explaining that the per se rule eliminates the need to perform a market analysis and defendants cannot offer procompetitive benefits or business justifications); *About the Division*, *supra* note 21 (articulating that the purpose of antitrust laws is "to protect economic freedom and opportunity by promoting free and fair competition in the marketplace").

177. *See, e.g.*, Union Circulation Co. v. FTC, 241 F.2d 652, 654 (2d Cir. 1957) (mentioning the no-poaching agreement restricted the employees' freedom to move to other companies in the sales industry).

178. *See* Amended Complaint, *supra* note 6, at 8–9 (explaining how employers typically use recruitment).

179. *See id.*

180. BORJAS, *supra* note 144, at 145; *Disequilibrium*, *supra* note 145.

181. BORJAS, *supra* note 144, at 145; *Disequilibrium*, *supra* note 145.

182. *See, e.g.*, *Union Circulation Co.*, 241 F.2d at 657; *Gallant*, *supra* note 80; *Wage Determination in Perfectly Competitive Labour Markets*, *supra* note 140.

183. *See, e.g.*, *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (recognizing that it is a "false assumption" to assume the rule of reason applies to all no-poaching agreements). While courts have not yet expressly held that naked no-poaching agreements should be treated as per se, it is not necessary for them to do so. *See id.* The court stated:

> Defendants' argument relies on the false assumption that the Court should apply a rule of reason analysis, but as the parties agree, . . . the Court need not decide now whether *per se* or rule of reason analysis applies. Indeed, that decision is more appropriate on a motion for summary judgment. Plaintiffs have successfully pled a *per se* violation of the Sherman Act for purposes of surviving a 12(b)(6) motion, . . . and therefore no market analysis is required at this time.

Id. (citations omitted). *See also* Plaintiff's Motion for Application, *supra* note 18.

> The per se rule does not condemn specific agreements based on their particular language or details; it condemns entire classes of agreements based on their terms and economic

Accordingly, the DOJ's commitment to scrutinize naked no-poaching agreements as criminal per se violations is entrenched in economics, which is the root of antitrust principles.

B. NAKED NO-POACHING AGREEMENTS MIRROR CUSTOMER ALLOCATION AGREEMENTS

Notwithstanding the support labor economics lends to the DOJ's policy, as previously stated, the touchstone for why it is logical for the DOJ to pursue naked anti-poaching agreements criminally is two-fold. Thus, now that we have deduced the anticompetitive effects of naked no-poaching agreements based solely on the fundamentals of labor economics, we can now delve into the second dimension supporting the DOJ's policy. This Section explains how established antitrust laws support the DOJ's policy to pursue naked no-poaching agreements criminally.

Recall from Part II that customer allocation agreements, a form of market allocation, are agreements between competitors to allocate customers among themselves.[184] Let us use the customer allocation agreement in *United States v. Cadillac Overall Supply Co.*[185] for illustrative purposes. There, the case concerned an agreement among uniform and industrial clothing rental companies in Florida not to solicit each other's customers and to discourage customers from switching to other rental companies.[186] Further, when the companies' discouragement was unsuccessful, managers had meetings which involved exchanging customer accounts so that customers were shared among each company equally.[187] The court held that the agreement was a per se violation because the agreement restricted free choice among customers and artificially stabilized prices.[188]

No-poaching agreements operate similarly to customer allocation agreements.[189] Again, no-poaching agreements practically say, "I won't recruit your employees if you don't recruit mine," and "If we hire employee

> effects. . . . (But sometimes the reasonableness judgment can be generalized for a class of behavior or for a class of claimed defenses.) Economic analysis, combined with *stare decisis*, drives the inquiry. ([P]er se rule applies where serious pernicious effects are likely to result from most of its concrete manifestations, and social benefits are likely to be absent or small or readily achievable in other ways).

Id. (citations and internal quotation marks omitted).

184. *See supra* Part II, Section D (citing various cases involving customer allocation agreements, including United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir. 1978)).

185. *Cadillac Overall Supply Co.*, 568 F.2d at 1081.

186. *Id.*

187. *Id.*

188. *Id.* at 1082.

189. *Compare id.* at 1081 (where the companies agreed to actively ensure that customers stayed with their current supplier), *with* Order Denying Approval of Settlements, *supra* note 12 (where the companies agreed not to recruit or seek out each other's employees so that employees remain with their current employer).

Q first, employee Q is ours forever."[190] Agreements of this nature are similar to customer allocation agreements because customer allocation agreements practically say, "These were my customers first, so they will be my customers forever."[191] Summarily, both no-poaching agreements and allocation agreements possess territorial and entitlement components; "these customers or these employees are mine, you can't have them, so let's agree not to compete for them."[192]

Both no-poaching agreements and customer allocation agreements have similar anticompetitive effects in markets.[193] As this Article proves in the labor market analysis above, agreements between employers not to recruit or compete for each other's employees restrict employee mobility, which infringes on employees' freedom of choice, and artificially interfere with wage-taking behavior, which results in wage-fixing.[194] To demonstrate, let us compare labor market competition disruptions caused by no-poaching agreements to market competition disruptions caused by customer allocation agreements.

First, customer allocation can result in higher prices for customers because they tend to eliminate price competition; this effect is similar to no-poaching agreements because the elimination of competition among employers can result in low wages for employees.[195]Second, just as customer allocation agreements demote consumers' freedom of choice and decrease options in products because they pre-select which consumers will have access to certain products in the market, no-poaching agreements restrict employees' freedom of movement and freedom of choice to work wherever such employees desire within labor markets.[196] Thus, no-poaching

190. *See* Moscarini & Postel-Vinay, *supra* note 172; *see also* Grimmer, *supra* note 15 ("Like an (illegal) agreement among competitors to divide sales territories, a naked agreement among competitors for labor simply to not hire each other's employees is likely *per se* illegal (in essence, they both entail 'you keep what's yours, I keep what's mine')."). The same principle applies to market allocation agreements that divide markets by customers (namely, customer allocation agreements). *See id.*

191. *See* Grimmer, *supra* note 15 (mentioning the entitlement nature of no-poaching agreements and market allocation agreements).

192. *See* United States v. Consol. Laundries Corp., 291 F.2d 563, 574–75 (2d Cir. 1961) (holding businesses agreeing not to compete for "old customers" was illegal even though they competed for new customers). The companies' agreement indicated their belief that they were entitled to customers they had already gained. *Id.*

193. *See supra* Part V, Section A (analyzing the anticompetitive effects of no-poaching agreements).

194. *See supra* Part V, Section A.

195. *See In re* Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279, 1293 (S.D. Fla. 2005) (explaining that customer allocation agreements are per se illegal because they have the "tendency to diminish output and raise prices").

196. *See, e.g.*, COLLIN & RIDINGS, *supra* note 84 ("Under the antitrust laws, it is unlawful for horizontal competitors to divide up territories so customers have no choice but to purchase from the seller that has rights in their territory."); Union Circulation Co. v. FTC, 241 F.2d 652, 655 (2d Cir. 1957) (mentioning that the no-poaching agreement restricted the employees' freedom to move to other companies in the sales industry).

agreements closely mirror customer allocation agreements because they have the same territorial nature as customer allocation agreements and have similar anticompetitive effects on their relevant markets.[197] Because naked no-poaching agreements mirror customer allocation agreements so closely, they are, in essence, employee allocation agreements, and therefore, should be treated as per se violations of Section 1.[198] Hence, well-established antitrust laws support the DOJ's criminal pursuit of naked no-poaching agreements. Further, as stated above, labor economics substantiates the policy. Therefore, proof that the DOJ's policy is both logical and prudent is two-fold.

CONCLUSION

When it comes to per se violations, it makes no difference whether naked, horizontal agreements negatively affect labor markets or sales markets. Basic labor economics and antitrust principles make clear that, absent a legitimate reason, no player—whether an employer or employee—in the labor market should have the power to alter the labor market in any given industry. No-poaching agreements entered into by employers create this power, as they affect the market through artificial means. As labor economics dictates, employers and their human resource professionals should not have the ability to artificially alter the labor market in any industry, even if the market is already imperfect. Imperfections in the labor market are inevitable, but such imperfections should only result from the natural flow of the economy—not from artificial manipulation.

Moreover, the very existence of antitrust law is to promote competition in markets, so that consumers have choices and receive price competition benefits. Similarly, when antitrust law is applied to labor markets, the goal is to promote freedom of choice among employees and afford employees the benefit of wage competition. Naked no-poaching agreements have clear anti-competitive effects on labor markets because they: (1) restrict competition among employers for specific types of labor, (2) restrict mobility among employees, and (3) disrupt wage-taking behavior (resulting in wage-fixing). This artificial disruption of competition is exactly the type of apparent harmful effect that antitrust law has condemned as a per se violation under Section 1. Therefore, the DOJ's decision to criminally prosecute corporations and corporate officials for naked no-poaching agreements is strongly supported by more than a century of antitrust law and criminal prosecution policy. If sales departments must refrain from entering horizontal, naked

197. *See supra* Part V, Sections A–B (analyzing how no-poaching agreements are similar to customer allocation agreements).

198. *See* United States v. Consol. Laundries Corp., 291 F.2d 563, 574–75 (2d Cir. 1961) (making clear customer allocations are no different from any other market allocation agreement and should be treated as per se violations); *see also supra* Part V, Sections A–B (analyzing how no-poaching agreements are similar to customer allocation agreements).

agreements that affect sales and price competition (like market allocation agreements), then human resources departments must refrain from entering horizontal, naked agreements that affect labor and wage competition.

Recall from Part I of this Article that the application of the per se rule would not allow employers to offer business justifications for their behavior, no matter how clever. Further, in Part II, this Article explained that courts apply the rule of reason to vertical restraints and typically apply the per se rule to horizontal restraints. As noted, one analogy to a vertical restraint in the labor force are non-compete agreements. They are vertical because the employee and the employer enter an agreement at different market levels. On the other hand, no-poaching agreements are between employers at the same market level. Hence, it is no surprise that the DOJ intends to pursue naked no-poaching agreements under the per se rule. Employers and their human resource professionals should simply make efforts to ensure that their reasons for entering no-poaching agreements are to further some legitimate business purpose, and they should narrowly tailor any such agreements.