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# Balancing the interests of antitrust and labor laws

**By Cynthia E. Richman and Daniel G. Swanson**

National attention has increasingly focused on the proper role of antitrust law in regulating labor markets. Much has been written about the possibility of stricter merger enforcement by the Federal Trade Commission and Antitrust Division of the Department of Justice based on claims of increasing concentration in labor markets and the associated possibility of greater employer buyer power. Agreements and understandings among employers relating to worker recruitment (e.g., alleged non-solicitation and "no poaching" arrangements) have been the target of recent scrutiny by the DOJ and state attorneys general and in class action litigation as alleged per se (automatic) antitrust violations. A recent Seattle ordinance that sought to authorize collective bargaining for independent-contractor drivers who partnered with transportation network companies (such as Lyft or Uber) ran into heavy sledding in the courts when challenged as a cartel scheme. And in recent weeks a powerful union — the Writers Guild of America — was hit by multiple antitrust suits for alleged efforts to boycott talent agencies that engaged in content "packaging" deals.

There is no question that agreements among employers pertaining to employee hiring and compensation can violate the antitrust laws. The Supreme Court has stated that "antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996). Agreements among employees can also constitute antitrust offenses. Indeed, shortly after the Sherman Act became law in 1890, it was wielded as a weapon against labor organizing and union activity.

In reaction, as part of the Clayton Act in 1914, Congress declared that the "labor of a human being is not a commodity or article of commerce" and that labor organizations are not "illegal combinations or conspiracies in restraint of trade." This, together with prohibitions on injunctive relief in labor disputes, was the fountainhead of the "statutory" labor exemption from the antitrust laws, which affords substantial immunity under the federal antitrust laws for union activity such as organizing, boycotting and picketing. This exemption is broad but not unlimited. A bona fide labor organization must pursue its "self-interest," limit its activities to labor market objectives and may not combine with a non-labor group. In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945), for example, the Supreme Court denied immunity to an electrical workers' union that combined with non-labor groups (electrical manufacturers and contractors) to foreclose the market to outside electrical firms.

The Supreme Court has also fashioned a so-called "nonstatutory" exemption protecting conduct such as bilateral bargaining activity based on federal labor policy grounded in the National Labor Relations Act. The court has observed in this regard that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975). Thus, when a union or employers seeks to attain goals not specifically permitted by any statute but sanctioned by the policy in favor of collective bargaining under the NLRA, the courts have exempted the conduct from antitrust liability. The Supreme Court, however, has never conclusively delineated a precise test for this exemption, and courts have observed that defining its boundaries has not proved an easy task.

For its part, the 9th U.S. Circuit Court of Appeals has applied a test which holds that "the parties to an agreement restraining trade are exempt from antitrust liability only if (1) the restraint primarily affects the parties to the agreement and no one else, (2) the agreement concerns wages, hours, or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from bona fide, arm's length collective bargaining." *Phoenix Elec. Co. v. National Elec. Contractors Ass'n*, 81 F.3d 858, 861 (9th Cir. 1996).

The 9th Circuit rejected an unusual plea for application of the exemption in a decision arising out of a 2003-04 strike by grocery workers in Southern California (a looming prospect once again given that grocery workers voted for strike authority just last month). *See California v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011) (en banc). In anticipation of the potential use of "whipsaw" tactics, where unions pressure one employer within a multi-employer bargaining unit (e.g., through selective strikes), the grocers had agreed that if one party was struck, the others would lock out all their union employees. Furthermore, the grocers agreed to a temporary revenue-sharing arrangement in the event of a strike to maintain historical market shares (by reallocating revenue to those suffering most from the labor action). The state of California sued the grocers, alleging that the revenue-sharing agreement was per se unlawful cartel-type conduct. The grocers claimed that the nonstatutory labor exemption applied. The 9th Circuit disagreed, noting that the employers' agreement was not approved or regulated by labor law, but went on to hold that the agreement was not a per se antitrust violation. Although then-Attorney General Kamala Harris did not prevail on the ultimate merits in the appeal, her experience in litigating over labor-antitrust issues with grocers was later on display when she again invoked the antitrust laws to assert claims against high-tech companies over alleged "no poach" agreements. In announcing settlements in 2014, Harris asserted that: "No-poach agreements unfairly punish talented workers and stunt our state's economic growth."

The future seems quite likely to hold more occasions for the courts to balance the various interests in play as antitrust law and labor issues move to the forefront of the national debate. ■

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