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I have been asked to comment on issues raised in several pieces of employment-related legislation that are pending in the House and Senate. These bills deal with occupational licensing, alleged monopsony power in labor markets, and certain unilateral business practices of employers that are alleged to enhance or maintain employers' monopsony power, harming workers' welfare. The specific practices at issue are: (1) No-Poach agreements, by which two or more business entities agree that they will not recruit certain types of employees from other parties to the agreement, and (2) Non-Compete clauses in employment contracts, which limit the ability of employees to accept positions with competing employers under certain circumstances.

1. No-Poach Agreements

Under a no-poach agreement, a set of separate business entities agree that they will not recruit or hire certain types of employees from other parties to the agreement. In evaluating the competitive effects of such agreements, it is important to distinguish between collusive agreements that are meant to suppress labor market competition without (much) procompetitive justification and agreements among members of a joint venture or franchise business model, where no-poach arrangements have clear procompetitive justifications. Because of this, I believe a uniform prohibition on no-poach agreements would be unwise and that additional legislation restricting such agreements is unwarranted.

Certain no-poach agreements are nakedly collusive, and can be challenged under existing antitrust law. For example, in *High-Tech Employees* it was found that Apple, Pixar and other Silicon Valley employers had entered into a set of bilateral agreements to refrain from actively recruiting ("cold calling") individuals in certain occupations who were employed by other parties to the agreements. Individuals who unilaterally sought to move from, say, Apple to Pixar by applying for a position were not covered by the agreement, and so Pixar could hire them without violating its agreement with Apple. Even so, this was a horizontal agreement among competitors who were not engaged in any formal joint venture. As

such, the agreements were found to be a *per-se* violations of Section I of the Sherman Act, which prohibits horizontal agreements in restraint of trade. Though the agreements might have certain procompetitive benefits in promoting recruiting of talented people to the Silicon Valley area generally—similar to those I will discuss in the context of joint ventures and franchises—it is unlikely that any benefits derived from applying a "Rule of Reason" analysis to every no-poach agreement that might be challenged would offset the costs of such case-by-case evaluation. Subject to carve-outs for joint ventures and related business models, *per-se* illegality of horizontal no-poach agreements is justified, in my view. But existing law is sufficient to achieve this. As I tell my students: "Don't do that."

Even in such *per-se* situations, there is a separate issue related to the extent of harm caused by an illegal no-poach agreement in comparison to illegal price fixing agreements among sellers. In the case of product market collusion, a typical horizontal agreement among sellers restricts output and raises price to a broad class of buyers—the classic monopoly outcome of collusive price setting. Many buyers are harmed by the elevated price, and few if any benefit. In contrast, in a no-poach agreement like the one in *High Tech*, or the allegedly similar "agreement" in *Duke Medical Center*, harm is much more limited. These alleged agreements did not restrict employment or lower wages generally. Instead, such no-poach agreements typically restrict a certain type of recruiting ("cold calling") and even then for only certain types of firm-to-firm moves (lateral hires in the medical schools of Duke and UNC in the case of *Duke*). It follows that an Apple employee who did not receive a superior cold-call-generated offer from Pixar as a result of such an agreement was clearly harmed by some amount. But given that Pixar had an open position it wished to fill, that position would be filled by either promoting an existing Pixar employee or by hiring from some other firm that was outside of the agreement. Those employees *benefitted* from the no-poach agreement. And since recruiting from parties to a horizontal agreement is typically a small fraction of their total recruiting, the overall impact on employees' compensation must be small. In the case of output markets, it is as if firms A and B agreed not to sell to some customers of the other party. If the agreement caused A to sell more to C, then C likely benefitted.

The economics of no-poach agreements are different in the case of joint ventures or franchises because there is typically a pro-competitive justification for the practice. Suppose that instead of the horizontal agreement described above, Apple and Pixar were engaged in a pro-competitive joint venture that required cooperation among teams of software engineers from each company. It's reasonable to assume that Apple and Pixar invested into identifying, recruiting and training these skilled employees, who are now going to work together. The cooperating firms are thus partners in the joint project and

competitors in the market for talent. The simple act of project cooperation reveals information about the employees' talents, and both firms know that the others' workers have been trained in firm-specific methods that might be valuable. They would like to "steal" the best, who are discovered as a result of cooperation, but in doing so they both reduce the incentive cooperate on the joint project and reduce the incentive to invest in identifying, recruiting and training talented people, because they might lose them. A no-poach agreement, with specified parameters such as a fixed duration and the types of workers covered, protects these investments and therefore has a credible procompetitive justification. Whether such an agreement is pro-competitive overall is a question of balancing these effects against possible harms, which means that such agreements should not be considered *per se* illegal.

Some have noted the prevalence of no-poach restrictions in franchise agreements, particularly in the fast-food industry. Simplifying a bit, an individual franchise owner for (say) Wendy's is restricted from hiring employees of another franchise owner without that owner's permission. The claim, for which there is virtually no evidence, is that such an agreement restricts mobility of workers among Wendy's franchises, and that such a restriction harms workers by denying them opportunities to advance, reducing their wages.

The franchise business model is a form of joint venture, where the individual franchisees enter into a cooperative relationship to promote the franchise (Wendy's) brand in competition with other chains. The contracts restrict (as all contracts do) the behavior of franchisees in a variety of ways meant to promote the brand—a franchisee may not open a store near another franchise (exclusive territories), must offer products from a limited set of suppliers (exclusive dealing) and so on. Even (perhaps especially) among less-skilled individuals, the identification, recruiting and training of reliable employees is an important brand-promoting activity by franchise owners. These human resource activities are costly. If franchisee A incurs these costs and develops a talented store manager, franchisee B has every incentive to simply hire that manager away—avoiding the cost of developing its own manager, but wiping out A's investment. From the perspective of the franchisor—the brand—B's free riding did not raise the overall level of existing talent but merely moved it around, while at the same time undermining the incentive of other franchisees to invest in improving the workforce. A no-poach rule has the effect of forcing franchisees to recruit externally, raising overall workforce quality. This is a clearly procompetitive effect and justification for the unilateral business practice, which means that a blanket prohibition is unjustified. Again, existing law is sufficient to deal with situations in which such restrictions might unduly restrict labor market competition.

2. Restrictive Covenants ("Non-Compete" restrictions)

Restrictive covenants are elements of employment contracts that restrict an employee from working for certain types of firms—typically close competitors of the employer—during a specified period of time after leaving the employer. The proposed legislation I examined (H.R. 5631) would effectively prohibit such contract restrictions for employers in all lines of commerce—they would be presumptively illegal under antitrust law. The only defense is in Section 3 of the proposed law, which allows an employer to prove by "a preponderance of evidence" that its rule is not anticompetitive. I believe such a broad and sweeping restriction would be unwise, and would harm labor market performance. But the proposed law would increase the employment and earnings of labor antitrust lawyers and experts, so there's that.

In my view, an economic analysis of the competitive effects of restrictive covenants in employment contracts should proceed along the same lines as the analysis of unilateral business practices in product markets. Suppose that a product market practice, such as exclusive dealing or loyalty discounts, is alleged to have anticompetitive impact if practiced by a firm with substantive market (monopoly) power. Does the practice have a legitimate procompetitive justification that should be weighed against possible anticompetitive harm? The existence of such a justification would be evidenced by the fact that other firms without substantive market power also use the practice. Here, in the case of restrictive covenants in labor contracts, their widespread use by employers that have no plausible monopsony power is *prima facie* evidence for such a justification. It is a dangerous law that would prohibit a widely used business practice—a practice used even in situations where the employer could not have substantive monopsony power.

Such a law is also dangerous because it fails to fully contemplate the but-for world that would exist if the law is passed. Suppose that "non-competes" are legal unless proven otherwise. Why would an employer wish to restrict the (later) mobility of its employees if by doing so it harms workers' careers and makes the employer less attractive ex-ante? The obvious reason is that the restriction allows the employer to capture some of the returns on its investments in identifying, recruiting and training talented workers, as described above in my discussion of no-poach agreements. Another, related, effect is to demonstrate to new employees that the employer has the incentive to engage in such investments, a commitment to advance their productivity and careers. Pull this away via a prohibition of non-competes, and employees lose the benefits of such employer-provided investments. Productivity is harmed, not enhanced. The only guaranteed beneficiaries of this legislation are employees who have already realized the productivity gains of employer investments, who can capture the returns of leaving.

That is a one-time transfer of wealth from employers to a cohort of existing workers, not a long-term productivity gain.

One might argue that new employees are ignorant of non-compete clauses, discovering their existence only when attempting to leave for another opportunity. This is itself dubious given their widespread use, but suppose it is true. Then a much simpler remedy is to require that employees be informed by the employer, and that they sign a separate affirmation that they have been informed at the time of hire.

My conclusion regarding legislation that would prohibit non-compete clauses is very similar to my analysis of a no-poach prohibition. Non-competes have clear procompetitive justifications, as evidenced by their widespread use in competitive markets. Economics indicates that a law making them presumptively illegal would be a dangerous extension of antitrust scrutiny and liability into areas where such extension has no proven benefits and potentially large and damaging costs.