# Too Much, Too Soon: The High-Tech Cases Reveal Criminal Antitrust Enforcement Inappropriate for No-Poach and Wage Fixing

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*J.D., May 2020, The George Washington University Law School; M.Ed, Lynn University; B.S., International Business, Florida Atlantic University. Editor-in-Chief, Federal Communications Law Journal, Vol. 72. First and foremost, I want to acknowledge the hard-working staff of the Federal Communications Law Journal for their dedication to the success of the FCLJ. Special thanks to Meredith Rose, Journal Adjunct, and Tess Macapinlac, Vol. 71 Notes Editor, for their steadfast encouragement, and to Professor William E. Kovacic for his guidance during the writing process.

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## I. INTRODUCTION

The use of agreements that restrict employee mobility has come under increasing scrutiny as economists, policy analysts, and legislators explore how these trends connect to rising income inequality.[1] In 2016, the Obama Administration turned its attention to non-compete and wage-fixing agreements as disruptors to the competitive nature of the labor market.[2] Both the White House and the Treasury Department issued reports asserting that these agreements may restrain employee movement and advancement, resulting in reduced job mobility and bargaining power, lower wages, and greater earnings inequality.[3] The Administration asserted that these agreements also likely stifle innovation by limiting the exchange of ideas and stymying employees' ability to launch new companies.[4] Though the 2016 reports did not focus on America's tech giants, disruption in how industries use non-compete and wage-fixing agreements would have a unique effect on big technology companies. Silicon Valley, arguably the seat of innovation in the digital economy, may prove instructive in a case against criminal enforcement.

In conjunction with the research findings outlined in the reports, President Obama directed executive agencies to use their authority, where applicable, to promote competition.[5] Against this political backdrop, in 2016, the Antitrust Division of the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC), in a dramatic departure from antitrust jurisprudence, branded "naked" no-poach and wage-fixing agreements *per se*

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1. *See* Shepard Goldfein & Karen Hoffman Lent, *No-Poach and Non-Competes: Democrats' Proposed Legislation Places Employment Practices in Antitrust Crosshairs*, LAW.COM: N.Y.L.J. (June 11, 2018), https://www.law.com/newyorklawjournal/2018/06/11/no-poaches-and-non-competes-democrats-proposed-legislation-places-employment-practices-in-antitrust-crosshairs/ [https://perma.cc/VEB6-KZWH].

2. *See, e.g.*, The White House, Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses 3 (May 2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf [https://perma.cc/VGC4-JG45] [hereinafter White House Report].

3. *Id.* at 5; OFFICE OF ECONOMIC POLICY, U.S. TREASURY DEP'T, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (Mar. 2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf [https://perma.cc/2GMN-7WV9].

4. White House Report, *supra* note 3, at 2.

5. *See* WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, EXECUTIVE ORDER: STEPS TO INCREASE COMPETITION AND BETTER INFORM CONSUMERS AND WORKERS TO SUPPORT CONTINUED GROWTH OF THE AMERICAN ECONOMY (Apr. 15, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers [https://perma.cc/4332-LF98]; *see also* Exec. Order No. 13725, 3 C.F.R. § 13725 (2017), https://www.govinfo.gov/content/pkg/CFR-2017-title3-vol1/pdf/CFR-2017-title3-vol1-eo13725.pdf [https://perma.cc/8YKX-LM3M] (last visited Jan. 20, 2019).

illegal under antitrust laws and announced its intent to pursue such agreements criminally.[6]

No-poach agreements, also referred to as "anti-solicitation," "no-hire," "no-switching," or "no cold call" agreements, are arrangements whereby companies agree not to compete for each other's employees by not soliciting or hiring them.[7] Similarly, wage-fixing agreements are arrangements whereby companies agree to constrain "employees' salary or other terms of compensation, either at a specific level or within a range."[8] Historically, the DOJ and FTC[9] have investigated and prosecuted companies for engaging in "naked"[10] no-poach and wage-fixing agreements as civil antitrust violations where violators have been met with consent decrees.[11]

The term no-poach agreement perhaps first made its way into the American consciousness when several Silicon Valley technology companies came under fire for their use.[12] In 2010, the DOJ brought a series of lawsuits against six of the most prominent technology companies—Adobe Systems, Inc., Apple, Inc., Google, Inc., Intel Corp., Intuit Inc., and Pixar—challenging their use of no-poach and wage-fixing agreements.[13] These cases have been collectively referred to as the *High-Tech* cases. Although the DOJ pursued civil enforcement in each of these cases, it asserted that the agreements were

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6. DEP'T OF JUSTICE ANTITRUST DIVISION & FEDERAL TRADE COMMISSION, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3, (Oct. 2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/4FAR-R764] [hereinafter Antitrust Guidance].

7. *See* Division Update Spring 2018, *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No-Poach" and Wage-Fixing Agreements*, Antitrust Division, U.S. Dep't of Justice, https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements [https://perma.cc/64M9-U5R6] [hereinafter DOJ, *"No-Poach" and Wage-Fixing Agreements*].

8. *Id.*

9. The DOJ has exclusive jurisdiction to criminally enforce Sherman Act Section 1. *See* FEDERAL TRADE COMMISSION, GUIDE TO ANTITRUST LAWS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/X62V-T37U].

10. An agreement is "naked" if it involves no more than the trade restraint itself. Conversely, an "ancillary" agreement is one that is reasonably necessary as part of a larger, procompetitive agreement. Alison Jones and William E. Kovacic note that the court's analysis in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) distinguishes between "naked trade restraints, where direct rivals simply agreed to restrict output and raise price, and reasonable ancillary restraints, which encumbered the participants only as much as needed to expand output or introduce a product that no single participant could offer." (internal quotations omitted). *See* Alison Jones & William E. Kovacic, *Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework*, 62 THE ANTITRUST BULLETIN 2, 266-67 (2017).

11. *See* Press Release, Antitrust Division, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee [hereinafter High Tech Press Release] [https://perma.cc/WH9H-8SZA].

12. *Id.*

13. *See* Complaint, United States v. Adobe Systems, Inc., 1:10-cv-01629, at 2 (D.D.C. Mar. 18, 2011), https://www.justice.gov/atr/case-document/file/483451/download [https://perma.cc/VY9L-PV7V].

*per se* unlawful under Section 1 of the Sherman Act, and thus gave rise to potential criminal liability.[14] In the *High-Tech* cases, the tech companies entered into consent decrees whereby they were enjoined from participating in these types of agreements in the future[15] and were required to institute training and compliance programs.[16] In the private lawsuits that followed against Apple, Google, Intel, and Adobe, 64,000 employees sought $3 billion in damages,[17] which would have trebled under antitrust law.[18] Nonetheless, the tech companies, which had initially proposed a settlement of $324.5 million—a number which the court rejected for "fall[ing] below the range of reasonableness"[19]—collectively paid $415 million in settlements.[20] The DOJ's shift in enforcement policy is significant as it implicates the economic and liberty interests of the actors and may have unintended ripple effects not only on the technology sector, but on the national economy.

This Note considers the implications of the DOJ's newly announced criminal enforcement priorities. Section I will provide a historical exploration of *per se* illegality under Section 1 of the Sherman Act. Section II will then review federal enforcement action on no-poach agreements, which have primarily targeted the technology sector through an examination of the *High-Tech* cases. Thereafter, Section III will consider the DOJ's criminal enforcement agenda in view of antitrust jurisprudence. Finally, Section IV will examine the competitive implications of criminal enforcement and recommend legislative policy alternatives.

## I. THE COURT-FORMULATED ANALYTICAL SHORTCUT TO SECTION 1 SHERMAN ACT CLAIMS

Section 1 of the Sherman Act, which declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" to be illegal,[21] reflects Congress' judgment that

14. *Id.* at 8.

15. *See* Final Judgment, United States v. Adobe Systems, Inc., 1:10-cv-01629, at 5 (D.D.C. Mar. 18, 2011), https://www.justice.gov/atr/case-document/file/483426/download [https://perma.cc/ZXU3-EFTB].

16. *Id.* at 7-9.

17. *Silicon Valley's No-poaching Case: The Growing Debate over Employee Mobility*, Knowledge@Wharton, UNIV. OF PENNSLYVANIA (Apr. 30, 2014), http://knowledge.wharton.upenn.edu/article/silicon-valleys-poaching-case-growing-debate-employee-mobility/ [https://perma.cc/W783-4XUT] [hereinafter Knowledge@Wharton].

18. 15 U.S.C. § 15(b) (2018). "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

19. Order Denying Plaintiffs' Mot. for Preliminary Approval of Settlements with Adobe, Apple, Google, and Intel, High-Tech Employee Antitrust Litig., No. 11-CV-02509 (N.D. Cal. Aug. 8, 2014).

20. *See* Dan Levine, *U.S. judge approves $415 million settlement in tech worker lawsuit*, REUTERS (Sept. 3, 2015 at 1:50 AM), https://www.reuters.com/article/us-apple-google-ruling/u-s-judge-approves-415-million-settlement-in-tech-worker-lawsuit-idUSKCN0R30D120150903 [https://perma.cc/U2UL-GFPT].

21. 5 U.S.C. § 1 (2012).

"competition is the best method of allocating resources in a free market."[22] On its face, the statutory language raises a threshold question of whether Congress intended that the term "every" be read literally. If so, Section 1 would raise tremendous concerns, given the myriad of procompetitive ways that companies cooperate and share information. In 1911, the Supreme Court in *Standard Oil of N.J. v. United States* examined the legislative history of the Sherman Act, which revealed that "[t]he statute . . . evidenced the intent . . . to protect [] commerce from . . . *undue* restraint."[23] In so doing, the Court presumed Congressional intent to apply a common law standard, which has come to be known as the Rule of Reason, under which only an "unreasonable" "contract, combination . . . or conspiracy" can violate Section 1.[24]

### *A. The Court Limits the Use of Per Se Condemnation for "Pernicious" and "Unredeemable" Conduct*

As a judicial construct, the Rule of Reason framework provides a continuum upon which alleged conduct is evaluated to determine liability.[25] At its outer bound sits *per se* condemnation as an analytical shortcut, wherein conduct is so obviously a detrimental restraint that it is conclusively presumed unreasonable.[26] If a court applies the *per se* standard, only the action or restraint must be proven—foreclosing the opportunity to present any justifications or defenses.[27] In the development of antitrust law over the last 120 years, it has always been the case that the courts are the only actor to determine presumably unreasonable conduct.[28] Historically, the courts have treated horizontal price fixing, horizontal market allocations, and some concerted actions as *per se* unlawful conduct.[29]

The Supreme Court provides the rationale for having a *per se* rule to shortcut the Rule of Reason determination as follows:

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22. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

23. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) (emphasis added).

24. *Id.*

25. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' '[R]ule of [R]eason,' and 'quick look' tend to make them appear."); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) ("[T]here is often no bright line separating *per se* from Rule of Reason analysis.").

26. *See, e.g.*, *Standard Oil*, 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).

27. *See* Ariz. v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343-44 (1982).

28. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 216 (1940) (addressing price fixing); *see, e.g.*, Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941) (addressing concerted action); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (addressing market allocation).

29. *Id.*

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[30]

Thus, in the interest of judicial economy, the Court has exclusively reserved *per se* condemnation for conduct where consumer harm is inevitable.

### *B. The Supreme Court Has Been Unsurprisingly Reluctant to Extend the Per Se Rule to New Areas*

By contrast, restraints that are not *per se* illegal "can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[31] Under the Rule of Reason standard, each party has the opportunity to present evidence.[32] The plaintiff offers evidence of a "restraint's anticompetitive effects, and the defendant submits procompetitive justifications." [33] Thus "the fact-finder weighs all the circumstances to determine whether the restraint is one that suppresses competition or promotes it."[34]

Courts have been reluctant to condemn no-poach agreements as *per se* violations[35] notwithstanding the likely analogous economic effects, in some scenarios, on economic markets as market allocations and price fixing.[36] Thus, in shifting its enforcement priority to prosecute no-poach agreements as *per se* violations,[37] the DOJ has eschewed the historical antitrust analysis

30. N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

31. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

32. Competitive Impact Statement at 8, United States v. Knorr-Bremse AG (No. 18-CV-00747) (D.D.C. filed Apr. 3, 2018), https://www.justice.gov/opa/press-release/file/1048481/download [https://perma.cc/MJQ6-DSPP].

33. *Id.*

34. *Id.* (quoting *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918)).

35. Eichorn v. AT&T Corp., 248 F.3d 131, 143-144 (3d Cir. 2001) (acknowledging "judicial hesitance to extend the *per se* rule to new categories of antitrust claims," the court applied Rule of Reason, rather than *per se* analysis).

36. *See* Rochella T. Davis, *Talent Can't Be Allocated: A Labor Economics Justification For No-Poaching Agreement Criminality In Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 283 (2017), https://brooklynworks.brooklaw.edu/bjcfcl/vol12/iss2/2 [https://perma.cc/EQ4V-W9GD].

37. Antitrust Guidance, *supra* note 6, at 2.

of no-poach agreements under the Rule of Reason.[38] The presumption of *per se* illegality would permit the DOJ to prosecute these agreements without considering their justifications or competitive effects, raising issues of fundamental fairness.[39] Perhaps unsurprisingly, cases that the DOJ has brought to date have been settled before the courts have had an opportunity to weigh in on which standard—*per se* illegality or Rule of Reason—should apply.[40]

## II. FEDERAL ENFORCEMENT OF NO-POACH CASES

### *A. The 2010 High-Tech Cases Illustrate the Immaturity of this Area of Law*

In 2009, after an investigation into the relationship between the boards of Apple and Google, the FTC reported the existence of an alleged "gentleman's agreement" whereby the two companies agreed not to hire one another's employees.[41] In 2010, the Antitrust Division investigated what they alleged to be similar no-poach agreements between Adobe, Apple, Google, Intel, Intuit, and Pixar.[42] A similar complaint was filed against a seventh company, Lucasfilm, three months later.[43] Shortly thereafter, a federal class-action lawsuit alleged that the companies made pacts not to have recruiters "cold call" each other's employees.[44] The precise conduct at issue varied between the DOJ cases and the class action, but the enforcement target was the same: "naked" restraints of trade—those agreements between companies to not to recruit or compete for each other's employees that were not ancillary to any procompetitive collaboration. These investigations collectively became known as the *High-Tech* cases.

In the *High-Tech* cases, the DOJ determined that the companies reached facially anticompetitive or naked agreements that "eliminated a significant form of competition to attract highly skilled employees."[45] Moreover, those

38. *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, 867-88 (M.D. Tenn. 1980) (applying the Rule of Reason); *Eichorn*, 248 F.3d at 144 (applying Rule of Reason to no-poaching agreement and declining *per se* application).

39. Dina Hoffer & Elizabeth Prewitt, *To Hire or Not To Hire: U.S. Cartel Enforcement Targeting Employment Practices*, 3 CONCURRENCES COMPETITION L. REV. 78, 79 (Sept. 2018), https://www.concurrences.com/en/review/issues/no-3-2018/articles/to-hire-or-not-to-hire-u-s-cartel-enforcement-targeting-employment-practices-87317-en [https://perma.cc/4QKH-BE9N].

40. *See, e.g.*, United States v. eBay, Inc., 968 F. Supp. 2d 1030 (N.D. Cal. 2012).

41. *See* Damon Poeter, *Apple, Intel, Google, Others Allegedly Conspired to Stiff Workers*, PC Mag, (May 4, 2011 9:21 PM EST), https://www.pcmag.com/news/264056/apple-intel-google-others-allegedly-conspired-to-stiff-wo [https://perma.cc/ZTR3-7NLG].

42. *See* High Tech Press Release, *supra* note 11.

43. Complaint at 1, United States v. Lucasfilm, Ltd., 1:10- cv-02220 (D.D.C. filed Dec. 21, 2010), https://www.justice.gov/atr/case-document/file/501671/download [https://perma.cc/527R-5HPX]. The complaint along with a concurrent proposed final judgment and competitive impact statement was filed, leading to settlement.

44. *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012).

45. High Tech Press Release, *supra* note 11.

agreements harmed employees by lowering salaries and benefits that they might otherwise have commanded and depriving them of access to "competitively important information about salary levels and better job opportunities."[46] According to the complaint, Apple, Google, Adobe, Pixar, Intel, and Intuit executives agreed not to cold call each other's employees.[47] Each company maintained internal Do Not Cold Call lists which instructed human resources staff not to directly solicit employees from companies that had no-poach agreements. [48] Specifically, the evidence, including extemporaneous internal emails, indicated that the tech companies agreed not to directly solicit employees from each other or extend employment offers if employees voluntarily applied.[49]

The DOJ investigation revealed that the agreements "were not ancillary to any legitimate collaboration,"[50] citing substantial documentary evidence, including evidence of direct communications between the tech executives.[51] While the companies argued that the bilateral agreements were separate, the DOJ noted that there was "strong evidence that the companies knew about the other express agreements, patterned their own agreements off of them, and operated them concurrently with the others to accomplish the same objective." [52] The agreements, created and enforced by senior company executives, were between Apple and Google, Apple and Adobe, Apple and Pixar, Google and Intel, and Google and Intuit.[53]

The DOJ asserted that the agreements, which were not limited by geography, job function, product group, or time period "eliminated a significant form of competition to attract high tech employees, and substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities."[54] Moreover, the DOJ found that the agreements generally covered all employees, and "were thus much broader than reasonably necessary for the formation or implementation of any

46. *Id.*

47. *See* Adobe Complaint, *supra* note 13, at 2.

48. *Id.* at 5-8.

49. Josh Constine, *Damning Evidence Emerges in Google-Apple "No Poach" Antitrust Law Suit*, TECHCRUNCH (Sept. 1, 2012), https://techcrunch.com/2012/01/19/damning-evidence-emerges-in-google-apple-no-poach-antitrust-lawsuit/ [https://perma.cc/2YCG-GBDW].

50. Competitive Impact Statement at 9, United States v. Adobe Sys., Inc., 1:10-cv-01629, 2011 U.S. Dist. LEXIS 83756 (D.D.C. Mar. 18, 2011), https://www.justice.gov/atr/case-document/file/483431/download [https://perma.cc/2HV3-7BBZ] [hereinafter Adobe Competitive Impact Statement].

51. *See* Jeff Elder, *Silicon Valley Tech Giants Discussed Hiring, Say Documents*, WALL ST. J. (Apr. 20, 2014) ("If you hire a single one of these people, that means war."), https://www.wsj.com/articles/case-reveals-silicon-valleys-clubby-ways-1398035419 [https://perma.cc/6Z5W-H4EN].

52. Constine, supra note 49.

53. Adobe Complaint, *supra* note 13, at 2.

54. *See* Adobe Competitive Impact Statement, *supra* note 50, at 10.

collaborative effort."[55] Employees were not informed of, and had not agreed to, this restriction.[56]

Significantly, in its complaint, the DOJ categorized these agreements as *per se* illegal.[57] Relying on precedent dealing with sales restraints outside of the employment context,[58] the DOJ argued that, if competing employers entered into market allocation agreements, then the alleged conduct would undoubtedly constitute a *per se* violation. The DOJ baldly asserted that "[t]here is no basis for distinguishing allocation agreements based on whether they involve input or output markets," because "[a]nticompetitive agreements in both input and output markets create allocative inefficiencies."[59] Mere allocative inefficiency, however, is analytically distinct from conduct "that would always or almost always tend to restrict competition and decrease output," the standard the court uses to determine whether conduct should be conclusively presumed unreasonable and thus subject to *per se* condemnation.[60]

In the *United States v. Lucasfilm* suit, it was alleged that in addition to "no cold call" arrangements, the companies agreed to additional stipulations.[61] The tech firms agreed to notify the current employers of any employees trying to switch between them, agreed not to enter into bidding wars, and agreed to limit the potential for employees to negotiate higher salaries.[62] The suit also alleged that the firms agreed to communicate about the timing of offers and set caps on pay packages to prospective employees.[63] The DOJ reiterated its arguments advanced in *Adobe,* specifically tying its arguments to employment markets, noting that "[a]ntitrust analysis of downstream customer-related restraints applies equally to upstream monopsony restraints on employment opportunities."[64] In other words, the DOJ made an unsupported assertion that customer allocation and price-fixing schemes whereby competitors enter into agreements to allocate customers or prices, which are subject to *per se* condemnation, are indistinguishable from no-poach agreements.

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55. *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1109.

56. *See* Adobe Complaint, *supra* note 13, at 5-8.

57. High Tech Press Release, *supra* note 11, at 5.

58. *See* Adobe Competitive Impact Statement, *supra* note 50, at 7 (citing United States v. Coop. Theatres of Ohio, Inc., 845 F.2d 1367 (6th Cir. 1988) (finding the agreement between movie theater booking agents to refrain from soliciting each other's customers was *per se* illegal, even though booking agents remained free to accept unsolicited business); United States v. Brown, 936 F.2d 1042 (9th Cir. 1991) (affirming jury verdict on violation of Section 1 of the Sherman Act against two competing billboard companies who agreed to refrain from bidding on each other's former sites for a year).

59. Adobe Competitive Impact Statement, *supra* note 50, at 7-8; *see also* Competitive Impact Statement at 5-6, United States v. Lucasfilm Ltd. (No. 10-CV-02220) (D.D.C. filed Dec. 21, 2010), https://www.justice.gov/atr/case-document/file/501651/download [https://perma.cc/56C8-CXWA].

60. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979).

61. Complaint, United States v. Lucasfilm, Ltd., *supra* note 43, at 1.

62. *See* Lucasfilm Competitive Impact Statement, *supra* note 59, at 2-3.

63. *Id.*

64. *Id.* at 5-6.

The DOJ Antitrust Division concurrently filed a civil complaint, a proposed final judgment, and a competitive impact statement in the *Adobe* matter on September 24, 2010, in the United States District Court for the District of Columbia.[65] The companies involved did not admit any wrongdoing.[66] The settlement, which was in effect for five years, prohibited the companies from entering into no-poach agreements and required the implementation of compliance programs.[67] While the complaint alleged only that the companies agreed not to directly "cold-call" prospective employees, the settlement more broadly "prohibit[ed] the companies from entering, maintaining or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees."[68]

In the *High Tech Employees* class action, the employees argued that, in the skilled high-tech labor market, where cold calling to lure employees away from competitors played an important role in determining salaries and labor mobility, their employers' conspiracy to restrain trade was a *per se* violation of the Sherman Act and a violation of Clayton Act.[69] The complaint asserted that the "labor market for skilled high-tech labor was national" and that employers "had succeeded in lowering the compensation and mobility of their employees below what would have prevailed in a lawful and properly functioning labor market."[70]

While the Court has historically established the boundaries of *per se* analysis, the DOJ itself has analyzed wage-fixing and no-poach agreements under the Rule of Reason, undermining its justification for precipitously recasting these agreements as *per se* illegal criminal offenses.[71] Both the DOJ and class action complaints in the *High-Tech* cases charge these "naked" no-poach agreements as *per se* violations of Section 1 of the Sherman Act.[72] Critically, no judicial determination was made as to whether the no-poach agreements constituted *per se* illegal conduct—the DOJ settled its case, and the parties and the court in the class action suit agreed that the court need not reach, and in fact did not reach, the issue of whether Rule of Reason or *per se* analysis applied.[73]

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65. *See* Adobe Complaint, *supra* note 12, at 2.

66. Proposed Final J. at 1, United States v. Adobe Sys., Inc., 1:10-cv-01629, 2011 U.S. Dist. LEXIS 83756 (D.D.C. Mar. 18, 2011), https://www.justice.gov/atr/case-document/file/483441/download [https://perma.cc/7T7N-ZCY7].

67. *Id.* at 4, 7-8.

68. *See* High Tech Press Release, *supra* note 11.

69. Order Granting in Part and Den. in Part Defs.' Joint Mot. to Dismiss; Den. Lucasfilm Ltd.'s Mot. to Dismiss; In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1122.

70. In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1122.

71. *eBay*, 968 F. Supp. 2d at 1037-40. The DOJ claimed that no-poach and wage fixing agreements were *per se* unlawful. However, the agency also argued in the alternative that the agreement was an "unreasonable restraint of trade . . . under an abbreviated or 'quick look' rule of reason analysis."

72. *See* Adobe Complaint, *supra* note 12, at 2; Adobe Competitive Impact Statement, *supra* note 50, at 3; In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1109.

73. Order Granting in Part and Den. in Part Defs' Joint Mot. to Dismiss; Den. Lucasfilm Ltd.'s Mot. to Dismiss at 22-23; *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1122-23.

On the heels of the *High-Tech* cases, the DOJ filed a similar no-poach agreement claim against eBay.[74] Defendants sought dismissal on the basis that the DOJ complaint failed to allege an unreasonable restraint of trade because the no-poach agreement should be analyzed under the Rule of Reason standard, and that the complaint failed to include any allegations sufficient to state a Rule of Reason claim.[75] Notably, the trial court found that the agreement constituted a "classic" horizontal market allocation agreement, which is generally a *per se* violation, because "[a]ntitrust law does not treat employment markets differently from other markets in this respect."[76] Nonetheless, in denying the motion to dismiss, the judge held that the court need not reach the question of the appropriate standard at the pleading stage.[77]

### *B. Criminal Enforcement of No-Poach Agreements Departs from Antitrust Jurisprudence*

Having merely charged, without judicial review, that no-poach agreements are *per se* illegal in the *Adobe*, *Lucasfilm*, and *eBay* cases, on October 20, 2016, the DOJ and FTC announced in its release of "Antitrust Guidance for Human Resource Professionals" its plans to criminally prosecute naked no-poach agreements:

> Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other's [sic] employees. And if that investigation uncovers a naked wage-fixing or no poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.[78]

The joint-agency guidance is a marked departure from earlier jurisprudence in equating the impact of no-poach agreements with that of price-fixing and market allocation agreements. The DOJ's apparent reclassification of no-poach and wage-fixing agreements from civil infractions to "hardcore" criminal conduct in and of itself is highly unusual. Yet the unconventional decision comes in the wake of the 2012 *eBay* enforcement action and without judicial precedent that is directly on point.

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74. *See generally* United States v. eBay, Inc., 968 F. Supp. 2d 1030 (N.D. Cal. 2012).
75. *Id.* at 1037.
76. *Id.* at 1039.
77. *Id.* at 1040.
78. Antitrust Guidance, *supra* note 6, at 4.

The substantive merits of the policy shift are vigorously debated in antitrust circles. Some commentators note that the guidance brings antitrust jurisprudence "full circle" to the precedent set forth a century prior in *Anderson v. Shipowners' Association of the Pacific Coast* [79] by extending the same level of antitrust protection to individuals and employees as to products in interstate commerce.[80] Conversely, the abrupt policy change has also received criticism that these agreements may offer some pro-competitive effects such that outright condemnation as *per se* anticompetitive is "precipitous and inappropriate." [81] The fatal flaw of the policy directive at this stage is one of procedure: the criminal enforcement strategy is inconsistent with legislative and judicial precedent.[82]

Early in the Trump Administration, the DOJ signaled that the Antitrust Division would continue to pursue criminal prosecutions of no-poach and wage-fixing agreements.[83] In January 2018, the newly-appointed head of the Antitrust Division, Assistant Attorney General Makan Delrahim, revealed that the Antitrust Division had several no-poach investigations underway and would soon be bringing enforcement actions in these investigations.[84] This policy change, which ignores antitrust jurisprudence and separation of powers considerations, was confirmed in public remarks by Principal Deputy Assistant Attorney General Andrew Finch.[85] The Antitrust Division's second-in-command reminded companies that they should be "on notice" that they could face criminal prosecution for participating in no-poach or wage-fixing agreements.[86]

The DOJ's Antitrust Manual currently permits criminal prosecution only against anticompetitive conduct between competitors that is *per se*

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79. 272 U.S. 359 (1926).

80. Jiamie Chen, *"No-Poach" Agreements as Sherman Act § 1 Violations: How We Got Here and Where We're Going*, 28 J. ANTITRUST & UNFAIR COMPETITION LAW SEC. CAL. LAW. ASS'N 81, 92 (2018).

81. *See* Hoffer & Prewitt, *supra* note 39, at n.26 *citing* J. M. Taladay and V. Mehta, Criminalization of Wage-fixing and No-poach Agreements, CPI, June 2017, https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/North-America-Column-June-Full-1.pdf [https://perma.cc/2QZM-QWLD].

82. At the Global Antitrust Symposium, then-Acting Assistant Attorney General Andrew Finch acknowledged that the appropriate course is for the DOJ to "advocate for a clear per se rule."

83. *See* Acting Asst. Att'y Gen. Andrew C. Finch, Antitrust Div., U.S. Dep't of Justice, Remarks at the Global Antitrust Enforcement Symposium (Sept. 12, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust [https://perma.cc/B5GL-WF4B].

84. Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are in the Works*, LAW360 (Jan. 19, 2018) ("If the activity has not been stopped and continued from the time when the DOJ's policy was made," in October 2016, "we'll treat that as criminal.").

85. *See* Principal Deputy Asst. Att'y Gen. Andrew C. Finch, Antitrust Div., U.S. Dep't of Justice, "Trump Antitrust Policy After One Year," Remarks at the Heritage Foundation (Jan. 23, 2018), https://www.justice.gov/opa/speech/file/1028906/download [https://perma.cc/VAP5-2DJK].

86. *Id.*

illegal.[87] Nonetheless, without judicial review, Delrahim has brought the looming specter of criminal prosecution by the U.S. Department of Justice, Antitrust Division on a fairly commonplace element of corporate conduct thought to be legal and competitively harmless.[88] Corporations found guilty of participating in a no-poaching or wage-fixing agreements could be required to pay up to $100 million in fines, while individuals could be required to pay up to $1 million in fines.[89] Alternatively, prosecutors could seek a fine up to twice the gross financial loss or gain resulting from the violation. Moreover, individuals criminally prosecuted for participating in a no-poach or wage-fixing agreement could face up to ten years in prison.[90]

The prospect of criminal liability creates risk for companies and higher ex-ante penalties, including more substantial fines and longer jail sentences. In the last several years, there has been an uptick in both the quantity and magnitude of DOJ prosecutions. Over the last decade, the Antitrust Division has secured a staggering $9.7 billion in criminal fines over 537 criminal cases.[91] Since the 2000s, the average jail sentence has grown to an average of 19.5 months, which is more than double the average of jail sentences in the 1990s.[92]

Criminal liability notwithstanding, individuals and companies face collateral costs from an investigation, including the use of *prima facie* evidence of a violation in a parallel civil proceeding and potential investigation in other jurisdictions [93] The mere announcement of an investigation often spurs civil litigation—a forum in which plaintiffs enjoy a lower burden of proof, a preponderance of the evidence. Moreover, the resulting reputational harm, decreased shareholder value, distraction from operations, and the loss of senior executives all test a company's operational capacity. The high costs extracted from companies in a criminal investigation requires that any policy shift be subject to judicial review.

87. *See generally* ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-12 (5th ed. Apr. 2015), https://www.justice.gov/atr/file/761166/download [https://perma.cc/3XL4-CR7C] [hereinafter ANTITRUST DIVISION MANUAL III-12].

88. Makan Delrahim, Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks following Knorr-Bremse Settlement (Apr. 3, 2018).

89. 15 U.S.C. § 1 (2018). ("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.")

90. *Id.*

91. Criminal Enforcement Trends Chart Through Fiscal Year 2018, Antitrust Division, U.S. Dep't of Justice, https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts [https://perma.cc/2HQU-HS5E] (last updated May 6, 2020).

92. *Id.*

93. 15 U.S.C. § 16(a) (2018). Section 5 of the Clayton Act treats a finding of liability in a government action as prima facie evidence of a violation in a follow-on private suit.

### *C. Prosecutorial Discretion Signals DOJ's Uncertainty with Enforcement Strategy*

On April 3, 2018, the DOJ Antitrust Division announced its first challenge to a "no-poaching" agreement since the release of the Antitrust Guidance.[94] Despite legal assertions of *per se* illegality in legal briefs and declarations from a number of high-ranking enforcement officials of impending criminal enforcement, the government elected to file a civil antitrust complaint alleging that Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation entered into unlawful agreements not to poach each other's employees in violation of Section 1 of the Sherman Act.[95]

In *United States v. Knorr-Bremse*, two rail equipment manufacturers who competed with one another to attract, hire, and retain skilled employees entered into a series of no-poach agreements between 2009 and 2016.[96] According to the complaint, the companies agreed not to solicit, recruit, hire without prior approval, or otherwise compete for employees.[97] Within the rail industry, the DOJ observed a "high demand for and limited supply of skilled employees."[98] Within that market, the agency found that the no-poach agreements restrained competition to attract workers, "denied employees access to better job opportunities, restricted their mobility, and deprived them of competitively significant information that they could have used to negotiate for better terms of employment."[99] In its Competitive Impact Statement, the DOJ echoed its position that no-poach agreements which unlawfully allocate employees between the companies are indistinguishable from market allocation agreements, and are thus *per se* unlawful restraints of trade that violate Section 1 of the Sherman Act.[100]

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94. *See* Press Release, Antitrust Division, U.S. Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 2, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete [https://perma.cc/P4JP-ULE4].

95. Complaint at 1, United States v. Knorr-Bremse AG (No. 18-CV-00747) (D.D.C. filed Apr. 3, 2018), https://www.justice.gov/opa/press-release/file/1048491/download [https://perma.cc/FVJ8-M6P9].

96. *Id.* at 2-3.

97. *Id.* at 2.

98. *Id.* at 5.

99. *Id.* at 10-11.

100. *See* Knorr-Bremse AG Competitive Impact Statement, *supra* note 32, at 9 ("Market allocation agreements cannot be distinguished from one another based solely on whether they involve input or output markets.").

> In the relevant labor markets, the agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, and they were not reasonably necessary for any collaboration between the firms. These no-poach agreements distorted competition to the detriment of employees by depriving them of the chance to bargain for better job opportunities and terms of employment.[101]

There are remarkable parallels to the *High-Tech* cases: (1) pervasive use of no-poach agreements over several years, which (2) impacts a highly-specialized skilled labor force in a high-demand market that (3) served no procompetitive benefit. Nonetheless, the DOJ explained that it reached a settlement as an exercise of prosecutorial discretion, rather than pursuing criminal prosecution.[102] Because the companies "formed and terminated [these agreements] before" the federal antitrust agencies issued their Antitrust Guidance for Human Resource Professionals, the DOJ declared that it would treat the no-poach agreements as civil violations.[103] The Antitrust Division made clear, however, "that it intends to bring criminal, felony charges against culpable companies and individuals who enter into naked no-poach agreements . . . where the underlying no-poach agreements began or continued after October 2016."[104] Thus, no-poach agreements (and presumably wage-fixing agreements) that either were entered into or continued after the agency guidance are likely to be prosecuted as criminal antitrust offenses, significantly increasing the liability exposure for companies and executives involved in no-poach agreements. An examination of prior agency practice in the *High-Tech*, *eBay, and Knorr* matters reveals continued uncertainty with respect to prosecuting wage-fixing and no-poaching agreements that undermine the *per se* criminal classification announced in the new guidance.

## III. THE DOJ'S PROSECUTORIAL DISCRETION DOES NOT EXTEND TO REDEFINING OFFENSES ALTOGETHER

The DOJ's strategy to summarily condemn the use of no-poach agreements is merely an attempt to appear responsive to public outcry about fears of the outsized influence wielded by the technology industry. The Antitrust Division's enforcement policy is problematic on several fronts. First, this development disregards long-standing antitrust jurisprudence. Courts have historically analyzed no-poach agreements under the Rule of

101. *See* DOJ, *"No-Poach" and Wage-Fixing Agreements*, *supra* note 7.

102. *See* Knorr-Bremse AG Competitive Impact Statement, *supra* note 32, at 9.

103. *See id.* at 12.

104. *See* Hoffer & Prewitt, *supra* note 39, at 78 n.35 ("In October 2016, the Division issued guidance reminding the business community that no-poach agreements can be prosecuted as criminal violations. For agreements that began after the date of that announcement, or that began before but continued after that announcement, the Division expects to pursue criminal charges.").

Reason standard of liability.[105] *Per se* analysis, which forecloses any inquiry into competitive efficiencies, has been strictly limited to conduct that is so "pernicious" that they can be condemned without detailed economic analysis.[106] As a result, the Supreme Court has narrowly cabined the types of conduct subject to categorical *per se* condemnation[107] in favor of the more comprehensive Rule of Reason framework, which allows defendants to offer procompetitive justifications for alleged anticompetitive conduct. [108] Moreover, the Court has signaled a shift away from *per se* analysis[109] and demonstrated a reluctance to extend *per se* condemnation to new areas.[110]

Second, the DOJ has traditionally pursued criminal prosecution only for conduct that *the courts* have characterized as *per se* illegal. Questions of fundamental fairness are implicated when an executive branch enforcement agency expands its criminal enforcement program without judicial review of its classification of no-poach and wage-fixing agreements as *per se* offenses under the Sherman Act.[111] Criminal investigation and prosecution have been reserved for narrow classes of conduct where the legality of the challenged conduct is unquestioned, in part due to the heightened exposure to defendants.[112] Criminal prosecution of no-poach and wage-fixing agreements threatens both economic and liberty interests,[113] exposing corporate officials

105. *See* Richard A. Posner, *The Rule of Reason and Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977).

106. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("Some types of restraints, however, have such predictable and anticompetitive benefit that they are deemed unlawful *per se*."); FTC v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411, 434 n.16 (1990) ("[P]rice-fixing cartels are condemned *per se* because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public."); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) ("*per se* rules are appropriate only for conduct that would always or almost always tend to restrict competition and decrease output"(citations omitted)); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103-04 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

107. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889-99 (2007) (finding minimum resale price maintenance no longer *per se* unlawful); *State Oil Co.*, 522 U.S. at 15 (finding maximum resale price maintenance not subject to *per se* condemnation); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-58 (1977) (finding non-price vertical restraints should be adjudged under a Rule of Reason analysis).

108. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 759 (1999) (finding where "any anticompetitive effects of given restraints are far from intuitively obvious, the [R]ule of [R]eason demands a thorough enquiry into the consequences of those restraints.").

109. *See Sharp Elecs. Corp.*, 485 U.S. at 726 (finding any departure from the Rule of Reason standard "must be justified by demonstrable economic effect.").

110. United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . . .").

111. Hoffer & Prewitt, *supra* note 39, at 78.

112. ANTITRUST DIVISION MANUAL III-12, *supra* note 87.

113. 15 U.S.C. § 1 (2018).

to higher risk of fines and jail terms for conduct that has previously been subject to only consent decrees.[114] Unlike in a civil antitrust investigation wherein market and economic analyses are relied upon to determine liability,[115] the bright-line categorization of no-poach agreements as *per se* illegal requires only that the Justice Department prove the prohibited conduct.[116] Moreover, the Antitrust Division's impromptu shift in its enforcement strategy stands as a clear appropriation of the authority consigned to the judicial and legislative branches.[117] If the Antitrust Division brings indictments, it will be asking courts to criminalize conduct when there is no precedent establishing *per se* treatment even as a civil violation. It has long been established that it is the Court—and not the antitrust enforcement agencies—that classifies conduct as *per se* illegal.[118] Meanwhile, the Court has clearly delineated the role of Congress's vested authority, determining that such "delicate judgment on the relative values to society of competing areas of the economy" is best left to the legislature.[119]

Lastly, with respect to the skilled labor market in the technology sector, there is uncertainty whether the criminal enforcement priority is the appropriate antitrust tool. While a politically popular target, it is unclear whether the antitrust harm of no-poach and wage-fixing agreements "would always or almost always tend to restrict competition and decrease output"[120] supporting a *per se* condemnation. To justify a *per se* prohibition, a restraint must have "manifestly anticompetitive" effects[121] and "lack . . . any redeeming virtue."[122] "As a consequence, the *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 [R]ule of [R]eason."[123] In 2007, the Supreme Court indicated that it should be unsurprising that the Court would be reluctant "to adopt *per se* rules with regard to restraints

114. Hoffer & Prewitt, *supra* note 39, at 78.

115. *See* Thomas O. Barnett, Criminal Enforcement of Antitrust Laws: The U.S. Model, Remarks before the Fordham Competition Law Institute (Sept. 14, 2006), https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model [https://perma.cc/3K7H-VPP9].

116. N. Pac. Ry. v. United States, 356 U.S. 1, 2 (1958) (discussing agreements or practices that are conclusively presumed "illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

117. Hoffer & Prewitt, *supra* note 39, at 79.

118. *See* Maricopa Cnty. Med. Soc'y, 457 U.S. at 350 n.19 (1982) (discussing the "established position that a new *per se* rule is not justified until the *judiciary* obtains considerable rule-of-reason experience with the particular type of restraint challenged.") (emphasis added).

119. United States v. Topco Assocs., Inc., 405 U.S. 596, 611-12 (1972) ("To analyze, interpret, and evaluate the myriad of competing interests and endless data" that would surely be brought to bear on such decisions [weighing competitive efficiency in one portion of the market against another] . . . the judgment of the elected representatives of the people is required.").

120. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

121. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977).

122. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289 (1985).

123. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886-87 (2007).

imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."[124] Furthermore, as the Court has stated, a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[125]

### *A. Federal Antitrust Agency Eschews Nearly a Century of Antitrust Jurisprudence*

Read generously, the DOJ's shift in enforcement policy is a push back against the argument advanced by Judge Richard Posner that "the [antitrust] enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough to cope effectively" with a dynamic technology industry.[126] Nonetheless, the precipitous decision to seek criminal enforcement flies in the face of well-established antitrust jurisprudence.

In 1926, the Supreme Court first addressed unreasonable restraints of trade in the employment context in *Anderson v. Shipowners' Association of the Pacific Coast*.[127] The case stood for the proposition that prohibitions against unreasonable restraint of trade apply to instrumentalities of commerce, with no distinction between employees and products.[128] The line of cases that follow, while grappling with the viability of an antitrust claim, and the appropriate focus of antitrust protection, has nevertheless upheld the principle that the uncertainty of alleged harm arising from the use of no-poach agreements warrants a fact-specific inquiry into the anticompetitive effects under the Rule of Reason.

The 1957 Second Circuit ruling in *Union Circulation Company v. Federal Trade Commission*[129] retreated from the *Anderson* decision, holding that no-poach agreements do not constitute *per se* antitrust violations.[130] The court reasoned that "[b]ecause a harmful effect upon competition is not clearly apparent from the terms of these agreements, we believe them to be distinguishable from those boycotts that have been held illegal *per se*."[131] Nonetheless, the court found the agreement *at issue* constituted unreasonable

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124. *Id.* at 887.

125. *GTE Sylvania*, 433 U.S. at 58-59.

126. *See* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001) (laying out the "new economy" as three interrelated industries: (1) the manufacture of computer software; (2) Internet-based businesses e.g., AOL and Amazon; and (3) the communications services and equipment designed to support the first two markets).

127. 272 U.S. 359 (1926). More than 69 years later, the 10th Circuit's decision in Roman v. Cessna Aircraft Co., 55 F.3d 542 (10th Cir. 1995), is regarded as a paradigm shift, focusing antitrust protections on employees, rather than the industry.

128. *See* Chen, *supra* note 81, at 82. The court in effect invited employees to bring antitrust no-poach lawsuits as class actions by framing the antitrust harm in no-poach cases as largely shouldered by employees.

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

130. *Id.* at 656-57.

131. *Id.*

restraints of trade.[132] The fact-specific analysis undertaken by the Second Circuit makes clear that the Rule of Reason is the appropriate analysis of competitive harm for no-poach agreements.

The 2001 *Eichorn v. AT&T Corp*. decision marked the beginning of the modern era of no-poach cases.[133] There, the court determined based on the clear weight of judicial precedent and an acknowledgment of "judicial hesitance to extend the *per se* rule to new categories of antitrust claims" that the Rule of Reason analysis applied in considering the use of no-hire clauses for particular employees in a series of business acquisitions and reorganizations.[134]

### *B. Courts, Not Agencies, Have the Authority to Classify Offenses*

The Antitrust Division's position that wage-fixing and no-poaching agreements are *per se* offenses subject to criminal prosecution appropriates authority consigned to the legislative and judicial branches.[135] As Justice Marshall declared in *Topco*, the *per se* rule is a judicial construct, crafted in recognition that the "courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason *we have formulated per se* rules."[136] Seminal cases like *Northern Pacific Railway*, *Broadcast Music*, and *Business Electronics* reveal the role the court has played in delineating the bounds of the *per se* rule,[137] resulting in a robust body of case law that has so far reserved *per se* condemnation for price-fixing, bid rigging, and customer or territory allocation.

Over time, the Court has constrained the types of offenses subject to a presumption of *per se* illegality;[138] however, there is *judicial* precedent for

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132. *Id.* at 657-58 (2d Cir. 1957). The petitioners, two door-to-door magazine sales companies, allegedly agreed with one another not to hire any salespersons who had been employed by another agency within the preceding year. The court, in examining the competitive harm to the industry, rather than to employees, distinguished the "no-switching agreement" from per se violations. The court reasoned that the agreements served an organizational "housekeeping" function directing employee conduct rather than a means "to control manufacturing or merchandising practices."

133. *See generally* Eichorn v. AT&T Corp., 248 F.3d 131, 143-44 (3d Cir. 2001).

134. *Eichorn*, 248 F.3d at 143-44.

135. *See* John Taladay & Vishal Mehta, Criminalization of Wage- Fixing and No-poach Agreements, 2 CPI, (June 2017), https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/North-America-Column-June-Full-1.pdf [https://perma.cc/X8J8-KG7A].

136. United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 (1972) (emphasis added).

137. *Compare N. Pac. Ry. Co.*, 356 U.S. at 4 ("[T]his principle of *per se* unreasonableness . . . avoids the necessity for complicated and prolonged economic investigation . . . .") *with Columbia Broad. Sys.*, 441 U.S. at 4 ("In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade. . . certain agreements . . . are conclusively presumed illegal without further examination under the [R]ule of [R]eason . . . .") *and Sharp Elecs. Corp.*, 485 U.S. at 719 ("[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

138. *See* Jones & Kovacic, *supra* note 10, at 259-60.

expanding *per se* condemnation to include conduct resembling price-fixing "which theory and experience show to have, or almost always have, harmful effects."[139]

As previously discussed, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations."[140] Nonetheless, in recent years, the Court has stressed a presumption in favor of the Rule of Reason in Sherman Act Section 1 cases. "[The] Court presumptively applies the Rule of Reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful."[141]

### *C. It Is Not Immediately Obvious that No-Poach and Wage-Fixing Agreements Always or Almost Always Pose Undue Restraint in the Technology Sector*

It is uncertain whether the criminal enforcement priority is the appropriate tool in this area of developing antitrust jurisprudence. The Court has consistently resorted to *per se* rules only in instances whereby restraints on trade "would always or almost always tend to restrict competition and decrease output."[142] Moreover, lower courts have been reluctant to extend a *per se* analysis to conduct that is unlikely to be intuitively viewed as criminal and where there is no contemporaneous consciousness of guilt expressed by the defendants (albeit not required under the Sherman Act).[143] As discussed above, these decisions make clear that the authority to classify these offenses is vested in the courts, rather than executive branch agencies.

The DOJ asserts that it is "the horizontal nature of the [no-poach] agreement—the elimination of competition between employers—that justifies [*per se*] treatment for these types of agreements."[144] However, scholars warn against drawing parallels between customer or product allocation and labor allocation.[145] There are several considerations, such as investments in professional training and development, that do not have a

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139. *Id.*

140. *Topco Assocs.*, 405 U.S. at 607-08; *see also, e.g.*, *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 349, n.19 (1982) (discussing the "established position that a new *per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged."); *Superior Court Trial Lawyers' Ass'n*, 493 U.S. at 432-33 (noting that the *per se* rule "reflect[s] a longstanding judgment that the prohibited practices by their nature have a substantial potential for impact on competition.") (quotations omitted).

141. Texaco, Inc. v. Dagher, 547 U.S. 1, 5 (2006).

142. *Sharp Elecs. Corp.*, 485 U.S. at 723.

143. *See* Bryan Koenig, *Partial 10th Circ. Win Puts DOJ In Bind on Antitrust Charges*, LAW360 (Oct. 31, 2018, 7:44 PM EDT), https://www.law360.com/articles/1097554?scroll=1&related=1 [https://perma.cc/24M6-MBS4].

144. *See* Andrew C. Finch, *supra* note 83.

145. Knowledge@Wharton, *supra* note 17. Joseph Harrington, Wharton professor of business economics and public policy, discusses benefits to consumers and shareholders of a return on employee investments in training and development that is facilitated by no-poach agreements.

corollary in the product market. While unlikely to be a compelling justification on its own, courts may consider the use of no-poach agreements in incentivizing investments in employee development, which may "provide some offsetting benefits for a 'no poaching' policy."[146] Joseph Harrington, Wharton professor of business economics and public policy, analogizes the use of no-poach agreements in the *High-Tech* cases to resale price management schemes, which the Court has determined to not be subject to *per se* condemnation because of potential procompetitive benefits.[147] As a result, Harrington argues that the balancing of the harm to employees and shareholders resulting from the departure of a highly-skilled worker after significant investment in training and development against the impact on the mobility of the individual employee more appropriately calls for the Rule of Reason standard in order to determine whether there is "undue" restraint.[148]

Since *Socony*, the courts have expanded the field of horizontal restraints to include other forms of conduct "which *theory and experience* show to have or almost always have harmful effects."[149] The Supreme Court has indicated that an expansion would be predicated in part upon the extent of "experience" that courts have had with the practice.[150] Even if the Court were to recognize no-poach and wage fixing agreements as *per se* illegal, as the Antitrust Division manual explains, criminal prosecution of even *per se* illegal matters may not be appropriate where truly novel issues of law or fact—certain to emerge in the evolving digital economy—are present.[151]

## IV. LEGISLATIVE & POLICY ALTERNATIVES TO ADDRESS MOBILITY OF TECH LABOR

The "high-stakes war" for skilled talent in Silicon Valley, where non-compete agreements are unenforceable, served to create a breeding ground where companies resorted to an arsenal of tactics, including "non-disclosure agreements, patent infringement lawsuits[,]" and no-poach agreements to retain top engineers.[152] Legal commentators have long attributed Silicon Valley's entrepreneurial success to its unique legal environment, hailing California's lack of enforcement of non-compete agreements as the linchpin of the innovation, entrepreneurship, and mobility that has exploded in the tech sector over the last 25 years.[153] Distinct from no-poach agreements, non-compete agreements, or covenants not to compete, are agreements whereby

146. *Id.*

147. *Id.*; *see also* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886-87 (2007).

148. Knowledge@Wharton, *supra* note 17.

149. Jones & Kovacic, *supra* note 10, at 269 (emphasis added).

150. *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 344 ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the [R]ule of [R]eason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.").

151. ANTITRUST DIVISION MANUAL III-12, *supra* note 87.

152. Roberts, *supra* note 20.

153. *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 [https://perma.cc/Y52G-N8A5].

an employee, as a condition of their employment, agrees not to work for a competing employer, generally within a specified geographic area for a specified time period.[154] In Silicon Valley, this opened the door for the circulation of ideas and employee mobility, resulting in "technology spillover"[155] that has become central to the innovative start-up ecosystem.

Legislators have begun to examine how the enforcement of these agreements have shaped local economies and sectoral development.[156] Any legislation of no-poach and wage-fixing agreements will need to balance on the one hand providing an incentive for employers to invest in employees. When employers make a capital investment, they do so with the full certainty that the property, plant, or equipment is going to stay. On the other hand, employers fear that employees will use the training and development that a company provides to boost their earning potential elsewhere, and any legislation pertaining to no-poach and wage-fixing agreements must balance this as well.

### *A. Policy Alternatives*

Where employees have high-level access to proprietary trade secrets, there is heightened concern that companies will lose competitive advantages if their talent simply walks out the door. In many states, non-compete agreements, where an employee has the (theoretical) ability to negotiate additional considerations in exchange for agreeing to not seek employment with a competitor, serve as a backstop.

Tax policy may provide an avenue for employers to reduce reliance on no-poach agreements. For example, employers are permitted to take tax deductions for employee training as a business investment. The current model presents unworkable limitations; employers are only eligible for a tax deduction for providing education that is legally required or improves or maintains skills that are required of their current position.[157] Providing tax incentives to employers for the development of new skills allows employers to reap additional immediate short-term benefits on their investment, increase employee loyalty, and (potentially) reduce reliance on no-poach agreements. Similarly, training repayment contracts, which stipulate that an employee is required to pay a portion of training costs, on a decreasing scale, based on the length of time in a position, may provide employers with a vehicle to protect investments in training.[158]

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154. *See* White House Report, *supra* note 2, at 2.

155. *See* Stephen Mihm, *Send Noncompete Agreements Back to the Middle Ages*, BLOOMBERG (Dec. 5, 2018, 10:58 AM EST), https://www.bloomberg.com/opinion/articles/2018-12-05/noncompete-agreements-are-bad-for-employees-and-the-economy [https://perma.cc/73A4-XACK].

156. *See* Roy Maur, *Democrats Propose Bans on Noncompete, No-Poach Agreements*, SOC'Y FOR HUMAN RES. MGMT. (May 10, 2018), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/democrats-propose-bans-noncompete-no-poach-agreements.aspx [https://perma.cc/8GNU-X6XY].

157. 26 U.S.C. § 127 (2012).

158. Knowledge@Wharton, *supra* note 17.

In 2018, as a part of a broader legislative package aimed at competition in the labor market, House Democrats put forward identical bills, HR5632 and S2480, The End Employer Collusion Act. The Act would codify the antitrust enforcement agencies' stance that no-poach and wage fixing agreements are unreasonable restraints of trade under the Sherman Antitrust Act and therefore unlawful.[159] The legislation would ban no-poach agreements, categorizing such agreements as *per se* illegal. Legislation appears to be the most straightforward path to provide authorization to the DOJ to pursue its criminal enforcement priority.

## V. CONCLUSION

Notwithstanding the likely harms that no-poach and wage fixing agreements present to competition, labor markets, and, ultimately, consumers, criminal prosecution may not be the best tool to address this issue. The body of law surrounding no-poach and wage-fixing agreements is not mature enough to support a presumption of unreasonableness to justify *per se* condemnation. The DOJ should continue to bring forward no-poach cases for investigation and prosecution to develop substantial experience with judicial review to determine whether these cases warrant an expansion of the boundaries of *per se* analysis.

The Supreme Court's steadfast posture in applying *per se* analysis suggests a likelihood that the Court will maintain its position absent Congressional action. The Court has signaled that the "delicate judgment on the relative values to society of competing areas of the economy" are best left not to the enforcement agencies, but the legislature.[160] Moreover, policy considerations for the impact of criminal prosecution on innovation and U.S. trade interests fall squarely within the purview of the legislature. Meanwhile, a more expedient approach to stem anticompetitive conduct with respect to no-poach and wage-fixing agreements may be derived from Congress. To that end, there are several legislative developments aimed at addressing competition in the labor market, and I would recommend taking that avenue.

159. End Employer Collusion Act, H.R. 5632, 115th Cong. (2018); End Employer Collusion Act, S. 2480, 115th Cong. (2018); *see also* Press Release, Rep. David Cicilline, House Democrats Unveil Legislation to Protect American Workers Against Anti-Competitive Employment Practices (Apr. 26, 2018), https://cicilline.house.gov/press-release/house-democrats-unveil-legislation-protect-american-workers-against-anti-competitive [https://perma.cc/PT4L-T8F9].

160. United States v. Topco Assocs., Inc., 405 U.S. 596, 612 (1972).