AVOIDING NO-POACH LIABILITY: MAKING REASONABLE CHOICES TO QUALIFY FOR THE RULE OF REASON

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No-poach agreements have been a focus of the antitrust enforcement agencies since 2016 when the Human Resource ("HR") Guidance was released by the Department of Justice and Federal Trade Commission. The HR Guidance raised the stakes for businesses engaged in no-poach agreements by declaring that naked no-poach agreements would thereafter be prosecuted criminally. This new priority seemed to be primarily just talk because no criminal prosecutions were filed in the first four years following the HR Guidance. However, everything changed in January 2021 when the Department of Justice returned its first criminal indictment for a no-poach agreement. Based on statements from within the Department of Justice, this indictment is just the beginning of future criminal investigations into no-poach agreements. Businesses should now take notice of the increased risk associated with no-poach agreements and act accordingly.

Understanding this increased risk may be more important now than ever before as more businesses decide to work together to effect social change and subsequently expose themselves to antitrust risk. Recently, businesses have been able to make great strides (where Congress and others have struggled) to address some of the more salient social issues of today—issues like diversity and climate change. To do this, however, many have relied on working together with other businesses to increase their collective voice and to mitigate some of the downsides associated with moving first, a trend that seems likely to continue. This increase in cooperation between businesses creates more antitrust risk for those involved—particularly in relation to the recent emphasis on no-poach. Unfortunately, if too many joint social initiatives are shut down due to no-poach violations, it could have a chilling effect on the social progress we have been witnessing of late.

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This Note discusses the relevant law regarding no-poach agreements. The goal is to help businesses avoid the antitrust risk sure to arise when they start working together. After discussing the relevant legal principles, this Note provides some examples and recommendations that businesses can implement now to help avoid, or at least lessen, future antitrust risk.

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INTRODUCTION

Markets work. Look no further than the relative economic prosperity of the United States as evidence. In some instances, markets may even work better than democratic voting to signal, and then bring to fruition, what Americans want. Think about the members of the U.S. Congress. Each member is voted in by a constituency that expects its representative to act according to the desires of those who voted for him or her. But how often do these representatives represent perfectly what their constituencies desire?[1] And when representatives do represent their constituency, there are often other barriers to change and progress such as red tape, partisanship, lobbyists, and even personal agendas. While Congress has been consistently bogged down struggling to balance these competing issues, markets have been filling the gap by promoting progress where the political system has stalled.

One function of markets is to indicate consumer preferences. Businesses, aware of this simple fact, have responded accordingly. In the past few decades, executives have learned through the market that investors care about more than profits alone. They care about social responsibility, good management, and public image. Whether executives actually support these issues is largely irrelevant because they know consumers and investors care about them enough to base their investment decisions on how these issues are handled. The market has spoken—and businesses have responded. While politicians have struggled to unify and effectuate progress on issues like climate change and diversity, businesses have been able to fill the gap, leaving politicians to play catch-up. Some recent examples include a new Starbucks policy linking executive pay to diversity goals,[2] a joint statement from pharmaceutical companies regarding the proper way to handle the development and release of a COVID-19 vaccine,[3] and a joint statement from major banks announcing their commitment to diversity and inclusion.[4]

Because of the progress the market has promoted thus far, it is important to protect organizations that seek to promote change. Although nothing appears to stop companies from striking out on their own and moving first (like Starbucks), some economic theories indicate that there may be competitive disadvantages to

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1. *See, e.g.*, Sonja Hutson, *Republicans in Utah Blast Romney for Trump Impeachment Guilty Vote*, NPR (Feb. 6, 2020), https://www.npr.org/2020/02/06/803292013/republicans-in-utah-blast-romney-for-trump-impeachment-guilty-vote [https://perma.cc/VX2D-GDJ7].

2. *See* Heather Haddon, *Starbucks Ties Executive Pay to 2025 Diversity Targets*, WALL ST. J. (Oct. 14, 2020, 10:31 AM), https://www.wsj.com/articles/starbucks-ties-executive-pay-to-2025-diversity-targets-11602680401#:~:text=The%20coffee%20chain%20said%20Wednesday,people%20of%20color%20by%202025 [https://perma.cc/F673-C48C].

3. *See Biopharma Leaders Unite to Stand with Science*, BUSINESS WIRE (Sept. 8, 2020, 6:30 AM), https://www.businesswire.com/news/home/20200908005282/en/ [https://perma.cc/PQ8A-K8WE]; Jared S. Hopkins & Peter Loftus, *Drug-Company CEOs Sign Pledge on Covid-19 Vaccine*, WALL ST. J. (Sept. 8, 2020, 8:55 PM), https://www.wsj.com/articles/nine-drug-company-ceos-sign-pledge-on-covid-19-vaccine-11599572714 [https://perma.cc/X3Y3-CML5]; Barak Orbach, *On the COVID-19 Vaccine Corporate Pledge*, HARV. L. SCH. F. CORP. GOVERNANCE (Sept. 10, 2020), https://corpgov.law.harvard.edu/2020/09/10/on-the-covid-19-vaccine-corporate-pledge/ [https://perma.cc/G9AK-BX46].

4. *An Open Letter to the Global Legal Community*, JPMORGAN CHASE & CO. (Sept. 30, 2020), https://www.jpmorganchase.com/news-stories/open-letter-to-diversity-in-the-legal-industry [https://perma.cc/LJ9Y-MPYU] (the letter includes general counsels from some of the largest banks in the world, namely: Morgan Stanley, JPMorgan Chase & Co., Bank of America, Goldman Sachs, and Citigroup Inc., as well as other smaller banks).

being the first mover.[5] In contrast, followers—e.g., the next company to link diversity initiatives to executive pay—will be able to learn from the mistakes of first movers, shorten their own learning curve, and save money.[6] This creates an incentive to wait until another business makes the first move, or at the very least it should make executives think carefully about moving first in an industry.[7] If no business has an incentive to move first, this could further delay social progress and innovation because no business wants to sacrifice its own competitive advantage by being the first to undertake a worthy, but risky, initiative. One solution is for businesses to create joint ventures to accomplish their social goals, thereby diminishing the risk associated with moving first while competitors watch from the sidelines.

In addition to minimizing some first-mover disadvantages, there are other valuable advantages that come from working together in a joint venture. Just as individuals join together through like-minded organizations to promote their various social causes, businesses can also join forces to increase their voice and social influence.[8] This reasoning, accompanied by concerns about moving first, indicates that future social movements by companies will likely take the form of joint initiatives within industries, as opposed to the Starbucks model of moving unilaterally.

As companies form agreements to collaborate on social issues, they may face increased antitrust risk exposure despite outwardly noble purposes.[9] The pharmaceutical pledge provides a good example of an agreement that from the outset appears to provide social value (in the form of public-health protection) but could also give rise to antitrust risk (due to a concerted action by direct competitors).[10] In response to political pressures for a COVID-19 vaccine, and growing public skepticism towards the prospect of a safe vaccine, nine leaders of prominent pharmaceutical companies pledged to abide by high ethical and scientific standards and ultimately pushed back against political pressure to release a vaccine as soon as possible.[11] This pledge, which is likely aimed at protecting public health for

5. *See* William Boulding & Markus Christen, *First-Mover Disadvantage*, HARV. BUS. REV. (Oct. 2001), https://hbr.org/2001/10/first-mover-disadvantage [https://perma.cc/4E7G-UR9A]. At the very least, there is more risk for first movers like Starbucks because they will be forced to discover the best way to implement these new policies and may face litigation risk if they fail to deliver. *See id.*

6. *Id.*

7. *See id.*

8. *See, e.g.*, JPMORGAN CHASE & CO., *supra* note 4.

9. This will be discussed further in Part II but note the relevant antitrust legal standard does not ask whether or not the parties meant well; rather, it asks about the anticompetitive effects. *See infra* Part II. Even if a well-meaning agreement is eventually absolved of antitrust liability, it may cost the defendant in overall reputation and legal costs to reach that result.

10. Orbach, s*upra* note 3.

11. Hopkins & Loftus, *supra* note 3 (the nine pharmaceutical companies involved with the pledge are AstraZeneca PLC, GlaxoSmithKline PLC, Johnson & Johnson, Merck & Co., Moderna Inc., Novavax Inc., Sanofi SA, BioNTech SE, and Pfizer Inc.); Peter Loftus & Jared S. Hopkins, *Covid-19 Vaccine Developers Prepare Pledge on Safety, Standards*, WALL

everyone, can introduce risk of antitrust prosecution if not handled properly. This increased risk arises due to the scrutiny that agreements among competitors will potentially draw from the enforcement agencies.[12] The increased scrutiny could unveil all kinds of antitrust issues if businesses are not careful and adequately informed.

Although there are many well-known antitrust issues, such as price fixing, that arise when competitors start working together, newer issues, such as no-poach agreements, may slide under the radar of general counsels, human-resource representatives, and business executives alike.[13] Despite being a relatively new antitrust landmine for businesses to avoid, no-poach agreements have been receiving considerable attention from government enforcement agencies, particularly in the past four years.[14] If business leaders and practitioners are unaware of the risks accompanying no-poach agreements when they negotiate and craft their joint-social-initiative agreements, they may set themselves up for increased liability that otherwise could have been avoided.[15] Additionally, if businesses are unaware of the potential risks—such as the increased risk with no-poach agreements now in the enforcement spotlight—associated with joining forces, these future, socially beneficial agreements could be in jeopardy as legal liability and the threat of criminal charges deter companies from joining together to address societal problems.

Because social agreements such as those mentioned above are likely only the beginning of businesses leveraging joint agreements to drive U.S. social change, the purpose of this Note is to cast light on the current law behind no-poach agreements and to show how business executives and practitioners can internally

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ST. J. (Sept. 4, 2020, 6:25 PM), https://www.wsj.com/articles/covid-19-vaccine-developers-prepare-joint-pledge-on-safety-standards-11599257729 [https://perma.cc/4E7G-UR9A]; *see also Biopharma Leaders Unite to Stand with Science*, *supra* note 3.

12. *See generally* FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS (2000), https://www.justice.gov/atr/page/file/1098461/download [https://perma.cc/9BQM-QQRF].

13. *Compare* Jiamie Chen, *"No-Poach" Agreements as Sherman Act § 1 Violations: How We Got Here and Where We're Going*, 28 COMPETITION 82, 82 (2018) ("The punctuated equilibrium of evolving antitrust law entered the current phase of rapid development in the 2000s, when the first no-poach antitrust class actions came before federal appeals courts, and the [DOJ] at the same time took a sudden and keen enforcement interest in no-poach agreements."), *with* Chi. Bd. of Trade v. United States, 246 U.S. 231 (1918) (one of the foundational early price-fixing cases).

14. *See, e.g.*, U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/D379-FNFJ] [hereinafter HR GUIDANCE] ("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 others' employees.").

15. For a discussion of some actions that businesses can take to avoid increased antitrust risk when it comes to no-poach agreements, see *infra* Part V.

prepare a business to engage in future social-initiative agreements in a way that minimizes antitrust risk. With antitrust risk minimized, there will be less overall uncertainty and a greater incentive for executives to engage in social progress.

In an effort to educate relevant business decision makers on minimizing the risk associated with joint agreements, this Note will discuss the antitrust law and recent policy developments behind no-poach agreements and then recommend some concrete, risk-reducing actions, such as evaluating existing antitrust compliance programs, employee training, and the Corporate Leniency Program. Part I defines no-poach agreements and discusses some of the legal and economic problems created by them. Part II sets out the relevant antitrust legal standard used to evaluate antitrust cases in general, and Part III discusses how these legal standards are applied to no-poach agreements. Part IV discusses the legal consequences of engaging in no-poach agreements. Finally, Part V provides some recommendations for how businesses could reduce antitrust risk.

I. WHAT IS A NO-POACH AGREEMENT?

At the simplest level, a no-poach agreement is when two competitors agree not to hire employees from each other; employees are not members of these agreements and often are not even aware of them.[16] One reason a business may do this is to preserve their investments in their employees.[17] It costs a great deal of money to maintain a workforce.[18] Not only is it costly to train employees and pay their wages, but there are also costs associated with losing an employee who has become efficient and knowledgeable about the business, its processes, and standards. Businesses do not want to lose this huge investment in time and money, so they engage in mechanisms to protect their interests, such as no-poach agreements. A no-poach agreement may be particularly tempting for businesses in the technology sector where the market is changing rapidly, and high-level talent is particularly specialized and hard to find, yet relatively portable between firms.[19] However, the prevalence of no-poach agreements extends beyond a few large tech companies in Silicon Valley and infects the labor market at virtually every level.[20]

16. *See* Alan B. Krueger & Orley Ashenfelter, *Theory of Evidence on Employer Collusion in the Franchise Sector* 4 (Princeton Univ., Working Paper No. 614, 2017), https://dataspace.princeton.edu/jspui/bitstream/88435/dsp014f16c547g/3/614.pdf [https://perma.cc/N7Q5-5RV3].

17. *See id.* at 17–18.

18. *See* Chad Halvorson, *Are Your Labor Costs Out of Control?*, WHEN I WORK BLOG (Mar. 7, 2013), https://wheniwork.com/blog/are-your-labor-costs-out-of-control [https://perma.cc/Y32W-FU9D].

19. *See, e.g.*, *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (no-poach litigation brought against Apple, Adobe, Intel, and Google).

20. *See, e.g.*, Cal. Dental Ass'n v. F.T.C., 526 U.S. 756 (1999); Deslandes v. McDonald's USA, No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) (unpublished decision regarding a no-poach agreement within McDonald's franchise agreement).

The most recent surge in no-poach litigation has involved agreements within franchises between franchisor and franchisee.[21]

Although some businesses may engage in no-poach agreements purposefully, others may do so unintentionally or without understanding the illegality of their actions. These businesses are still at risk of legal exposure, despite a lack of intent or knowledge. For the purpose of no-poach agreements, a formalized legal contract is not needed to show a restrictive agreement, but instead merely an "agreement, conspiracy, or combination between two or more [parties]" must be proven.[22] As a result, something as innocent as a simple conversation between executives of different firms can lead to costly litigation regarding an illegal no-poach agreement.

A. No-Poach Problems

The economic problem—and source of competitive harm for antitrust law purposes—with no-poach agreements is they reduce competition by decreasing wages and limiting mobility for employees.[23] This, in turn, enriches employers by helping them retain more of the value they have invested in their employees while at the same time inhibiting the ability of employees to use their additional training to their own personal advantage.[24] Another, more sinister, reason for no-poach agreements is that employers want to depress employee wages and restrict employee mobility.[25] Absent no-poach agreements, employees are able to use the training and progress they have made in their individual careers to seek better (and higher paying)

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21. *See, e.g.*, Krueger & Ashenfelter, *supra* note 16, at 29–30. One good example of a franchise no-poach agreement comes from the McDonald's franchise agreement which states:

> During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph 14 shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.

Id. at 3.

22. Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996); McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988). Since most antitrust cases do not survive the motion-to-dismiss phase, an agreement must only be sufficiently alleged, per *Twombly*, to be successful on the agreement element of a claim. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) ("[W]e hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.").

23. *See* Krueger & Ashenfelter, *supra* note 16, at 17–18.

24. *See id.* at 18.

25. *See* Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663, 667–70 (2020) (discussing first the effect of noncompete agreements as a restrictive covenant and then making the analogy to no-poach agreements).

positions at different businesses.[26] This puts pressure on all competitors to compete for a particular employee's services. At a high level, this competition creates an external incentive for employees to improve, innovate, and generally become better at what they do. The absence of healthy competition for labor may create a negative effect which stagnates employee growth, not to mention a downward effect on overall wages in general.[27]

According to economists Alan Krueger and Orley Ashenfelter, a no-poach agreement "reduces workers' outside options and lowers their quit rate, increasing the share of net returns to training captured by employers."[28] Today employees change careers with more frequency than in years past.[29] This has the effect of allowing them to signal their worth more regularly, and subsequently makes their current wages a better reflection of their actual worth.[30] Put differently, employees can either move to another company to receive a pay increase, or use the threat of such a move to motivate employers to increase their pay. This forces employers to more regularly evaluate wages and to remain competitive, as opposed to only increasing wages in proportion to annual increases in the cost of living.[31] No-poach agreements remove this important pressure from employers by assuaging fears of losing an employee to a competitor. As pressure is eliminated, a wage gap between what an employee is worth and what they are paid is created based on the monopolization of labor created by these agreements.[32] The value of the wage gap is then captured by the business because they are free to pay less for labor.[33]

When a business enters into a no-poach agreement, employee alternatives are eliminated.[34] Due to limited employment options, employee bargaining power is damaged—creating an additional downward force on wages.[35] Whether in the labor market or any other market, competition is about providing options. No-poach agreements limit options for employees. More options are typically accompanied by more favorable prices (for consumers this means lower prices and for employees this means higher wages).[36] Put in economic terms, when inefficiencies are removed from the market, such as the inefficiency created by the heightened power of the employers, the market can function correctly and reach a market equilibrium. This in turn helps employee wages reach an equilibrium rate: a rate that should be higher than the rate they are paid today.

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26. *See id.* at 685–86 ("When an employee discovers information regarding their undervalued labor compensation by receiving an external offer from a competing employer, the employee may use that information to negotiate a higher salary.").

27. *See* Krueger & Ashenfelter, *supra* note 16, at 17–18.

28. *Id.* at 17.

29. *See* Lobel, *supra* note 25, at 686 ("In job markets, discovering one's value depends on the *frequency* with which one is exposed to information about one's price.").

30. *Id.*

31. *Id.* at 686–87.

32. *See id.*

33. Krueger & Ashenfelter, *supra* note 16, at 17–18.

34. *See id.* at 17.

35. *See id.* at 18.

36. *See* HR GUIDANCE, *supra* note 14, at 2.

Because no-poach agreements harm competition, antitrust laws apply. The primary legal question, however, is about the *level* to which they apply. For evaluating the consequences of engaging in no-poach agreements,[37] the level of antitrust application could mean the difference between criminal charges and substantial fines, civil liability, or no liability at all. The level of application is directly connected to the amount of antitrust risk associated with engaging in each social-initiative agreement.

II. LEGAL STANDARD

Before further discussion of no-poach agreements specifically, a basic understanding of general antitrust law is necessary. The primary statute for federal antitrust law is the Sherman Act.[38] Any antitrust analysis of an agreement between multiple companies begins with a discussion of § 1. Section 1 makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ."[39] This makes joint actions between competitors illegal where the actions result in a reduction of quantity produced, which ultimately raises prices and harms competition.[40] The simplest measure of harm to competition is consumer welfare, understood as harm to consumers—higher prices, lower quality, etc.[41]

Although the Sherman Act seems relatively straightforward at first glance, it does not provide much in the way of substance for a court to apply.[42] This creates confusion, as courts are forced to deal with complex economic problems and highly sophisticated conspiracies with little guidance from the statute.[43] Courts are left to their own reasoning and limited experience to determine and shape antitrust jurisprudence, creating in essence a statute that functions like common law because it is primarily shaped by the judiciary and not the legislature.[44] To evaluate the anticompetitive effects of agreements, courts created two primary standards of evaluation: the rule of reason and the per se rule.[45] After applying both standards in separate "silos" and discovering the wide degree of variance between the per se rule and the rule of reason, courts created an additional "category": the quick-look

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37. Whether they are purposeful or out of ignorance is not particularly relevant for this Note.

38. Sherman Act, 15 U.S.C. §§ 1–2.

39. *Id.* § 1. A private cause of action is created under the Clayton Act. 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . without respect to the amount in controversy . . . .").

40. Sherman Act § 1.

41. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 118 (2018) ("In order to assess a restraint under the consumer welfare principle, one need query only whether prices are higher (or output lower) as a result of the restraint.").

42. *Id.* at 87 ("The antitrust statutes provide almost no guidance about the formation of specific antitrust rules of illegality. The Sherman Act says nothing useful on the subject.").

43. *See id.*

44. *See id.*

45. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1213–16 (2008).

approach.[46] This new approach was intended to help bridge the gap between the two original categories.[47] Quick look, which was never actually accepted by the Supreme Court, has since evolved into a sliding-scale approach that is primarily how courts apply antitrust law today, whether they say so explicitly or not.[48]

A. Rule of Reason

The rule of reason, used to evaluate most antitrust claims, places the burden on the plaintiff to prove the anticompetitive effects of a defendant's conduct.[49] This legal standard starts with the assumption that not all agreements between competitors are inherently anticompetitive (or at least not entirely), and then allows the parties to argue over the nature of the agreement.[50] To prove the agreement in question is in fact anticompetitive, the rule of reason requires the plaintiff to show the defendant had market power and the agreement had an anticompetitive effect.[51] Under the rule of reason the plaintiff has the "primary burden of alleging and then providing sufficient evidence both that the defendants have sufficient market power to make an anticompetitive restraint plausible and also that they have imposed at least one such restraint."[52] Because both of these can be very complicated and challenging to prove, the initial burden placed on the plaintiff becomes quite significant.[53] Consequently, this is the standard defendants—the corporations in the context of no-poach agreements—should argue to be evaluated under.[54]

Some have defined the rule of reason as a balancing approach where courts are required to balance the procompetitive effects against the anticompetitive effects of the agreement in question.[55] However, it is better understood as a burden-shifting approach.[56] Under this approach, after market power has been shown, the plaintiff first has the burden of proving a prima facie case by showing competitive harm.[57] As mentioned above, this is a difficult burden for a plaintiff to meet, but if the plaintiff succeeds, the burden shifts to the defendant to show "a procompetitive justification" for the agreement.[58] Note here the defendant is only required to show *one* procompetitive justification. If the defendant can adequately prove just one procompetitive justification, the justification becomes the baseline for the final

46. *See* Hovenkamp, *supra* note 41, at 122–23.
47. *See id.*
48. *See id.* at 123–25, 123 n. 227.
49. *Id.* at 83.
50. *See id.* at 102–04 (describing the "black letter antitrust rule" for proof under the rule of reason).
51. *Id.* at 101–02.
52. *Id.* at 102 (noting further that while some decisions describe the requirement as market power *or* anticompetitive effects, the standard is correctly described as requiring *both* elements).
53. *Id.* at 101–02.
54. *See id.*
55. Lemley & Leslie, *supra* note 45, at 1251.
56. *See* Hovenkamp, *supra* note 41, at 102–06.
57. *See id.* at 102, 106–07 (explaining that harm is best measured by the consumer welfare standard which looks at an increase in price or a decrease in quantity to determine harm).
58. *Id.* at 103–04.

burden shift back to the plaintiff.[59] The plaintiff must then show the justification presented by the defendant can be accomplished by different means that are less restrictive, meaning it "offers more-or-less the same benefits but without the threat of competitive harm."[60] Only after the plaintiff has met this last burden do courts finally attempt to balance procompetitive and anticompetitive effects.[61] Practically speaking, this stage of the process is rarely, if ever, reached.[62] This final balancing approach is especially difficult to apply after both sides have already shown pro- and anti-competitive effects throughout the analysis, making courts hesitant to allow the proceedings to get this far. Therefore, by this point, courts are often too far out of their comfort zone and area of expertise to accurately determine the "right" outcome for a particular set of facts.[63]

Important for this Note is understanding that the burden for the plaintiff is *much* higher under the rule of reason. Not only does the plaintiff have a difficult initial burden to prove, but later in the process the burden returns to the plaintiff once again. Thus, corporate defendants who want to minimize antitrust risk need to place themselves in a position for evaluation under the rule of reason. Part V of this Note discusses how a no-poach defendant can increase its chance for evaluation under a pure rule-of-reason analysis.

B. Per Se Rule

The per se rule is at the opposite end of the spectrum from the rule of reason. In contrast to the rule of reason, the per se rule is extremely favorable to plaintiffs because the primary assumption made under this rule is that some agreements have no redeeming, procompetitive effects and are inherently illegal under the Sherman Act.[64] The primary benefit of this rule for courts—and plaintiffs—is it requires no analysis once the plaintiff has provided evidence of an agreement and shown it falls into one of the per se categories, which each carry a presumption of illegality.[65] Because certain types of agreements are presumed illegal under the per se rule, the rule does not require the court to engage in any analysis of the competitive effects of the agreement once an agreement has been proven by the plaintiff.[66] Per se agreement categories include naked price-fixing and market-division agreements, group boycotts, refusals to deal, and some types of tying agreements.[67] Once the plaintiff has shown the defendants' agreement falls into one

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59. *Id.*

60. *Id.* at 104.

61. *See id.* at 131–32 (stating that balancing attempts are actually quite rare as the whole rule-of-reason analysis is designed to avoid balancing by the courts wherever possible).

62. *Id.*

63. *See id.* at 131–33.

64. Lemley & Leslie, *supra* note 45, at 1213–14.

65. *Id.* at 1214 (quoting Pace Elecs., Inc. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

66. *E.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); *see also* Hovenkamp, *supra* note 41, at 83; Lemley & Leslie, *supra* note 45, at 1214.

67. Hovenkamp, *supra* note 41, at 83. While no-poach agreements do not fall directly into one of these categories, analogizing to one of the categories is one primary strategy to convince the court to apply a stricter burden on the defendant. The Department of

of these categories, "the plaintiff need not prove anticompetitive intent or effect. Nor will the defendant[s'] purported noble motives save the agreement from condemnation."[68] In *Northern Pacific Railway Co. v. United States*, the Supreme Court explained the logic behind the per se rule: "[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."[69]

Most business and legal leaders are aware of types of agreements that are per se illegal and know how to avoid them. This said, the per se rule is an important benchmark for the discussion below of antitrust risk as it relates to joint social initiatives. Simply put, corporate defendants should not hesitate to put in as much effort as they can to distance themselves from the per se rule.

C. Quick Look and the Later "Sliding Scale"

The quick-look analysis fits into the gray area between the per se rule and the rule of reason. Although the Supreme Court has never ratified the quick-look analysis, it has been discussed by academics and occasionally implemented by lower courts.[70] After the Supreme Court divided antitrust analysis into two categories, lower courts looked for cost-saving ways to fill the gap between the two disparate "silos" of the rule of reason and the per se rule.[71] The problem courts encountered was while the rule of reason provided a tailored approach to each unique set of facts, it was costly to implement because it was so reliant upon facts.[72] In contrast, the per se rule was relatively cheap to implement (as a bright-line rule) but very inflexible.[73] Courts eventually concluded that even if the agreement in question was not wholly in one of the per se categories discussed above, its anticompetitive effects may be well known enough to warrant a truncated version of the rule-of-reason analysis instead of the full burden-shifting analysis typically required under the rule of

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Justice's Antitrust Division would like to see naked no-poach agreements added to this list and has stated that they will prosecute these agreements criminally. *See* U.S. DEP'T OF JUST. ANTITRUST DIV., ANTITRUST DIVISION SPRING UPDATE 2019 (2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach [https://perma.cc/93CH-XF6M] [hereinafter SPRING UPDATE] ("[A] naked no-poach agreement is a type of horizontal market allocation that should be assessed under the per se rule."); HR GUIDANCE, *supra* note 14, at 4 ("Going forward, the DOJ intends to criminally prosecute against naked wage fixing or no-poaching agreements.").

68. Lemley & Leslie, *supra* note 45, at 1213–14.

69. *N. Pac. Ry. Co.*, 356 U.S. at 5.

70. *See* Hovenkamp, *supra* note 41; Lemley & Leslie, *supra* note 45, at 1215–16; *see, e.g.*, Deslandes v. McDonald's USA, No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018).

71. Hovenkamp, *supra* note 41, at 122; *see also* United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927) (applying the per se rule in a price-fixing case); Bd. of Trade of Chi. v. United States, 246 U.S. 231, 244 (1918) ("To determine [whether the restraint was illegal] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.").

72. Hovenkamp, *supra* note 41, at 122.

73. *See id.*

reason.[74] Thus, the quick-look analysis was born. While the Supreme Court has not explicitly rejected this rule, the Court has been skeptical of the quick-look approach.[75] It has mentioned the rule three times, and even then, each was only to criticize it.[76]

At first glance it would appear courts have applied antitrust law in three distinct approaches: the rule of reason, per se rule, and quick-look analysis. While this may have been true in the past, over time the lines between the "silos" have blurred considerably.[77] The reality today is while some courts may still refer to the law as three separate categories, courts actually apply the law in a spectrum, or sliding scale, from per se to rule of reason.[78] At the end of the twentieth century, the Supreme Court in *California Dental Ass'n v. FTC* explained that there "is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for a more detailed treatment."[79] The Court went on to explain that the analysis will depend on fact-specific circumstances, and the application may change as courts gain more experience (which is gained through repeated application of the rule of reason) regarding specific types of agreements.[80] A couple decades prior to the clarity of *California Dental*, Justice Stevens elaborated in a concurring opinion:

> [R]ule-of-reason analysis is not distinct from "per se" analysis . . . . [A]greements that are illegal per se are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to establish their illegality, but they nonetheless violate the basic rule of reason.[81]

This assertion by Justice Stevens may have seemed nuanced due to the existing precedent of the time recognizing two distinct categories which had not been overruled.[82] However, as seen in recent years, the per se category now only extends to the few narrow categories listed above, and more and more cases apply the rule of reason in varying degrees.[83]

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74. *Id.*; *see also* Jeffry Martino & Tyson Herrold, *Demystifying the Antitrust Implications of Franchise No-Poach Agreements*, BAKERHOSTETLER (Nov. 11, 2019), https://www.bakerlaw.com/alerts/demystifying-the-antitrust-implications-of-franchise-no-poach-agreements [https://perma.cc/BFV9-7KCD].

75. Hovenkamp, *supra* note 41, at 123.

76. *Id.*; *see also* F.T.C. v. Actavis, Inc., 570 U.S. 136, 158–59 (2013); Texaco, Inc. v. Dagher, 547 U.S. 1, 4 (2006); Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 781 (1999).

77. Hovenkamp, *supra* note 41, at 122.

78. *Id.* at 125–28.

79. 526 U.S. at 780–81.

80. *Id.* at 781.

81. United States v. U.S. Gypsum Co., 438 U.S. 422, 476 (1978) (Stevens, J., concurring in part).

82. *See* Lemley & Leslie, *supra* note 45, at 1217–18 (stating that the "continuum" approach by the Court was "entirely inconsistent" with its prior case law which had not yet been overruled).

83. Hovenkamp, *supra* note 41, at 83; *see also supra* text accompanying note 67.

Under this analysis, there are different fact-finding requirements for courts to apply depending on each situation.[84] If the agreement in question is more analogous to a type of agreement that is per se illegal, then courts require a lower standard for proving the anticompetitive effects of the agreement. Conversely, the further away from a per se category the agreement appears, the higher the standard (and closer to the rule-of-reason analysis) implemented for proving anticompetitive effects. The practical implications of this approach, and likely the reason it has been adopted, is that it combines the benefits of the rule of reason with the benefits of the per se rule; courts are able to tailor their analysis depending on the facts (rule of reason), but are also able to save costs by shortening the analysis (per se rule) when the agreement is more likely to be anticompetitive on its face.

The factors courts use to determine where on the scale an agreement falls include market power, the strength of the plaintiff's (or government's) case, the plausibility of various assumptions, and the availability and possession of evidence.[85]

III. LEGAL APPROACHES TO NO-POACH AGREEMENTS

Depending on the court and the specific facts of the agreement, no-poach agreements have been scrutinized at every level of the "sliding scale."[86] Based on the facts of the particular agreement, in conjunction with a number of factors, courts are able to determine what level of scrutiny is required for each no-poach agreement. The important factors are: (1) horizontal or vertical restraint; (2) naked or ancillary restraint; (3) voluntary or coerced restraint; and (4) unilateral or concerted restraint.[87] For purposes of no-poach agreements, the most important factor is the distinction between a naked and ancillary restraint. However, I will discuss briefly horizontal and vertical restraints first because not only is the distinction fundamental in antitrust law generally, but it also has a slightly different application in no-poach agreements specifically. According to a recent treatise, more and more courts are using a two-step analysis to determine whether an agreement is per se unlawful:

> [T]he court first asks whether the challenged conduct truly involves a "horizontal" restraint between . . . competitors . . . and, if so, whether the restraint is [naked] or is instead plausibly ancillary and necessary to some larger, procompetitive integrative activity.
>
> If the answer to the first question is "no," then the restraint is assessed under the rule of reason as a vertical nonprice restraint.

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84. Hovenkamp, *supra* note 41, at 123.

85. *Id.* at 127. Regarding market power, Professor Hovenkamp explained: Resolution of the market power issue should affect the strength of the prima facie case. For example, a joint venture that controls 80-100% of a well-defined market should face close scrutiny of price-affecting or potentially exclusionary conduct. By contrast, if shares are more in the 50% range or the market is not well defined, then the burden of making out a prima facie anticompetitive practice should be higher. The all-important question is the venture's ability to control the market with respect to the restraint in question. If ample opportunities exist for market participation outside the venture, a restraint there is less threatening. *Id.*

86. *See, e.g.*, Martino & Herrold, *supra* note 74.

87. Lemley & Leslie, *supra* note 45, at 1219–23.

> If the answer to the first question is "yes," and the restraint is naked . . . then the per se rule is applied.
>
> If, however, it appears plausible that the restraint is ancillary and necessary to achieve some larger procompetitive activity or other legally protected objective, such that the restraint cannot be said to be manifestly anticompetitive, then the more flexible rule of reason (or at least the quick look) is applied.[88]

It is important to note the use of phrases like "more flexible rule of reason" above, because phrases like this point once again to the sliding-scale approach. A more detailed discussion of each step and how it applies to no-poach agreements is presented below.

A. Horizontal Versus Vertical Agreements

One of the most fundamental distinctions between agreements in antitrust law is the distinction between horizontal and vertical agreements. As discussed above, this is normally the first distinction a court makes when determining which rule—or where on the sliding scale—to apply. A horizontal agreement is an agreement between competitors or between businesses at the same level in the distribution chain.[89] A good example is the pharmaceutical agreement regarding the release of a COVID-19 vaccine referenced above.[90] There, pharmaceutical companies, all competing independently to create a COVID-19 vaccine, agreed amongst each other to delay the release of the vaccine until certain conditions were met.[91] Horizontal agreements typically receive a higher level of scrutiny and are more likely to be evaluated under the per se rule[92]—or at least on the per se side of the sliding scale. Should courts evaluate the pharmaceutical company statement, the pharmaceutical companies will begin with a greater burden due to the horizontal nature of the agreement, and will need to rely on the distinction between ancillary and naked restraints to support their case.[93]

A vertical agreement, in contrast, is an agreement between businesses at different levels of the distribution chain.[94] A good example of this type of agreement in the no-poach context is a franchise no-poach agreement where the standard template franchise agreement includes a provision prohibiting one franchisee from

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88. William Holmes & Melissa Mangiaracina, ANTITRUST LAW HANDBOOK § 2:13 (Dec. 2020 update); *see also In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 480 (W.D. Pa. 2019).

89. Lemley & Leslie, *supra* note 45, at 1219. It is also important to note that "agreement" in this context does not require a formal contract, but instead could be a verbal agreement between parties. *See* HR GUIDANCE, *supra* note 14, at 3. The standard for an agreement is lower than the standard for a contract in the legal sense. *See id.* ("It does not matter whether the agreement is informal or formal, written or unwritten, spoken or unspoken.").

90. *See supra* note 3 and accompanying text.

91. *Id.*

92. *See supra* Section I.B.

93. *See infra* Section III.B.

94. Lemley & Leslie, *supra* note 45, at 1219.

hiring the employee of another franchisee or the franchisor.[95] These types of franchise no-poach agreements are relatively common, but vary in scope and duration.[96] For example, they may restrict the hiring of employees from the same franchise within a certain radius of the franchisee, or they may restrict the hiring of employees while they are currently employed by the franchise. Economists Alan Krueger and Orley Ashenfelter found that 58% of major franchise chains have these kinds of no-poach provisions included in their standard franchise agreements.[97] Although vertical agreements have typically been viewed as not harmful to competition, recent research into and enforcement against, franchise no-poach agreements may prompt a shift away from the presumption that vertical restraints cannot be anticompetitive.[98] Currently, vertical agreements are typically evaluated under the rule of reason.[99] A clear understanding of the nature of a business agreement should help inform what a business should do to limit antitrust risk.

B. Naked Versus Ancillary Restraints

Although antitrust law generally makes the first "cut" at horizontal and vertical agreements,[100] the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") have focused on the second "cut"—the distinction between naked and ancillary restraints—when it comes to no-poach agreements.[101] This agency focus should create a red flag for all businesses engaged in any agreement, whether they are horizontal or vertical, making it the most important distinction among no-poach agreements.

"Naked" restraints involve a "restriction on competition [] unaccompanied by new production or products . . . ."[102] Technically, naked restraints can occur in both horizontal and vertical agreements. However, the DOJ has argued that naked no-poach agreements are a "type of *horizontal* market allocation that should be assessed under the per se rule."[103] The most obvious form of naked restraint is a price-fixing agreement between competitors.[104] These types of agreements are

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95. *E.g.*, Krueger & Ashenfelter, *supra* note 16, at 6 (quoting a Jiffy Lube franchise agreement which states that the "Franchisee covenants that during the term of [the franchise agreement], Franchisee will not employ or seek to employ any person who is or within the preceding six months has been an employee of Franchisor or of any System franchisee of Franchisor . . . ."). Krueger and Ashenfelter found that 58% of major franchise chains have no-poach provisions in their franchise agreements. *Id.* at 4.

96. *See id.* at 4.

97. *Id.*

98. *See, e.g.*, Martino & Herrold, *supra* note 74.

99. SPRING UPDATE, *supra* note 67 (explaining that an agreement that restricts hiring within a franchise is subject to the rule of reason because it is a vertical restraint).

100. *See supra* note 88 and accompanying text.

101. *See* HR GUIDANCE, *supra* note 14, at 4. While guidelines from enforcement agencies are not law, it is important to note this stance by the DOJ and FTC because it creates a very real risk of litigation for all who engage in naked no-poach agreements. *Id.* ("[T]he DOJ intends to proceed criminally against naked wage fixing or no-poaching agreements."); *see also* SPRING UPDATE, *supra* note 67.

102. Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188 (7th Cir. 1985).

103. SPRING UPDATE, *supra* note 67 (emphasis added); *see also In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019).

104. *See generally* Lemley & Leslie, *supra* note 45, at 1225–28.

widely known as illegal. When it comes to naked no-poach agreements, the agreement is to fix *wage* prices among competitors and therefore is similar to a price-fixing agreement in the traditional sense.

One prominent example of a naked no-poach agreement involved Apple and some of its toughest competitors.[105] The private lawsuit (the DOJ simultaneously filed civil complaints in the District Court for the District of Columbia) from over 60,000 employees of major tech companies in Silicon Valley was consolidated as the *High-Tech Antitrust Employee Litigation* ("*High-Tech*").[106] In *High-Tech*, Steve Jobs (the CEO of Apple) allegedly orchestrated a hub-and-spoke conspiracy between Apple, Google, Intel, Adobe, Lucasfilm, and Pixar not to hire employees from each other between 2005 and 2009.[107] Prior to settlement of the case, emails were released showing communications between Jobs, Sergey Brin (Google co-founder), and Eric Schmidt (then CEO of Google) discussing hiring plans among the competitors.[108] In response to this conspiracy, employees of the companies involved sought $3 billion in damages, which would be tripled with the treble damages allowed under the Clayton Act.[109] In conjunction with the private lawsuit brought by the employees of these companies, the DOJ filed two separate complaints in which they alleged the agreements were per se unlawful because they were "facially anticompetitive" and naked restraints on the labor market.[110] In response to these DOJ findings, Apple and the other co-defendants, without admitting any wrongdoing, entered into consent decrees with the DOJ in 2011.[111] Shortly after the consent decrees were entered, the court in *High-Tech* denied the defendants' motions to dismiss;[112] a settlement, rumored to be in the ball park of $325 million, followed soon afterwards.[113]

Ancillary restraints, in contrast, are "part of a larger endeavor whose success they promote."[114] Unlike naked restraints, which have no procompetitive merit whatsoever, it can be argued ancillary restraints provide procompetitive benefits and therefore should, at the very least, be evaluated under the rule of reason, even if they are ultimately determined to be anticompetitive. One example of this type of restraint is a joint venture. A no-poach agreement has not been challenged from a joint venture to date, but a price-fixing joint venture case may be helpful in

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105. *See In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1108–09 (N.D. Cal. 2012).

106. *Id.*

107. *See* Jeff Elder, *Tech Companies Agree to Settle Wage Suit*, WALL ST. J. (Apr. 24, 2014, 6:58 PM), https://www.wsj.com/articles/SB10001424052702304788404579522012693196966 [https://perma.cc/F9F4-L7GG].

108. *Id.*

109. Clayton Act § 4, 15 U.S.C. § 15(a).

110. *See High-Tech*, 856 F. Supp. 2d at 1109.

111. *See id.*

112. *See id.* at 1126–27.

113. Elder, *supra* note 107 (stating that an individual close to the matter said the settlement price was around $325 million).

114. Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188–89 (7th Cir. 1985).

predicting how a no-poach case would proceed.[115] In 2006, the Supreme Court decided *Texaco Inc. v. Dagher*, an antitrust case involving a joint venture between Texaco and Shell Oil.[116] In the lawsuit, owners of gas stations challenged the practice of the joint venture to set the same price for both Texaco and Shell Oil brand gasoline.[117] After losing in the Ninth Circuit, Texaco appealed to the Supreme Court, which granted certiorari to "determine whether it is *per se* illegal under § 1 of the Sherman Act . . . for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products."[118] The Court reasoned that because the price was essentially set by one entity, within the framework of a joint venture, it was not a pricing agreement between competitors under § 1 of the Sherman Act.[119] The Court reversed the Ninth Circuit holding and held that because it was not a pricing agreement between competitors it was not per se illegal.[120]

The key question for members of a joint venture today is whether or not a court will buy the argument that hiring decisions within a joint venture are the same as pricing decisions and should therefore be evaluated under *Texaco*. The primary similarity between the two scenarios is the existence of a joint venture itself. If the same reasoning applies, and the joint venture is essentially one entity, it follows it would not fall under § 1 which addresses concerted action among *multiple* entities. While it seems like a strong argument, how far will this go? To strengthen this argument, joint venture participants would also want to argue that the no-poach agreement within the venture was ancillary and promoted the success of the joint venture as a whole. After all, if businesses were not able to protect their workforce during a joint venture, there may be a negative effect on the total number of joint ventures.

IV. CONSEQUENCES OF NO-POACH AGREEMENTS

In 2016, the DOJ and the FTC released guidelines for human-resource professionals ("HR Guidance").[121] While these guidelines were overtly aimed at human-resource professionals, one secondary effect was to put all businesses on alert to a new DOJ priority: no-poach agreements. The HR Guidance raised the stakes for any businesses engaged in no-poach agreements by making clear how enforcement agencies would proceed against such agreements in the future.[122] In no uncertain terms, the HR Guidance stated:

> 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

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115. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 8 (2006) (pricing decisions of a joint venture do not fall into the narrowly defined category of price fixing—which is per se illegal).
116. *Id.* at 3.
117. *Id.*
118. *Id.*
119. *Id.* at 5–6.
120. *Id.* at 8.
121. HR GUIDANCE, *supra* note 14.
122. *Id.* at 4.

> 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 others' employees.[123]

Although these guidelines clearly set out the position of the antitrust enforcement agencies, they appeared to be an empty threat for the last four years. Until the end of 2020, the DOJ had yet to prosecute any agreements criminally, instead choosing the civil system.[124] The first criminal charges for a no-poach agreement came in January 2021.[125] On January 7, 2021, a federal grand jury returned an indictment against Surgical Care Affiliates ("SCA"), owners and operators of outpatient medical centers nationally, for alleged agreements between SCA and two separate competitors not to hire senior-level employees.[126] For corporations, such as SCA, the maximum fine for a Sherman Act violation is $100 million or "twice the gain derived from the crime or twice the loss suffered by the victims if either amount is greater than the statutory maximum,"[127] as well as a maximum prison sentence of ten years for individuals involved.[128] Unfortunately for SCA and its co-conspirators, the DOJ contends that the agreement entered into is per se unlawful.[129]

Although the HR Guidance will not be dispositive in any legal proceedings, it is extremely important for businesses nonetheless. Most businesses encounter many lawsuits in their day-to-day operations; it is the cost of doing business. But in a day when social media and information generally is so readily available, any lawsuit will hurt a business's bottom line in both the cost of defending the lawsuit and the social image damage that a high-profile lawsuit will likely cause—damage that can be magnified even more if the lawsuit is a criminal prosecution.[130] Even though the guidelines are not the law, they determine when the enforcement agencies will prosecute, and therefore should be taken seriously in order to minimize risk of potential litigation, whether criminal or civil.

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123. *Id.* (emphasis added).

124. *See supra* note 67 (discussing the DOJ's "No-Poach Approach" and three civil actions filed by the DOJ for no-poach agreements since the 2016 HR Guidance).

125. *See Health Care Company Indicted for Labor Market Collusion*, U.S. DEP'T OF JUST. (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion [https://perma.cc/K6YW-VYYQ].

126. *Id.*

127. *See id.*

128. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/8SJN-CC3Z] (last visited Feb. 3, 2021).

129. Indictment at 7, United States v. Surgical Care Affiliates, LLC, No. 3:21-cr-00011-L (N.D. Tex. 2021) [hereinafter SCA Indictment].

130. *See, e.g.*, V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1500–02 (1996) (discussing how "reputational penalties arise once the share market becomes aware of the possible corporate misconduct" which then is translated into a decreased stock price). The type of harm discussed by Khanna in 1996 is only magnified more today with the increased access the internet provides the general public and the increased emphasis placed on ESG issues by investors in general.

V. WHAT SHOULD BUSINESSES DO (AND NOT DO)?

A. What a Business Should NOT Do

Before discussing some substantive suggestions for businesses, it is important to illustrate some practices businesses should avoid. Even if the practices discussed below are innocent, because much of antitrust litigation begins with the establishment of an agreement—which is determined primarily by circumstantial evidence and "plus factors"[131]—even the appearance of a conspiracy can increase litigation risk. Businesses should avoid this appearance where at all possible.

The recent SCA indictment serves as an example of what not to do. Regardless of the outcome of this new indictment, businesses would be wise to use the practices described in the indictment as a model of what not to do, or else run the risk of finding themselves in the same situation as SCA. The reality for SCA, and for any other business that finds itself in DOJ crosshairs for a similar agreement, is litigation is costly, regardless of whether the agreement is proven or criminal convictions are handed down. The sections below discuss specific examples directly from the SCA indictment which will serve as a baseline for recommendations of what a business should do later in this Note.

1. Businesses should altogether avoid "meetings, conversations, and communications" discussing solicitation of employees.[132]

The example given in the indictment is an email from an individual to other employees within their own company that said, "I had a conversation w[ith] [individual from a competitor] re[garding] people and we reached agreement that we would not approach each other's proactively."[133] While official meetings regarding poaching of employees may seem like obvious territory for illegal behavior, it is important to note here the bar is set low. It does not even require an official meeting—a mere conversation may be problematic.[134] Even before the advent of the internet, which significantly reduced the cost of communication between competitors, key executives of competitors ran in the same circles. It is not hard to imagine a small community where all the major players of an industry live. They send their kids to the same school, have each other over for dinner parties, and may even attend the same church. This recent indictment suggests if at one of these community events executives have a conversation regarding hiring practices,

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131. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54 (2007) (discussing how parallel business behavior is admissible circumstantial evidence but it falls short of conclusively proving a conspiracy absent some additional "plus factors"); *In re* Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015) (explaining that "plus factors" are "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action"); Michael Murray, *Antitrust Enforcement in Labor Markets: The Department of Justice's Efforts*, 59 SANTA CLARA L. REV. 561, 574 (2020).

132. SCA Indictment, *supra* note 129, at 3.

133. *Id.*

134. A conversation between competitors, even if completely innocent, would potentially be a plus factor that could push circumstantial evidence from "neutral territory" to conspiracy when coupled with parallel business conduct such as refusing to hire certain job applicants. *See Twombly*, 550 U.S. at 557.

criminal prosecution could shortly follow. Granted, this is only one of many allegations in the SCA indictment, but when most of the evidence in an antitrust proceeding is circumstantial,[135] even an incidental conversation between friends could lead to antitrust problems.

2. Businesses should not "instruct[] executives, employees, [or] recruiters not to solicit . . . employees" from competitors.[136]

Second, as a result of the agreement entered into above, conspirators instructed certain important employees, executives, and even recruiters not to recruit senior-level employees from other members of the conspiracy.[137] The indictment references a human resource employee who told a recruiter, "Please do not schedule a call w/[candidate from SCA], thanks. She would have had to apply for the job first. We cannot reach out to SCA folks. Take any SCA folks off the list."[138] Time may tell if it is a dispositive fact the instruction was *not to hire* from co-conspirators (instead of not to accept applications from competitors). Regardless, even a blanket statement not to hire within a particular industry could raise red flags which are better avoided entirely. Businesses serious about reducing antitrust risk should avoid this type of conduct altogether.

3. Businesses should not create internal policies requiring employees to notify their existing employers before their application can be considered somewhere else.

The SCA indictment alleges that conspirators required senior-level employees who applied for a job with a co-conspirator to notify their current company they were seeking a job elsewhere before their application could be considered.[139] According to the indictment, a human-resource executive sent an internal email stating, "[O]ur agreement is that we would only speak with senior executives if they have told their boss already that they want to leave and are looking."[140] The chilling effect of this sort of policy on employees should be relatively clear. In addition to discouraging employees from moving to competitors, this company policy also allowed the SCA conspirators to monitor each other's compliance with the illicit agreement.[141] If businesses have these types of policies in place currently, they should be changed immediately because their existence will increase antitrust risk and could lead antitrust enforcement to infer a conspiracy even if one does not exist.

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135. *See* Murray, *supra* note 131.
136. SCA Indictment, *supra* note 129, at 3.
137. *Id.* at 4, 8.
138. *Id.* at 4.
139. *Id.* at 4–5, 8–9.
140. *Id.* at 4.
141. *See id.* (alleging that the practice of requiring employees to notify their existing employers before their application can be considered elsewhere was a means to "monitor[] compliance with the [no-poach] agreement").

B. What Businesses Should Do Immediately

The SCA indictment, along with another wage-fixing indictment charged in December 2020,[142] indicates that after four years of talk, the enforcement agencies are ready to prosecute. Given the recent change of administration, it is unlikely that antitrust enforcement will decrease—consequently, this is likely only the beginning of criminal indictments to come regarding no-poach agreements.[143] Therefore, businesses should act immediately and do whatever it takes to distance themselves from any potential antitrust risk.

1. Evaluate Existing Antitrust Compliance Programs

The first major project all businesses should undertake is a systematic evaluation of their existing antitrust compliance problems. In a review of compliance programs, "[c]ompanies should review the antitrust agencies' HR Guidance and minimize their antitrust risk by ensuring their antitrust compliance programs are current, comprehensive and effective"[144] and their programs comply meticulously with the HR Guidance. By creating a strong compliance program, businesses set themselves up to benefit from a credit (either in the charging or filing phase) if an antitrust action is filed.[145] In July 2019, the DOJ's Antitrust Division announced that in addition to the existing Leniency Program,[146] they were implementing a new policy to "consider compliance at the *charging* stage in criminal antitrust investigations . . . ."[147] This 2019 change came in addition to an earlier change to credit compliance at the sentencing phase[148] and created another reason for businesses to invest in compliance.

While the Antitrust Division is still looking for the "gold standard" for antitrust compliance programs with regard to giving credit at the charging stage,[149]

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142. *See* U.S. DEP'T OF JUST., *supra* note 125; *DOJ Brings First Criminal "No-Poach" and "Wage-Fixing" Prosecutions; New Focus on Labor Market Prosecutions*, CADWALADER (Jan. 14, 2021), https://www.cadwalader.com/resources/clients-friends-memos/doj-brings-first-criminal-no-poach-and-wage-fixing-prosecutions-new-focus-on-labor-market-prosecutions# [https://perma.cc/2J9S-HLEC].

143. CADWALADER, *supra* note 142 ("[T]he Biden administration has stated its intention to '[e]liminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers.'").

144. *Id.*

145. *See id. But see* Eva W. Cole et al., *DOJ Antitrust Division Still Looking for a "Gold Standard" Compliance Program*, WINSTON & STRAWN LLP (Jan. 29, 2021), https://www.winston.com/en/competition-corner/doj-antitrust-division-still-looking-for-a-gold-standard-compliance-program.html [https://perma.cc/SGX6-2AFW]. Although the DOJ's Antitrust Division has not yet encountered a compliance program strong enough to actually benefit the corporation at the charging stage, compliance programs can at minimum benefit corporations at the sentencing phase. *Id.*

146. *See infra* Section V.B.3.

147. *Antitrust Division Announces New Policy to Incentivize Corporate Compliance*, U.S. DEP'T OF JUST. (July 11, 2019), https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance [https://perma.cc/D46G-N2AW] (emphasis added).

148. *Id.*

149. Cole et al, *supra* note 145.

implementing the recommendations in the HR Guidance is a step in the right direction and can only help. First, the Guidance recommends "HR professionals . . . implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees."[150] One example of an "inappropriate discussion" the Guidance gives is "[s]haring information with competitors about terms and conditions of employment . . . ."[151] Returning to the SCA indictment above,[152] had SCA implemented these safeguards, they would have ideally had the effect of preventing the initial conversations that led to the no-poach agreements. If SCA had safeguards in place already, the existence of this feature of their compliance program may provide supporting evidence that their compliance program is "well designed" and "applied earnestly and in good faith."[153]

Sharing information, specifically information regarding "terms and conditions of employment,"[154] can still create risk even if companies are part of a joint venture or engaged in talks of a merger.[155] Although agreements under the umbrella of joint venture are not evaluated as per se illegal, they may still be found unreasonable under the rule of reason. Therefore, businesses should take precautions when sharing information, regardless of whether the relationship between parties is horizontal or vertical.

The HR Guidance lists a number of ways that information can be exchanged and still conform to antitrust laws.[156] It suggests an information exchange may be lawful if: (1) "a neutral third party manages the exchange;" (2) "the exchange involves information that is relatively old;" (3) "the information is aggregated to protect the identity of the underlying sources;" and (4) "enough sources are aggregated to prevent competitors from linking particular data to an individual source."[157] Following these four steps prior to any antitrust investigation will allow businesses to argue effectively the information exchange was ancillary to a reasonable joint venture "whose success they promote" and therefore subject to the rule of reason.[158]

2. Employee Training

Once a strong compliance program is in place, it is essential the program is communicated effectively to rank-and-file employees—not just senior executives—in order for the program to be effective. The HR Guidance recommends "[human-

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150. HR GUIDANCE, *supra* note 14, at 1.

151. *Id.* at 4 ("Even if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement.").

152. *See supra* Section I.A.

153. U.S. DEP'T OF JUST. ANTITRUST DIV. 2, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (2019), https://www.justice.gov/atr/page/file/1182001/download [https://perma.cc/V46Z-UUDC].

154. HR GUIDANCE, *supra* note 14, at 4–5.

155. An ancillary restraint is subject to the rule of reason, not the per se rule. *See* Section III.B.

156. HR GUIDANCE, *supra* note 14, at 5.

157. *Id.*

158. Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188–89 (7th Cir. 1985).

resource] professionals . . . take steps to ensure that interactions with other employers competing with them for employees do not result in an unlawful agreement not to compete on terms of employment."[159] Human-resource representatives physically cannot be in each meeting or mere conversation monitoring antitrust compliance; therefore, one of the only ways human-resource professionals can accomplish this recommendation is through employee training. At the highest level, an effective employee training program helps each employee understand their antitrust compliance obligations.[160] In its July 2019 guidance document, the Antitrust Division gave the following examples of what to include in an employee training program:

> [T]raining can teach relevant personnel that competitor communications could signal an antitrust violation if they are not part of a legitimate joint venture or other procompetitive or competitively neutral collaboration. In addition, training should instruct employees involved in such collaboration that a legitimate collaboration between competitors can become problematic if it develops into an exchange of competitively sensitive business information or future pricing information, or if other antitrust violations occur. Training should address what to do when an employee thinks [an] activity is potentially unlawful.[161]

This example provides a broad, and relatively vague, outline of what a training should include. The 2019 guidance continues with a series of questions for prosecutors (and prudent businesses) to consider when evaluating the effectiveness of a training program.[162] Note in the quote above that according to the Antitrust Division, part of training is communication.[163] This communication should move both downward from executives to employees, as well as upward from employees to executives.[164] A key part of the training is clearly explaining how employees can communicate believed antitrust violations. These reports should be followed up on and recorded as additional evidence of the company's culture of compliance.

3. Corporate Lenience Program

At some point during the two steps mentioned above, a business may learn of an existing no-poach agreement. The first step should be obvious: terminate the agreement. Next, the business should strongly consider participating in the

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159. HR GUIDANCE, *supra* note 14, at 2.

160. U.S. DEP'T OF JUST. ANTITRUST DIV. 8, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (2019), https://www.justice.gov/atr/page/file/1182001/download [https://perma.cc/V46Z-UUDC].

161. *Id.*

162. *Id.* at 8–9.

163. *Id.* at 8 ("Training should address what to do when an employee thinks [an] activity is potentially unlawful.").

164. The July 2019 Antitrust compliance program guidance instructs prosecutors to ask questions such as, "How has the company communicated its antitrust policies and procedures to all employees?" and "What mechanisms does the company have in place to ensure that employees follow its compliance program?" *Id.* at 8–9. To evaluate the ability of employees to communicate upwards, prosecutors are instructed to ask, "How often must employees certify their antitrust compliance?" *Id.* at 9.

Corporate Leniency Program (the "Program").[165] Since the 1993 revision of the Program, "the first company to report cartel activity was not prosecuted criminally, nor were any of its officers, directors, or employees who cooperated with the DOJ investigation."[166] Notice the Program does not protect against civil liability. Realizing this may deter businesses from participating in the Program. Congress in 2004 passed the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA").[167] In the ACPERA, Congress removed treble damages and joint-and-several liability for participants in the Program in civil lawsuits that followed criminal prosecution.[168] The coupling of the Program with the ACPERA provides two incentives from different directions for businesses who are parties to a no-poach agreement. The first incentive is the protection the DOJ can offer under the Leniency Program. The second incentive is an incentive to be the first member of a no-poach agreement to report to the DOJ, because once another member of the conspiracy cooperates the probability of success in a lawsuit for the others greatly decreases.[169]

The Leniency Program is not without its drawbacks, however. In an address to the Georgetown University Law Center in 2014, then Assistant Attorney General Bill Baer remarked:

> Our leniency policy is quite clear that it governs only the Antitrust Division's exercise of its prosecutorial discretion in connection with self-reported criminal violations and does not prevent other components from prosecuting offenses other than Sherman Act violations. Indeed, we have seen fact patterns where the anti[t]rust crime is only part of the bad behavior engaged in by the leniency applicant.[170]

The bottom line for those seeking to use the Leniency Program is the DOJ reserves the right to prosecute other behavior—besides the antitrust behavior covered by the Program—that may come to light as a result of a disclosure under the Program.[171] Back peddling some, Baer went on to explain that "front-and-center

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165. *Leniency Program*, U.S. DEP'T OF JUST. (Feb. 20, 2020), https://www.justice.gov/atr/leniency-program [https://perma.cc/RR22-UXCF]. "Corporations and individuals who report their cartel activity and cooperate in the Division's investigation of the cartel reported can avoid criminal conviction, fines, and prison sentences if they meet the requirements of the program." *Id.*

166. Robert B. Bell & Kristin Millay, *The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?*, ANTITRUST MAG., Fall 2018, at 80.

167. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004), extended through 2020 by Pub. L. No. 111-190, 124 Stat. 1275 (2010) (codified as amended at 15 U.S.C. § 1).

168. *Id.* § 213(a)–(b), 118 Stat. 661, 666–68.

169. Bell & Millay, *supra* note 166, at 80 (explaining that those who lose the race for lenience typically begin negotiations immediately for a guilty plea because "they know the leniency recipient will often have enough information to incriminate them . . . .").

170. Bill Baer, *Prosecuting Antitrust Crimes*, U.S. DEP'T OF JUST. ANTITRUST DIV. 4 (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download [https://perma.cc/L9DZ-EQHR].

171. *See* Bell & Millay, *supra* note 166, at 82–83.

in the [DOJ] charging calculus" is self-reporting, "so a leniency applicant . . . still benefits materially from reporting and cooperating with respect to both its antitrust and non-antitrust crimes."[172] Although Baer seems to be saying the DOJ will credit the leniency applicant as much as it can, businesses should be warned that Leniency Program participation does not wipe away all its transgressions, only the antitrust ones.

CONCLUSION

This Note has discussed in detail the potential risks associated with no-poach agreements, risks that are only going to increase as more companies decide to work together on joint-social-initiative agreements. Businesses that embark on these joint endeavors should do everything they can, at both the outset of the endeavor as well as throughout, to make sure they qualify for rule-of-reason analysis. Better yet, businesses should altogether abandon any relic no-poach agreements, or risk severe civil and criminal consequences.

Further, this Note has provided some "do's and don'ts" for businesses to strongly consider. Businesses should not engage in any type of meeting with another business and discuss hiring practices;[173] instruct executives, employees, or recruiters not to hire from competitors;[174] or create hiring policies that instruct applicants to inform existing employers before their application can be considered.[175] Businesses should, however, take a close look at their existing antitrust compliance programs[176] and implement employee training to communicate their compliance policies.[177] They should also have a plan for and know what to do if they find an antitrust violation within their organization.[178]

Prosecutions against no-poach agreements are here to stay, as evidenced by recent DOJ indictments. The recommendations discussed above will allow businesses to reduce antitrust risk and place themselves as far along the sliding scale towards relative safety as the law will permit. This safety will in turn allow businesses to continue to foster the social progress we have seen in recent years. Unfortunately, if businesses remain ignorant of important enforcement agency priorities like no-poach agreements, one result could be a chilling effect on joint social initiatives and subsequent social progress stagnation.

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172. Baer, *supra* note 170.
173. *See supra* Section I.A.1.
174. *See supra* Section I.A.2.
175. *See supra* Section I.A.3.
176. *See supra* Section I.B.1.
177. *See supra* Section I.B.2.
178. *See supra* Section I.B.3.