FEDERAL CRIMINAL PROSECUTIONS OF LABOR MARKET RESTRICTIONS: SMALL CASES WITH BIG IMPLICATIONS

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INTRODUCTION

Historically, there has been a tension between antitrust and labor law.[1] In an age of ongoing wage stagnation,[2] however, this fractured relationship may be changing. Antitrust economists and practitioners are raising concerns about market concentration's negative effects on real wages.[3] As a result, the government has placed greater emphasis on prosecuting anticompetitive conduct practiced in labor markets.[4] In 2016, the U.S. competition agencies—the Department of Justice's Antitrust Division and the Federal Trade Commission—jointly announced that they viewed agreements among competitors to restrict competition in the purchase of labor services as per se illegal under the Sherman Act.[5] Firms that entered explicit agreements with competitors to restrain competition

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1. *See generally*, Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381 (2020) (analyzing the tensions between prosecuting anticompetitive labor market conduct and antitrust's general focus on consumer welfare).

2. *See, e.g.*, John Pavlus, *What's Causing Wage Stagnation in America?*, KELLOGG INSIGHT (Dec. 2, 2019), https://insight.kellogg.northwestern.edu/article/wage-stagnation-in-america.

3. *See, e.g.*, Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L. J. 1031, 1062 (2019); C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L. J. 2078 (2018).

4. *See, e.g.*, *United States v. Knorr Bremse*, No. 1:18-cv-00747-CKK, WL 2283110, at *2–8 (D.D.C. Apr. 3, 2018).

5. ANTITRUST DIV. U.S. DEP'T. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 1, 3 (Oct. 2016) [hereinafter HUMAN RESOURCE GUIDANCE], https://www.justice.gov/atr/file/903511/download. There are many federal antitrust statutes, but only some contain criminal penalties. *See* Sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. §§ 1–3; Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13a; Section 14 of the Clayton Act, 15 U.S.C. § 24; and Section 14 of the Federal Trade Commission Act, 15 U.S.C. § 54. The Antitrust Division, the Federal Trade Commission, state attorneys general, and private entities enforce antitrust laws. However, only the Antitrust Division can seek criminal sanctions. *See* E. THOMAS SULLIVAN, HERBERT HOVENKAMP, HOWARD A. SHELANSKI & CHRISTOPHER R. LESLIE, ANTITRUST LAW, POLICY AND PROCEDURE 63 (8th ed. 2019). The Division only seeks criminal indictments to redress clearly intentional, or per se illegal, violations, such as price-fixing, bid-rigging, and market allocation. ANTITRUST DIV. U.S. DEP'T OF JUST., ANTITRUST DIVISION MANUAL III-12. (Mar. 2012).

in the purchase of labor services, such as through "no-poach" or wage-fixing agreements,[6] could face criminal prosecution.[7]

Since, its announcement, the Antitrust Division emphasized its commitment to this policy in several speeches,[8] and implied that criminal cases would be filed in 2018.[9] Yet no cases materialized for some time. Then, in late 2020, the Division, for the first time ever, announced a criminal indictment related to anticompetitive agreements practiced within labor markets.[10] Two other indictments related to separate agreements were filed in 2021.[11] Notably, while the Division's first articulation of the per se standard emerged from an investigation into "no-poach" agreements practiced by America's largest firms,[12] these conspiracies implicated a much smaller volume of commerce.[13]

This Comment argues that, though these cases involve a small amount of money, they contain large implications for the future of antitrust law. Part I provides an overview of the law surrounding anticompetitive

6. A wage-fixing agreement is an agreement with another employer to limit wages, salaries or other employee benefits. A no-poach or non-solicit agreement is an agreement with another employer not to hire or solicit its employees. No-poach or non-solicit agreements may be acceptable if entered into in connection with legitimate business collaborations, but a "naked" no-poach or non-solicit agreement, one unrelated to any legitimate business collaboration, is illegal. *See* Peter J. Levitas & Keron J. Morris, *Wage-Fixing and No-Poach Agreements*, ARNOLD & PORTER KAYE SCHOLER (Feb. 19, 2019), https://www.arnoldporter.com/en/perspectives/publications/2019/02/wage-fixing-and-no-poach-agreements.

7. *See* HUMAN RESOURCE GUIDANCE, *supra* note 5, at 4.

8. *See* Makan Delrahim, Asst. Att'y Gen., Antitrust Div., U.S. Dep't. of Just., Remarks at the Public Workshop on Competition in Labor Markets 1, 4 (Sept. 23, 2019), https://www.justice.gov/opa/speech/file/1204301/download; Jiamie Chen, *No-Poach Agreements As Sherman Act § 1 Violations: How We Got Here And Where We're Going*, 28 No. 1 COMPETITION: J. ANTI., UCL & PRIVACY SEC. CAL. L. ASSOC. 82, 94 (describing how Kate Patchen, section chief of the DOJ San Francisco office, stated at a Federal Bar Association event that the office's top priority was "no-poach" cases).

9. *See* Aldo Badini & Susannah Torpey, *DOJ Antitrust Division Confirms Criminal "No Poach" Cases Expected Soon*, WINSTON & STRAWN (Jan. 23, 2018), https://www.winston.com/print/content/502541/doj-antitrust-division-confirms-criminal-no-poach-cases-expected.pdf.

10. *See* Indictment at 1–2, United States v. Neeraj Jindal, No. 4:20-cr-358 (E.D. Tex. Dec. 9, 2021) [hereinafter Jindal Indictment], https://www.justice.gov/opa/press-release/file/1387866/ .

11. Indictment at 1–2, United States v. Surgical Care Affiliates, No. 3-21-CR0011-L (N.D. Tex. Jan. 5, 2021) [hereinafter Surgical Care Indictment], https://www.justice.gov/opa/press-release/file/1351266/ ; Indictment at 1–2, United States v. Ryan Hee, No. 2:21-cr-00098 (D. Nev. Mar. 30, 2021) [hereinafter Hee Indictment], https://www.justice.gov/opa/press-release/file/1381556/ .

12. *See* Adobe Impact Statement, *infra* note 35, at 3–5.

13. *See* Robert Connolly, *A Look Back at the Road to the Antitrust Division's First Criminal Wage-Fixing Case*, CARTEL CAPERS (Dec. 17, 2020), http://cartelcapers.com/blog/a-look-back-at-the-road-to-the-antitrust-divisions-first-criminal-wage-fixing-case/ (describing this as "a very small case in terms of commerce for the Antitrust Division").

agreements in the labor context. Part II examines the Division's 2010 shift to a per se standard in evaluating anticompetitive labor practices, such as "no-poach" and wage-fixing agreements. Part III argues that the use of criminal prosecutions against anticompetitive labor agreements is reasonable, and addresses counterarguments to this approach, and concludes with an exploration of how these cases raise more fundamental questions as to the underlying policies of modern antitrust.

I. INJURY TO SELLERS OF LABOR SERVICES

Traditionally, antitrust law proscribes anticompetitive agreements in both input and output markets.[14] That is, agreements among buyers to distort the competitive process for acquiring inputs receive the same per se presumption of illegality as sellers 'agreements to distort output competition.[15] This presumption is not contingent on a showing of anticompetitive effects in downstream markets.[16] Injury to the sellers ' market is sufficient to state a claim because "the [Sherman Act] does not confine its protection to [consumers, purchasers, competitors, or sellers], nor does it immunize the outlawed acts because they are done by any of these."[17] Agencies also do not distinguish between seller and buyer cartels in their enforcement decisions.[18]

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14. *See* Swift & Co. v. United States, 196 U.S. 375, 391–92 (1905) (recognizing the constitutionality of the Sherman Act in relation to a meatpackers' cartel which rigged cattle bids). In economic terms, "inputs" are objects used in the production process to create various "outputs," meaning finished goods and services.

15. *See, e.g.*, Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948) (holding that a sugar refiners 'cartel that fixed the prices paid for sugar beets should receive the same per se condemnation as a price-fixing agreement would if performed by sellers'); Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598, 601–02 (7th Cir. 1996) (applying a per se standard in a monopsony context); Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1133–36 (10th Cir. 2002) (holding that "suppliers . . . are protected by antitrust laws even when the anticompetitive activity does not harm end-users").

16. *See* Randy Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AMERICAN ANTITRUST INSTITUTE 1, 4–5 ("[Antitrust laws] have always applied to competitive distortions on the buyer side of the market even if a harmful output effect is not traced through to a price or output effect in downstream consumer product market."); Hemphill & Rose, *supra* note 3, at 2087–92 (discussing a number of cases premised on input market effects even where "immediate harm to the output market may be attenuated or absent"). *But see*, United States v. Anthem, Inc., 855 F.3d 345, 377–78 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (implying that mergers-to-monopsony should be judged illegal based on a showing of downstream effects); Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare: A Closer Look at Weyerhauser*, 2007 COLUM. BUS. L. REV. 353, 361–63 (arguing that *Mandeville* alleged market power on the buy-side and sell-side as is required under the consumer welfare standard).

17. *Mandeville*, 334 U.S. at 236.

18. *Roundtable on Monopsony and Buyer Power: Note by the United States*, ORG. FOR ECON. COOP. AND DEV., 2, 3–4 (2008) ("[The Sherman Act] has never distinguished

Antitrust law also applies to labor services.[19] Injury to one's employment prospects from anticompetitive conduct can give rise to an antitrust claim according to the Supreme Court,[20] the circuits,[21] and the competition agencies.[22] These twin presumptions, that anticompetitive agreements in input markets should be evaluated under a per se standard and that injury to one's employment opportunities grants Sherman Act standing, provide real support for holding that horizontal agreements to eliminate competition in labor markets are per se illegal.

Despite these theoretical grounds for applying the per se standard to horizontal labor market restrictions, a number of historical circumstances have contributed to a lack of antitrust precedent in the labor context.[23] Early antitrust decisions sympathized with labor's buyers over its sellers.[24] Later "Chicago School" scholars believed that labor and antitrust should be separate because the former implicated legislative determinations that antitrust should not disturb.[25] As a result, agencies chose not to focus on labor markets that seemed analytically distinct from output markets they better understood.[26] Furthermore, many class-actions alleging antitrust injury to workers 'employment prospects faced certification issues.[27]

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between seller cartels and buyer cartels . . . during the 11-year period 1997-[06], the Department brought 70 criminal cases against buyer cartels."), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf.

19. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 786–88 (1975) ("A restraint on . . . services may substantially affect commerce for Sherman Act purposes.").

20. *See* Radovich v. Nat'l Football League, 352 U.S. 445, 448, 454 (1957) (football player subject to blacklisting for playing in a rival league stated a claim for relief); Anderson v. Shipowners Ass'n of Pacific Coast, 272 U.S. 359, 362–65 (1926) (holding that a shipowners' no-poach agreement which caused injury to sailor's employment prospects violated antitrust law).

21. *See, e.g.*, Roman v. Cessna, 55 F.3d 532, 544 (10th Cir. 1995) ("Plaintiffs whose opportunities in the employment market have been impaired by an anticompetitive agreement directed at them as a particular segment of employees have suffered an antitrust injury . . . .") (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, 377c (rev. ed. 1995)); Quinonez v. Nat'l Assoc. of Securities Dealers, 540 F.2d 824, 828–29 (5th Cir. 1976) (recognizing that injury to employees from no-switching agreements could state a claim under the Sherman Act).

22. *See* HUMAN RESOURCE GUIDANCE, *supra* note 5, at 2.

23 *See* Suresh Naidu, Eric Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 540 n. 10.

24. *See* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 788-793 (2019).

25. Discussed, *supra* in note 4. Many economists also believed that labor markets were always competitive, and that labor law provided its own remedies for abuses. *See* Naidu, et al., *supra* note 23, at 540-44. Some labor advocates also pushed for antitrust staying out of labor markets; *see* Ralph Winter Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L. J. 14, 34 (1963) (arguing that bringing antitrust into private collective bargaining reduces freedom).

26. *See* Naidu, et al., *supra* note 23, at 541-42. As of 2010, the Horizontal Merger Guidelines, which mention input markets, did not address labor markets. *See* U.S. DEPT.

The relative lack of antitrust case law dealing with labor input markets has created uncertainty among lower courts as to what standard should apply in this context.[28] This uncertainty is compounded by the different factual circumstances that arise in labor market cases, which make courts reluctant to perform what may otherwise appear to be a straightforward application of the standard.[29]

When courts do apply a per se standard in labor markets, they appear more comfortable doing so in relation to wage-fixing rather than "no-poach" agreements.[30] This is probably because "no-poach" agreements are more likely to be judged as "ancillary" to a procompetitive purpose, and receive rule of reason review, than pure wage-fixing.[31] Another reason may be that, while input wage-fixing clearly resembles output price-fixing, plaintiffs struggled to analogize no-poach agreements to illegal output market practices as clearly for some time.[32]

II. THE DOJ'S SHIFT TO A PER SE APPROACH

The Antitrust Division's recent shift to evaluating horizontal labor market restrictions under a per se standard offers further guidance for courts. Prior agency challenges to no-poach agreements were generally argued under the rule of reason.[33] However, when the Division filed a

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OF JUST. ANTITRUST DIV. HORIZONTAL MERGER GUIDELINES, (Aug. 19, 2010) https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

27. *See* Weisfeld v. Sun Chemical, 84 Fed.Appx. 257, 263 (3d. Cir. 2004) (denying class certification to workers affected by a no-poach agreement because some workers were denied new opportunities while others were denied wage increases).

28. *See* Union Circulation Co. v. FTC, 241 F.2d 652, 656–57 (2d. Cir. 1956) (finding that "no-switching" agreements were not inherently anticompetitive because they are "directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing").

29. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886–87 (2007) (holding that per se standards should be rarely expanded).

30. *Compare* Todd v. Exxon, 275 F.3d 191, 199 (2d. Cir. 2001) ("If plaintiff . . . could allege that defendants actually formed an agreement to fix MPT salaries [the] per se rule would likely apply."), *and* Cordova v. Bache & Co., 321 F. Supp 600, 606 (S.D.N.Y. 1970) ("There can be little doubt [that] . . . a group of employers . . . that agree together to reduce the commissions paid to their respective employees . . . have the same power to restrain competition as is inherent in a price-fixing agreement."), *with* Nichols v. Spencer, 371 F.2d 332, 335–36 (7th Cir. 1967) (finding that the injury caused by a no-poach agreement must be shown through output markets effects).

31. *See* Eichorn v. AT&T, 248 F.3d 131, 145 (3d Cir. 2001) (finding a limited no-poach agreement was to be ancillary to a procompetitive merger).

32. *See, e.g.*, First Amended Complaint at 7–8, Weisfeld v. Sun Chemical Co., 210 F.R.D. 136 (D.N.J. 2002), 2001 WL 34883727 (alleging that a "no-hire" agreement constituted "a horizontal agreement to fix the equivalent of prices and not to compete and/or a concerted refusal to deal and/or a group boycott").

33. *See* Complaint at 9–16, United States v. AZ Hosp. & Health Care Assoc., No. CV07-1030-PHX (D. Ariz. May 22, 2007) (performing a rule of reason analysis), https://www.justice.gov/atr/case-document/complaint-28. The Division did charge a no-

complaint against no-poach agreements utilized by Silicon Valley's largest firms in 2010,[34] it made the then-novel argument that these "no-poach" agreements were per se illegal because they constituted a market allocation agreement within an input market for labor services.[35] The complaint alleged that the companies entered explicit agreements to refrain from soliciting, or extending offers to, highly skilled employees from each other's companies.[36] The Division argued that this type of "no-poach" agreement was per se illegal because it constituted a market allocation agreement within an input market for labor services.[37] In output markets, customer "no-solicitation" agreements are a recognized form of market allocation.[38] The Division reasoned that "no-poach" agreements represent the same kind of agreement, just performed in an upstream market.[39]

The Antitrust Division's 2010 application of the per se standard to "no-poach" agreements, and its 2016 announcement that it would criminally prosecute "naked" labor-market restrictions, did not result in any criminal cases until 2020.[40] Then, the Division filed an indictment in a case called *United States v. Jindal*, alleging that physical therapist staffing companies

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poach scheme practiced by family practice residency programs in relation to medical residents under the per se standard in 1996 but did not explain their reasoning. *See* Complaint at 6, United States v. Assoc' of Family Practice Residency Directors, No. 96-575-CV-W-2 (W.D. Mo. May 28, 1996), https://www.justice.gov/atr/case-document/file/487256/.

34. Companies involved included Adobe, Apple, Google, Intel, Intuit, and Pixar. *See* Press Release, U.S. Dep't. of Justice. Antitrust Div., Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

35. Competitive Impact Statement at 2–5, United States v. Adobe Systems Inc., No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010) [hereinafter Adobe Impact Statement], https://www.justice.gov/atr/case-document/file/483431/.

36. *Id.* at 3–5.

37. *Id.*

38. *See* United States v. Cooperative Theaters of Ohio, 845 F.2d 1367, 1373 (6th Cir. 1988).

39. *See* United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991) ("A market allocation agreement between two companies at the same market level is a classic per se antitrust violation."). The Division's approach seems to have paved the way for other courts to apply the per se standard to naked no-poach agreements. *See, e.g.*, United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013).

40. However, the competition agencies' expansion of the per se standard did cause a wave of civil litigation. *See* Ogden v. Little Caesar Enterprises Inc., 393 F. Supp. 3d 622, 627–30 (E.D. Mich. 2019); for wage-fixing, see Jien v. Perdue Farms, No. 1:19-CV-2521-SAG, 2020 WL 5544183 at *1–3 (D. Md. Sept. 16, 2020); Kelsey K. v. NFL Enterprises, No. C 17-00496, 2017 WL 3115169, at *1–3 (N.D. Cal. July 21, 2017). In addition to the increase in civil litigation, legislative and enforcement pressures were present. J. Wyatt Fore, *DOJ Tells Congress Criminal Prosecution of No-Poach Agreements is Still a "High Priority,"* CONSTANTINE CANNON (Oct. 31, 2019), https://constantinecannon.com/2019/10/31/doj-tells-congress-criminal-prosecution-of-no-poach-agreements-is-still-a-high-priority/.

conspired to artificially decrease wages.[41] In 2021, the Division filed an indictment in *United States v. Surgical Care Affiliates*, alleging that a company operating outpatient medical care facilities entered into "no-solicitation" agreements to suppress competition for high-level employees' services.[42] The Division also filed an indictment in *United States v. Ryan Hee*, asserting that a healthcare staffing service engaged in a wage-fixing and "no-poach" agreement in relation to nurses within the school district it serviced.[43]

The indictments indicate the Division's continued focus on applying per se standards to horizontal labor-market agreements, despite its apparent gap in enforcement.[44] They also display interesting commonalities and other insights. All three involve healthcare labor markets, continuing the Division's focus on that sector.[45] They all allege notably bad facts,[46] which indicates that the Division has strong cases on which to test its new per se approach.[47] In addition, the alleged scheme in all of these cases, though *United States v. Jindal* in particular, implicate a

41. *See* Jindal Indictment, *supra* note 10, at 4–6. In April of 2021, the Division filed a superseding indictment to join one of Jindal's collaborators to their action. *See* First Superseding Indictment, United States v. Neeraj Jindal (1) John Rodgers (2), No. 4:20-CR-358 (E.D. Tex Apr. 15, 2021).

42. *See* Surgical Care Indictment, *supra* note 11, at 3.

43. *See* Press Release, U.S. Dep't. of Justice. Antitrust Div., Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses, (Mar. 30, 2021), https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses.

44. There are a number of potential explanations for why criminal cases were slow to arrive. The gap likely represents the litigation risk of bringing cases under a novel per se standard in the labor market context. *Compare eBay*, 968 F. Supp. 2d at 1039 (finding that a horizontal no-hire agreement stated a horizontal market allocation claim), *with Ogden*, 393 F. Supp. 3d at 632–33 (holding that a no-poach agreement among franchisees should be evaluated under the rule of reason though only ruling on the franchisee context). Given its novelty as applied to labor markets, the Division may have been waiting for stronger cases, wary of a trial loss that could hurt a developing policy. *See* Connolly, *supra* note 13. Alternatively, companies improved compliance, though that seems unlikely given recent comments from AAG Delrahim. *Id.* (quoting Delrahim saying "I've been shocked about how many [no poach agreements] there are, but they're real").

45. *See, e.g.*, Deferred Prosecution Agreement at 19–22, United States v. Florida Cancer Specialists & Rsch. Inst., LLC, No. 2:20-CR-78- FLM-60MRM (M.D. Fla. Apr. 30, 2020), https://www.justice.gov/atr/case-document/file/1281681/download.

46. *See* Jindal Indictment, *supra* note 10, at 7–10 (alleging that Jindal lied to the FTC during this investigation); Surgical Care Indictment, *supra* note 11 at 3–5 (showing e-mails between SCA senior-level employees and other firms' senior employees saying "we reached agreement that we would not approach each other's [employees] proactively"); Hee Indictment, *supra* note 11, at 5 (showing e-mails from Hee to a subordinate instructing them that "[our competitor] and us have a deal not to poach nurses").

47. *See* Connolly, *supra* note 13 ("if you *want* to make yourself a test case establishing a prosecutorial principle, do what [Jindal] allegedly did").

small volume of commerce and ran for a short period.[48] This brings up equitable concerns given the vast gap between the criminal penalties applied to a small-time player in *Jindal*, and the civil penalties applied to large firms in cases like *United States. v. Adobe*.[49] Regardless, these cases are likely intended to signal a more stringent approach to anticompetitive labor markets.

III. THE PER SE STANDARD IN LABOR MARKETS: A REASONABLE EXTENSION WITH BIG IMPLICATIONS

The Division's extension of the per se standard to anticompetitive labor market agreements is welcome because applying a per se standard incentivizes companies to avoid anticompetitive agreements which harm workers, and the number of defendant procedural protections which make it unlikely that this policy will proscribe truly procompetitive conduct. Extending the per se standard to anticompetitive labor market agreements extension provides a strong incentive for companies to avoid them, and the harms to workers they impose. Naked "no-poach" and "wage-fixing" agreements clearly hurt worker compensation.[50] However, current law make it difficult for workers injured by those agreements to seek redress, given the heavy burdens to receiving class certification,[51] or proving a conspiracy.[52] This pushes the Division to step in and take strong steps to affirmatively prevent these agreements. Per se treatment achieves that end. The possibility of criminal prosecution vastly expands companies ' incentives to avoid anticompetitive agreements. In addition, this extension is unlikely to sweep up procompetitive conduct given the number of procedural protections which apply to defendants in a per se case.[53] Agreements evaluated under the per se standard involve a "characterization" step, which grants defendants the chance to advance an

48. *See id.* ("[T]his is a very small case . . . for the Antitrust Division").

49. Jindal Indictment, *supra* note 10, at 7–10; *c.f.* Adobe Impact Statement, *supra* note 36, at 3–5 (describing major companies alleged to have violated antitrust law).

50. *See* Naidu et al., *supra* note 23, at 541 ("from an economic standpoint, the dangers…posed by product market power and labor market power are the same"); Rochella T. Davis, *Talent Can't Be Allocated: A Labor Economics Justification For No-Poaching Agreement Criminality In Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 283, 283–84 (2017). Though one could argue that these agreements could create downstream procompetitive effects, this balancing is not required under current law.

51. *See* Reed v. Advocate Health Care, 268 F.R.D. 573, 590–95 (N.D. Ill. Sept. 28, 2009) (denying class certification to nurses affected by an alleged wage-fixing agreement due to plaintiffs' failure to establish that "common proof concerning the fact of injury will predominate").

52. *See* Fonseca v. Hewlett-Packard, 2020 WL 4596758, at *9 (S.D. Cal. Aug. 11, 2020).

53. *See* John M. Taladay & Vishal Mehta, *Criminalization of Wage-Fixing and No-Poaching Agreements*, COMPETITION POL'Y IT'L, (Aug. 14, 2017), https://media2.mofo.com/documents/170800-criminalization-wage-fixing.pdf.

efficiency justification for their agreement.[54] Courts are carefully performing this "characterization" step in labor market cases.[55] Characterization is therefore perfectly able to permit truly procompetitive agreements to evade per se treatment.[56] The Division's public statements also display a sensitivity to the fact that certain employee restrictions are procompetitive.[57] In addition, as with other cartel defendants, participants in an anticompetitive agreement can still apply to the Division's "amnesty program"[58] or receive compliance credits.[59]

Though some critics argue that the Division's application of the per se standard to labor markets represents prosecutorial overreach but these arguments are not persuasive given the courts 'history of applying per se standards to input markets. Some critics, including the Chamber of Commerce,[60] argue that the Division is impermissibly creating new law by establishing a new per se standard.[61] These arguments elide the fact that, once again, labor markets are similar to other input markets. Courts have a

54. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9 (1979) ("[I]t is necessary to characterize the challenged conduct as falling within or without that category of behavior [which receives per se treatment].").

55. *See* Aya Healthcare Services, Inc. v. AMN Healthcare, Inc., 2018 WL 3032552, at *8–14 (S.D. Cal. June 19, 2018).

56. *See* FED'L TRADE COMM'N, TRANSCRIPT OF FTC HEARINGS SESSION #2: COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY – SEPTEMBER 21, 2018 194 (Sept. 21, 2018) (holding by William Kovacic, former FTC Commissioner, that the per se standard should apply to naked wage-fixing and no-poach agreements absent downstream harm as "[the] presumption [should] be an illegality and, with characterization, BMI always gives the defendant an opportunity to advance the plausible, cognizable efficiency justification").

57. *See* United States' Corrected Statement of Interest at 11–13, Stigar v. Dough Dough, Inc., No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 8, 2019) [hereinafter U.S. Corrected Statement of Interest], ECF No. 34 (alleging that the Division views most franchisor-franchisee employee restraints as being subject to the rule of reason).

58. *See* U.S. DEP'T. OF JUST. ANTITRUST DIV., CORPORATE LENIENCY POLICY (Aug. 10, 1993), https://www.justice.gov/atr/file/810281/; Robert Connolly, *DOJ Files First Indictment Charging No-Poach Labor Agreement*, CARTEL CAPERS (Jan. 8, 2021), http://cartelcapers.com/blog/doj-files-first-indictment-charging-no-poach-labor-agreement/.

59. *See generally* Theodore Salem-Mackall, *"The Heart of the Business": An Analysis of the Antitrust Division's New Policy of Crediting Corporate Compliance at the Charging Stage*, 58 AM. CRIM. L. REV. ONLINE 27 (2020).

60. *See* Brief for the United States' Chamber of Commerce as Amicus Curiae, United States v. Surgical Care Affiliates, No. 3-21-CR0011-L (Apr. 2, 2021). One should note that the brief only mentions "no-poach" agreements, and the Chamber has filed no similar briefs in the indictments involving wage-fixing. Though this makes no sense under current law, as both are different kinds of input market restrictions, we can likely interpret this as a chance to take advantage of the greater judicial ambiguities regarding wage-fixing *vis a vis* no-poach. *See id.* at 2–8.

61. *See id.* at 2–5. *See also* Taladay & Mehta, *supra* note 53; Tawanna Lee, *Too Much, Too Soon: The High-Tech Cases Reveal Criminal Antitrust Enforcement Inappropriate for No-Poach and Wage-Fixing*, 72 FED. COMM. L. J. 197, 220 (2020).

long history of applying per se standards to various input markets.[62] Therefore it is difficult to understand how doing so in this context represents "making new law" rather than an application of current law within a new context. In fact, this argument implicitly holds that labor is so "different" from other markets that it must be evaluated under a distinct set of standards; the Supreme Court firmly rejects that idea.[63]

That said, though the legal basis for applying per se standards to horizontal labor market agreements in labor markets is strong, doing so raises fundamental questions about the goals of antitrust law. Following the rise of "Chicago" antitrust, the law has encouraged the maximization of consumer surplus through low prices.[64] Other per se illegal agreements, such as price-fixing, bid-rigging, and market-allocation, are clearly inimical to this goal. However, while wage-fixing and no-poach agreements hurt employee compensation, their effect on downstream prices is less clear.[65] *Jindal*'s application of criminal penalties to a policy that only creates negative wage effects implies that such effects, on their own, are sufficiently egregious to justify imprisonment. However, what if those negative effects somehow increased downstream output? Would that conflict with the purpose of antitrust law? If so, could jail time be imposed in response to a policy that is actually consistent with antitrust law's overarching goals?

This question is not hypothetical; lower courts have, in evaluating franchisor-franchisee no-poach agreements, reasoned that anticompetitive upstream arrangements are valid following a showing of procompetitive effects downstream.[66] The Division actually endorses that rule of reason approach in the franchisor-franchisee context,[67] even though such a cost-benefit analysis undermines the rationale for applying the per se standard to labor-market restrictions in the first place. How can one say that negative wage effects are so terrible that jail time can be imposed for causing them, but *also* say that such harms no longer matter if they help sell a couple more McDoubles?[68]

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62. Alan Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony*, 3 HASTINGS BUS. L. J. 223, 244–46 (2007).

63. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 681 (1978).

64. *See* Warren Grimes, *Breaking Out of Consumer Welfare Jail: Addressing the Supreme Court's Failure to Protect the Competitive Process*, 16 RUTGERS BUS. L. REV. 49, 50–57 (describing the consumer welfare approach).

65. *See* Hafiz, *supra* note 1, at 395–99. *But see* Naidu et al., *supra* note 23, at 558–60 (arguing that reduced labor inputs reduce output downstream).

66. *See* Deslandes v. McDonald's USA, No. 17 C 4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018).

67. *See* U.S. Corrected Statement of Interest, *supra* note 57, at 11–13.

68. *See Deslandes*, 2018 WL 3105955, at *8. This kind of intra-market weighing is allowable under the "ancillary restraint" doctrine. *See* ANTITRUST DIV. DEP'T. OF JUST. COMPETITION IN LABOR MARKETS: TRANSCRIPT OF PROCEEDINGS AT THE PUBLIC WORKSHOP AT THE DEPARTMENT OF JUSTICE, 55–56 (Sept. 23, 2019) (describing ancillary restraints weighing and *Deslandes*),

The tension between these approaches, one of per se upstream liability, and the other of flexibly weighing harms, is obvious. *Jindal* represents a push for liability stemming solely from a showing of upstream harm, while the modern Supreme Court seems to endorse balancing of downstream procompetitive effects with upstream harm in other contexts.[69] Which approach is superior? Though any definitive answer as to that question is beyond this Comment's scope, an approach that focuses on how certain agreements might distort access to free markets seems to track the purposes of antitrust law.[70] This approach would encourage proscribing anticompetitive input market distortions using the same standard as in output markets.

CONCLUSION

The reality of American wage stagnation makes increased antitrust intervention in labor markets a welcome proposition. Wage-fixing and no-poach cause harms to workers that the Division should attempt to prevent. Their new policy represents a strong attempt to take on that harm in a way that comports with current law. However, we should also recognize the ways in which this approach raises larger questions. Should antitrust prioritize unfettered market access, and explicitly protect wages as it does prices, even if consumers pay more? Or should antitrust balance upstream harms with downstream benefits, and accept real harm to worker's paychecks in the process? These are difficult questions. However, the fact that we can ask them in response to a couple criminal indictments display the weighty implications of the Division bringing criminal cases in labor markets. *U.S. v. Jindal* is a little case, but it asks large questions.

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https://www.justice.gov/atr/page/file/1209071/. However, the *Deslandes* court also justified this based on *Leegin*'s idea that inter-brand competition matters more than intra-brand competition. *See Leegin*, 551 U.S. at 878. That is a misreading of *Leegin*. *Leegin*'s intra-brand harms and inter-brand benefits both took place in the same output market; the court did not simply weigh harms to one market and say they were remedied by benefits in another. *See id.*

69. *See* Ohio v. American Express, 138 S. Ct. 2274, 2278 (2018); Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 SANTA CLARA L. REV. 579, 613 (2020) (discussing how the Court's footnote in *American Express* may require no-poach plaintiffs to more clearly delineate "the market(s) where the restraints harmed competition for workers"). *See also* United States v. Anthem, Inc., 855 F.3d 345, 373 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (discussing the need to balance anticompetitive upstream effects with procompetitive downstream ones).

70. *See Mandeville*, 334 U.S. at 236 (holding that the antitrust law does not confine its protection to" consumers, purchasers, competitors, sellers).