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CLIENT ALERT

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STOP HIRING MY EMPLOYEES!! PENNSYLVANIA FLOATS A NEW APPROACH TO NO-POACH

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A no-poach agreement binds one employer from hiring employees from another employer. Such restrictions between employers may be stand-alone agreements or appear as clauses within contracts.[2] Recently, antitrust enforcement has been increasingly aggressive in the "no-poach" arena. Employees affected by no-poach agreements, particularly among fast-food chains, have filed antitrust class action claims, making no-poach agreements a hot topic for federal and state agencies, as well as employers and employees.

In January 2019, the Pennsylvania Superior Court took a different approach, analyzing no-poach agreements through a public policy lens under common law.[3]

Pittsburgh Logistics Systems ("PLS"), a third-party logistics provider, entered into a services contract with BeeMac, a trucking company. BeeMac agreed not to hire any employees of PLS for two years after termination of the contract. After BeeMac hired four former PLS employees in violation of the agreement, PLS sued to enforce the agreement and sought injunctive relief, which the trial court denied. The Superior Court upheld the decision under a "highly deferential" standard of review.[4]

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[2] In the antitrust context, the appropriate standard of review continues to be litigated. In the October 2016 joint agency Guidance for Human Resource Professionals issued by the Department of Justice Antitrust Division and the Federal Trade Commission, on which antitrust enforcement agencies have heavily relied, the government took the position that "naked" no poach agreements are *per se* unlawful. The DOJ further explained in a 1/25/19 filing with a U.S. District Court in Washington that no-poach clauses within legitimate contracts require deeper analysis under the antitrust Rule of Reason framework.

[3] See Pittsburgh Logistics Sys. v. BeeMac Trucking, LLC, 2019 PA Super 13 (2019).

[4] The trial court decision was reviewed to determine whether it was grounded in "any apparently reasonable grounds," the standard of review for preliminary injunctive relief. Id. at *4.

The appellate court concluded that the trial court's invalidation of the no-poach clause was reasonable based on public policy grounds gleaned from Wisconsin and California precedent, stating that restrictions affecting employees are unenforceable when the employees were not aware of the restriction, were not parties to the contract, and did not receive consideration for the restriction. The court further viewed the no-poach agreement as an inequitable attempt to revive a non-compete restriction that had been stricken from PLS's contracts with its employees. Finally, the no-poach restrictions were deemed to be overly broad because the contracts were self-renewing, creating an indefinite time horizon, and applied to all PLS employees, regardless of each employee's specific circumstances.

In a dissenting opinion, Judge Mary Jane Bowes applied a *de novo* standard of review, thus giving no deference to the trial court's reasoning.[5] The dissent argued that the no-poach clause was a "reasonable restraint upon trade" because "(1) it is ancillary to the main purpose of a lawful transaction; (2) it is necessary to protect a party's legitimate interest; (3) [it] is supported by adequate consideration; and (4) it is reasonably limited in both time and territory."[6] Significantly, the no-poach clause supported the contractual relationship between the parties by preventing BeeMac from treating PLS "as an involuntary and unpaid employment agency."[7]

The dissent criticized the majority's analysis as conflating the no-poach clause binding on BeeMac with non-compete provisions binding on employees. The clause limited BeeMac from hiring PLS employees but did not limit PLS employees from seeking employment with any company other than BeeMac. Similarly, the dissent argued that, without relevant Pennsylvania statutory authority or case law, no "dominant public policy" exists to invalidate an otherwise proper contractual clause.[8]

While BeeMac suggests that Pennsylvania public policy opposes no-poach agreements, the majority opinion can largely be explained by the deferential standard of review. The dissenting opinion provides a persuasive analysis under the appropriate *de novo* approach. Nevertheless, in light of potentially significant exposure in the antitrust context, employers should review agreements (employment and otherwise) that include employee no-poach provisions.[9]

[5] *De novo* review is appropriate for reviewing questions of law, such as enforceability of contracts. Id. at *19 (Bowes, J., dissenting) (citing GeoDecisions v. Data Transfer Sols., LLC, 2010 U.S. Dist. LEXIS 128283 (M.D. Pa. Dec. 3, 2010)).

[6] Id. at *22 (Bowes, J., dissenting) (quoting GeoDecisions, 2010 U.S. Dist. LEXIS 128283).

[7] Id. at *27 (Bowes, J., dissenting) (citing GeoDecisions, 2010 U.S. Dist. LEXIS 128283).

[8] Id. at * 27-28 (Bowes, J., dissenting).

[9] As noted above, no-poach agreements can implicate anti-trust enforcement, which may lead to civil and criminal penalties, so regular review of agreements could help reduce potential exposure.