

A Warning On No-Hire And Nonsolicitation Clauses In Pa.

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When consultants or other vendors bring their employees together in collaboration with their customers' personnel, the parties may be concerned that one side might poach the other's talent. Why would a party attempt to poach the employees of its business partner?



Joseph Lincoln

For one, the client in the relationship may want to trim costs by cutting out the consulting firm as a middleman and hire that firm's employee directly. Other times, the client or customer may want to take an entire outsourced function in-house. What better way to do that than to hire the professionals who were already performing the work? Conversely, the consultant or vendor may find, in a customer or client, the ideal candidate to provide its services, hiring away a key employee.



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Frequently parties have dealt with these possibilities by including a no-hire or a nonsolicitation clause, often broadly thought of as no-poaching provisions,[1] in their agreements. These clauses will, to some extent, prevent or limit the ability of employees to move from one side of the relationship to the other.



Patrick McCabe

A recent en banc decision from the Pennsylvania Superior Court, *Pittsburgh Logistics Systems Inc. v. BeeMac Trucking LLC*[2], casts significant doubt on the enforceability in Pennsylvania of no-hire clauses in commercial agreements. In addition, in recent years, the Antitrust Division of the U.S. Department of Justice has issued guidance stating an intent to investigate "naked" no-hire and nonsolicitation provisions as restraints on the labor market as potentially criminal violations of Section 1 of the Sherman Antitrust Act.[3] In combination, the Pittsburgh Logistics case and DOJ guidance call for extreme care in drafting, agreeing to and implementing anything resembling a no-poaching clause.



David Kully

Styled as a case of first impression in Pennsylvania, Pittsburgh Logistics addressed the enforceability of a no-hire provision among a trucking business and its logistics vendor. After reviewing decisions from other states and noting the conflicting treatment no-hire clauses have received,[4] the majority held that:

The trial court [correctly] determined the no-hire provision would violate public policy by preventing persons from seeking employment with certain companies without receiving additional consideration for the prohibition, or even necessarily having any input regarding or knowledge of the restrictive provision. Additionally, the trial court reasoned the no-hire provision was overly broad in that the enforceable no-solicitation provision between PLS and BeeMac sufficiently protected PLS from the loss of its clients, which was the ultimate purpose of all the relevant restrictions.[5]

The broad, principal rationale of the Pittsburgh Logistics court may undercut most no-poaching agreements as currently drafted and implemented, even if in compliance with DOJ guidance, because the court imposes public policy scrutiny on such clauses similar to that imposed on a post-employment restrictive covenant agreement between a business and an individual employee.

A Pennsylvania court confronted with a no-poaching clause more narrowly crafted than in Pittsburgh Logistics might be persuaded to uphold the clause without applying restrictive covenant law.[6] Such a narrowly tailored clause may also avoid the DOJ's concern with "naked" no-poaching clauses by meeting the DOJ's recognition that certain clauses are acceptable if they are reasonably necessary to a separate legitimate business transaction or collaboration.

The Superior Court's decision may have been colored by the uncontested invalidity of covenants not to compete in Pittsburgh Logistics' separate agreements with its employees. Ignoring the commercial rationale for a no-poaching agreement, the majority took the position, as the minority described it, that the no-hire provision was merely a "back door" covenant not to compete.

By contrast, the DOJ guidance, does not wrap itself around the standards for a covenant not to compete. In the final judgment settling *U.S. v. Knorr Bremse AG, et al.*,[7] the DOJ permitted the defendants to continue with no-poaching covenants ancillary to legitimate

business collaborations, provided that each such covenant:

1. be in writing and signed by all parties thereto; 2. identify, with specificity, the Agreement to which it is ancillary; 3. be narrowly tailored to affect only employees who are reasonably anticipated to be directly involved in the Agreement; 4. identify with reasonable specificity the employees who are subject to the Agreement; and 5. contain a specific termination date or event.[8]

To address the concerns of the Pittsburgh Logistics court and of the DOJ, a company desiring to protect itself with no-poaching restrictions should carefully consider the following points.[9]

- ***Expressly define the legitimacy and business purpose on any hiring limitations.*** Including an explicit recital of the purpose for the no-hire provision that is clearly distinguishable from being an additional layer of protection against nonsolicitation of customers is advisable following Pittsburgh Logistics. For example, defining the purpose of the clause as to ensure a productive temporary cooperative relationship and to protect each company's interest in the training, investment and confidential business information entrusted to its employees who will be collaborating with the other company's employees may help to obviate these issues. Further, to negate the "back door" restrictive covenant view, it may be advisable to recite or at least establish a record that nothing in the covenant prevents employees from being hired by anyone except the parties and their affiliates.
- ***Define the employee group at issue as narrowly as possible.*** Consider limiting the clause to cover only those employees that actually perform meaningful work under the contract at issue. A restriction covering other employees might well be viewed as "naked" with respect to those other employees.
- ***Limit the time period and scope of any restriction.*** Consider tying the no-hire restriction to the time period associated with an employee's time on the project covered by the agreement. By way of example, if the underlying agreement between the companies lasts 10 years, but an individual employee only worked on the project for years one and two of those 10, tying the no-hire restriction to the term of the contract could well be considered overly broad or "naked."

- **Demonstrate the commercial focus of the restriction.** Tying a restriction to focus on legitimate business concerns such as protection of trade secrets may help demonstrate the commercial nature of the restriction.[10]

The Pittsburgh Logistics court frowned upon the lack of notice provided to employees subject to the no-hiring provision. Clear disclosure of the existence of no-hire clauses in agreements with customers through a standardized acknowledgment may help alleviate this concern. For smaller-scale operations, or infrequent situations, a similar protective action might be to inform any employees who would work on a project covered by an agreement containing a no-hire clause with another company of the existence of that clause on a case-by-case basis. The Pittsburgh Logistics concern of additional, independent consideration is difficult to address absent a willingness on the part of the employer to pay a premium.

One additional alternative may be worth exploring in light of the Superior Court's focus on no-hire provisions: a nonsolicitation of employees clause. Although such a clause could still implicate antitrust concerns if "naked," Pennsylvania courts may be more likely to permit enforcement of reasonable nonsolicitation clauses in connection with the protection of an employer's legitimate business interests.[11] Violations will be more challenging to prove than with a no-hire provision, but policy-based scrutiny should be reduced.

Although no-poaching protections are fundamental to many commercial relationships, both state and federal law drive limitations on those protections, when not carefully constructed, and in some cases may criminalize them. Given recent precedent and DOJ guidance, a closer look at these provisions is recommended.

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[1] While some may want to distinguish between anti-hiring and anti-solicitation provisions, the Department of Justice includes both in its view of potential antitrust violations described below. The United States Department of Justice, No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute 'No-Poach' and Wage Fixing Agreements, (updated April 10, 2018), <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements>. (the "No-Poach Guidance"). The DOJ might, however, regard nonsolicitation provisions to be less restrictive of competition between the parties than a no-hire provision, and thus more defensible, as it would not block hiring of an employee if the interaction with the new employer is initiated by the employee (or through a head hunter).

[2] [Pittsburgh Logistics Systems Inc. v. BeeMac Trucking LLC](#), et al., No. 134 WDA 2017 (Pa. Super. Ct. 2019). A Petition for Allowance of Appeal to the Pennsylvania Supreme Court was filed on Feb. 11, 2019, by Pittsburgh Logistics Systems Inc.

[3] See No-Poach Guidance. The Antitrust Division has taken the position that any "naked" anti-poaching agreement entered into or continuing after October 2016 is per se violation of Section 1 of the Sherman Act and potentially a criminal offense. Agreements established before that date are not subject to criminal sanctions, but may be subject to civil penalties.

The Department of Justice has also pointed out that private litigants may recover treble damages for violations. Competitive Impact Statement at 19, [U.S. v. Knorr-Bremse AG](#), No. 1:18-cv-00747, slip op. 2018 WL 4386565 (D.C. Cir. July 11, 2018). In fact, private litigation is following on. In re Railway Industry Employee No-Poach Antitrust Litigation, No. 2:18-mc-798 (W.D. PA). The DOJ has stated that the plaintiffs' allegations of naked no-poach agreements are sufficient to state a per se claim. Statement of Interest of the United States (Feb. 8, 2019). See Statement of Interest of the United States of America, Seaman v. Duke University, (D. NC March 7, 2019)(No. 1:15-cv-462).

The DOJ, however, takes the position that no-poaching restrictions to the extent established through "vertical" agreements between a franchisor and a franchisee, unlike certain horizontal naked no-poach agreements, should receive rule-of-reason analysis. See Statement of Interest of the United States of America, Stigar v. Dough Dough Inc., et al., (E.D. WA March 7, 2019) (No. 2:18-cv-00244). The vertical agreements may be argued to advance the procompetitive purpose of incentivizing franchisees to invest in training

employees (which the franchisees would be less likely to do if other franchisees could simply hire already-trained employees).

Less sympathetically, the Washington attorney general, however, has suggested it will take an approach under state antitrust law different from the DOJ's under the Sherman Act. See Motion for Expedited Leave to File Amicus Curiae Brief by the Attorney General of Washington, *Stigar v. Dough Dough Inc. et al*, (E.D. WA March 1, 2019), granted March 7, 2019 (No. 2:118-cv-00244). The Washington attorney general has extended no-poach enforcement to the fast-food and other franchise contexts, challenging provisions in franchise agreements that prohibit one franchisee from poaching employees from another, investigating over 100 franchisors and settling with 57. See Declaration of Rahul Rao in Support of Motion for Expedited Leave to File Amicus Curiae Brief by the Attorney General of Washington, *Stigar v. Dough Dough Inc.*, (E.D. WA March 1, 2019) (No. 2:118-cv-00244). The Washington State view survived a motion to dismiss in *State of Washington v. Jersey Mike's Franchise Systems Inc.*, (WA Super. Ct. King County Jan. 25, 2019) (No. 18-2-25822-7). In addition, the Attorney General of Massachusetts, together with the Attorneys General of 9 other states and the District of Columbia, has sent letters to eight national fast-food franchisors requesting information and documents on no-poaching agreements. Attorney General of Massachusetts, AG Healy Leads Multistate Investigation of Worker No-Poach Agreements at National Fast Food Franchises, (July 9, 2018), <https://www.mass.gov/news/ag-healey-leads-multistate-investigation-of-worker-no-poach-agreements-at-national-fast-food>. At this writing, in *Dough Dough*, a hearing on a motion to dismiss for failure to state a claim has been scheduled for March 20, 2019.

The DOJ has simultaneously reiterated its position that a per se violation exists in the case of a naked horizontal no-poaching agreement absent an ancillary purpose reasonably necessary to a separate, legitimate business transaction or collaboration among employers both in its Statement of Interest in the *Dough Dough* case and in a North Carolina case. See Statement of Interest of the United States of America, *Seaman v. Duke University*, (D. NC March 7, 2019)(No. 1:15-cv-462).

[4] The court noted that Wisconsin, California and Texas have held that these types of agreements are void against public policy while Alabama and Illinois have held that they are permissible partial restraint of trade.

In [Heyde Cos. V. Dove Healthcare LLC](#) , 654 N.W.2d 830 (Wis. 2002), a physical

therapist agency brought action against a nursing home alleging breach of a no-hire provision in a service agreement between the parties. The court held the provision was not necessary for the agency to protect its interest in maintaining its employees and the provision was harsh and oppressive to agency's employees and was contrary to public policy. The provision restricted the hiring of Heyde employees with respect to all of the facilities that Heyde had a contract with and not just the facility operated by Dove, even if an employee had no contact with that facility. The record also established that Heyde had contracts with 35 nursing homes making it much broader than the provision at issue in Pittsburgh Logistics.

In [VL Systems Inc. v Unisen Inc.](#), 152 Cal. App. 4th 708 (2007), a consulting company brought breach of contract action against its client, alleging that the client hired one of its consultants in violation of a no-hire provision in a short-term computer consulting contract. The court held that the no-hire provision was unenforceable because it was overly broad. The VLS employee did not perform any work for the client and was not employed by VLS at the time the contract was performed.

In [Texas Shop Towel Inc. v. Haire](#), 246 S.W. 2d 482 (Tx. Ct. App. 1952), the buyer of a business brought claims against the seller for breach of a noncompete agreement by seller's employees. The court held that seller was not liable for alleged breach by a person who was no longer employed by the seller. The court reasoned that, in a contract restricting trade, an employee's right and freedom to contract may not be traded away by a third person, even by the third party's express contract.

In *Ex Parte Howell Engineering and Surveying Inc.*, 981 So. 2d 413 (Ala. 2006), an engineering firm brought breach of contract and conversion actions against its client and former employee who had been moonlighting for the client. The court held that the no-hire provision, as a partial restraint of trade, was not rendered void by statute governing contracts in restraint of trade. There was no corollary noncompetition agreement with the employee and the no-hire provision did not prevent employee from practicing her profession and only prevented her from working for the client.

In [H&M Commercial Driver Leasing Inc. v. Fox Valley Containers Inc.](#), 209 Ill. 2d 52 (2004), a truck-driver lessor brought action against a truck-driver lessee for breach of contract, relating to a no-hire provision for leased drivers for one year following contract termination. The court held the contract was a restraint of trade rather than a restrictive

covenant and the restraint was reasonable. The court reasoned the drivers could seek employment with employers other than lessee and, if lessee was allowed to hire lessor's drivers, lessee would no longer need lessor's services.

[5] Pittsburgh Logistics, No. 134 WDA 2017 at 5.

[6] The outcome in the Pennsylvania Supreme Court could follow several paths. The court could simply not hear the case, leaving the Superior Court decision in place, it could simply reverse or it could remand on the basis that the decision was improper but there were other grounds upon which the Pittsburgh Logistics clause might fail.

[7] U.S. v. Knorr-Bremse AG, No. 1:18-cv-00747, slip op. 2018 WL 4386565 (D.C. Cir. July 11, 2018). The case involved "naked" no-poaching agreements among competitors "not reasonably necessary to any separate, legitimate business transaction or collaboration between the companies." Competitive Impact Statement at 5, U.S. v. Knorr-Bremse AG, No. 1:18-cv-00747, slip op. 2018 WL 4386565 (D.C. Cir. July 11, 2018). The defendants were saved from a criminal prosecution because the U.S. uncovered and began investigating the agreements, and the defendants terminated them, before the October 2016 announcement. Id. at 12.

[8] Id. at 4. Given the view of the Department of Justice, this analysis should be undertaken with respect to existing as well as new agreements. What steps should be taken with respect to any existing "naked" agreements is beyond the scope of this article.

[9] Under Federal law, at least, a somewhat different approach might be taken with respect to vertical restrictions. See *infra* at 3 n. iii.

[10] The majority opinion ignored a federal case in which the court upheld a no-hire provision while applying what it believed to be Pennsylvania state law. [GeoDecisions v. Data Transfer Solutions LLC](#), 2010 WL 5014514 (M.D. Pa. 2010). There two competitor information technology companies executed a mutual nondisclosure agreement that contained a no-hire clause as part of teaming up on a project. The no-hire provision was for a period of two years from the date of the agreement. After DTS hired several of GEODecisions employees within the two-year time period, GEODecisions brought a breach of contract action against DTS. The court concluded that the restraint of trade was not unreasonable and it was not overly broad. The minority in Pittsburgh Logistics found the

district court's reasoning in GEODecisions particularly persuasive, and noted that the only distinction between GEODecisions and Pittsburgh Logistics was that the GEODecisions covenant was mutual while the Pittsburgh Logistics clause was unilateral.

[11] See, e.g., [Metalico Pittsburgh Inc. v. Newman](#), 160 A.3d 205, 207 (Pa. Super. Ct. 2017) (reversing trial court decision to strike down covenant that prohibited, among other things, former employees from engaging in actions to “solicit, employ, or otherwise engage as an employee, independent contractor, or otherwise, any person who is or was an employee of the Employer at any time during the Employment Period or in any manner induce or attempt to induce any employee of the Employer to terminate his employment with the Employer”); [Synthes, Inc. v. Emerge Med., Inc.](#), 25 F. Supp. 3d 617, 691 (E.D. Pa. 2014) (permitting enforcement of nonsolicitation of employees provision under Pennsylvania law).