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Recent No-Poach Developments: Federal Enforcement Agencies Ally to Promote Labor and McDonald's Latest Judicial Win

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Antitrust in labor markets remains a "hot topic" for government, business, and labor. The antitrust enforcement agencies, consistent with the Biden administration's "Executive Order on Promoting Competition in the American Economy," continue to push the use of the antitrust laws to enhance the mobility and bargaining power of employees. Recently, several developments occurred which both hinder and help the administration's goals. On July 26th, the U.S. Department of Justice, Antitrust Division, and the National Labor Relations Board (NLRB) entered into a memorandum of understanding (MOU) to strengthen the agencies' partnership through greater coordination in information sharing, coordinated investigations and enforcement activity, training, education, and outreach.[1] Similarly, last week, the U.S. Federal Trade Commission entered into a separate MOU with the NLRB "outlin[ing] ways in which the Commission and the [NLRB] will work together moving forward on key issues such as labor market concentration, one-sided contract terms, and labor developments in the "gig economy."[2] Last month, a federal court in Chicago dismissed civil antitrust claims brought by former McDonald's restaurant workers rejecting their argument that a no-hire provision in the McDonald's franchise agreement should be considered *per se* illegal.

State and federal courts continue to work through the recent spate of filed cases that challenge no-hire provisions. Last month, McDonald's obtained a judgment on the pleadings, ending the antitrust litigation challenging the legality of the no-hire restraint in its franchise agreements. McDonald's convinced the court that its previous inclusion of no-hire clauses within its franchise agreements did not violate Section 1 of the Sherman Act. Ultimately, the court's decision turned on the application of the rule of reason, as opposed to *per se* treatment or quick-look, which the plaintiffs argued were the proper standard to apply to the no-hire clauses. The court also rejected the plaintiffs' argument that the relevant geographic market for analyzing McDonald's market power was limited to only McDonald's-branded restaurants nationally. The decision reaffirms the application of traditional antitrust principles in buy-side labor markets, despite the considerable pressure from politicians, government enforcement agencies, and the U.S. Plaintiffs' Class Action Bar to apply heightened antitrust scrutiny to these restraints.

Deslandes v. McDonald's USA LLC

On June 28, 2017, plaintiff Leinani Deslandes, a McDonald's employee, filed a class-action complaint against McDonald's in Illinois federal court, alleging that the company violated Section 1 by including a no-hire provision

in its franchise agreements. In 2019, a nearly identical class-action complaint was filed by plaintiff Stephanie Turner, and the cases were combined for litigation.[3] Both plaintiffs (hereinafter, the plaintiffs) sought to represent former and current employees of McDonald's who allegedly suffered from wage suppression and limited competition as a result of the no-hire clauses.

Until 2017, McDonald's franchise agreements contained no-hire clauses that prohibited franchisees from employing or seeking to employ individuals who worked for other McDonald's restaurants. These restraints applied to all other McDonald's restaurants, including restaurants owned and operated by McDonald's corporation or its subsidiaries. The plaintiffs alleged the restrictions limited the employment opportunities available to McDonald's employees, which resulted in suppressed wages.

Court Grants McDonald's Motion for Judgment on the Pleadings

On June 28, the court granted McDonald's motion for judgment on the pleadings.[4] Having previously, partly granted McDonald's motion to dismiss and having denied the plaintiffs' motion for class certification, the only claims before the court were plaintiff Deslandes' and plaintiff Turner's individual claims against McDonald's for violation of Section 1.[5]

McDonald's argument for judgment on the pleadings relied heavily on the court's previous denial of the plaintiffs' motion for class certification in which the court held the rule of reason, as opposed to quick–look analysis, applied to the no-hire provisions.[6] McDonald's argued that the plaintiffs had failed to plead the relevant markets in which they sold their labor, let alone that McDonald's had market power in the relevant markets, and therefore, the plaintiffs could not prove their claims as a matter of law.

In response, the plaintiffs alleged that while the court had rejected the application of quick-look analysis, the no-hire provision could still be found to be *per se* illegal. The plaintiffs also argued that they were not required to plead legal theories and therefore, were not required in their complaints to define the relevant markets. Lastly, the plaintiffs argued that employment by McDonald's constituted its own market, and therefore, the relevant market was the national market of McDonald's restaurants.

The court rejected each of the plaintiffs' arguments in turn. The court found that the plaintiffs' claims "'presumptively' call for rule of reason analysis" based on the Supreme Court's recent decision in *NCAA v. Alston*, __U.S. __, 141 S. Ct. 2141 (2021) and because the plaintiffs specifically alleged the restraint was part of a franchise agreement. Therefore, it was ancillary to an agreement that was output enhancing.[7]

Next, the court rejected the argument that the plaintiffs were not required to plead the relevant market.[8] The court acknowledged that the plaintiffs did not need to plead legal theories but ruled they did need to plead sufficient facts to support a judgment in their favor, and by failing to plead the relevant market, the plaintiffs could not show that the noncompete clauses were unlawful.[9]

Lastly, the court rejected as implausible the plaintiffs' contentions that the relevant market was the national market of McDonald's restaurants.[10] The court instead accepted McDonald's argument that the relevant market was the market for quick-service food employees in the immediate area (within 10 miles) in which the plaintiffs lived.[11] The court noted that unlike certain high-level positions, such as chief executive officers, companies do

not undertake national searches for candidates to fill the positions at local fast-food establishments, and therefore, the relevant labor market could not be a national market.[12]

Despite having rejected all of the plaintiffs' arguments, the court did not stop there. The court went on to rule that even if it were inclined to grant the plaintiffs' request for leave to amend their pleadings, the amendment would be futile.[13] The court stated that because the relevant market was the local labor market in close proximity to where the plaintiffs reside, the plaintiffs could not possibly allege that McDonald's had market power in the relevant markets.[14] The court cited to the undisputed fact that 517 quick-service restaurants were within 10 miles of plaintiff Deslandes' home, and 253 quick-service restaurants were within 10 miles of plaintiff Turner's home.[15] This undisputed evidence established conclusively that the plaintiffs could not prove that McDonald's had significant market power within the relevant market for either plaintiff.[16]

The plaintiffs filed a notice of appeal of the order, dismissing their claims on July 27.

Conclusion

The court's ruling in *McDonald's* is good news for franchisors and, more generally, firms that use ancillary restraints, such as no-hire or no-poach provisions. First and foremost, the *McDonald's* ruling reinforced the viability of the ancillary restraint doctrine and that courts remain open to considering, on a case-by-case basis, whether no-hire provisions are ancillary to the broader agreement. Parties that want their no-hire provision to be deemed ancillary should take the time to document their legitimate business interest for the provision and the relationship between that interest and the lawful, beneficial goals of the parties' overarching agreement.

Second, the *McDonald's* ruling reinforced the traditional rule that ancillary restraints are presumptively evaluated under the rule of reason. This was particularly notable in *McDonald's*, which addressed no-hire provisions in the franchise context and where the defendant has company-owned stores that compete against its franchisees. Despite the plaintiffs' arguments that the court should apply the quick-look or subject the noncompete clauses to *per se* treatment, the court maintained and ultimately dismissed the litigation on the application of the rule of reason. The court's consistent application of the rule of reason is notable because like the plaintiffs, federal antitrust enforcement agencies and legislators have been advocating for heightened scrutiny of restraints in labor markets that, they argue, tend to suppress wages and employee mobility. The court's application of the rule of reason helps allow franchisors to protect themselves and their interests with no-hire clauses, provided the clauses are ancillary to franchise agreements.

Lastly, this decision shows how difficult it will be for employees to claim that buy-side restraints caused them harm. Determinations as to the relevant market and the market power within the relevant market are fact-specific determinations unique to each plaintiff. By ruling that the relevant market in *McDonald's* was quick-serve restaurants, as opposed to just other McDonald's restaurants, the plaintiffs could not claim that the restraints prevented them from working. And, because the relevant market was not the national market, but instead a more local market near the plaintiffs' residence, the nationwide class claims failed.

The decision of a single court will not deter the federal and state agencies in their effort to improve the bargaining position and mobility of the U.S. workforce. In fact, civil litigants who have sought to rely on the *McDonald's* decision in unrelated cases have been met with DOJ intervention and pushback.[17] Similarly, we would expect

the DOJ and perhaps other agencies to seek to participate in the appeal of the *McDonald's* decision.

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[1] "Justice Department and National Labor Relations Board Announce Partnership to Protect Workers" press release, available at https://www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers.

[2] "Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices" press release, available at https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers.

[3] *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-4857 (N.D. Ill. June 28, 2017); *Turner v. McDonald's USA, LLC*, 19-cv-5524 (N.D. Ill. August 15, 2019).

[4] The parties cross moved for summary judgment, and McDonald's also moved for judgment on the pleadings. *Deslandes v. McDonald's USA, LLC,* No. 1:17-cv-4857, at 1-2 (N.D. Ill. June 28, 2022).

[5] *Deslandes v. McDonald's USA, LLC,* No. 1:17-cv-4857, at 18 (N.D. Ill. June 25, 2019); *Deslandes v. McDonald's USA, LLC,* No. 1:17-cv-4857, at 27 (N.D. Ill. July 18, 2021).

[6] *Deslandes v. McDonald's USA, LLC,* No. 1:17-cv-4857, at 7-12 (N.D. Ill. July 18, 2021).

[7] *Id.* at 8.

[8] *Id.* at 10.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 11-12.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See* https://www.law360.com/articles/1515579/doj-says-mcdonald-s-no-poach-win-inapplicable-to-davita.

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