

Recent Decision Questions Use of No-Poach Clauses in Franchise Agreements

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States across the country have been using [enforcement actions](#), [legislation](#), and [interpretive guidance](#) to limit employers' ability to enforce restrictive covenants against low wage workers. The recent decision in [Butler v. Jimmy John's Franchise, LLC et. al.](#), 18-cv-0133 (S.D. Ill. 2018) suggests this trend may extend to federal antitrust law.

The *Butler* case relates to the legality of certain restrictive covenants in Jimmy John's franchise agreements.^[1] The Complaint alleges that Jimmy John's required franchisees to agree not to hire any job applicants who worked for a different Jimmy John's franchise in the previous year. Franchisees also agreed not to solicit one another's employees. The franchise agreements also named all other Jimmy John's franchisees as third-party beneficiaries of the agreement. This meant that if Franchise B hired a Franchise A employee, Franchise A could sue to enforce the agreement between Franchise B and Jimmy John's Franchise LLC (the franchisor).

In determining claims of antitrust violations, the distinction between "horizontal" and "vertical" agreements is highly significant. Challenges to vertical agreements are analyzed under the "rule of reason" under which plaintiffs must prove market power and that the challenged practices actually harm competition. This generally requires sophisticated economic analysis. Horizontal agreements not to compete, in contrast, are generally deemed "per se" unreasonable and do not require any proof regarding market context.

In *Butler*, the Court characterized the franchise agreements as horizontal agreements. Such a characterization permitted the plaintiffs to state a claim without alleging that a particular franchisor has sufficient market power to effect the market for employees in an entire geographic region. In other words, the plaintiffs did not have to prove that Jimmy John's on its own had enough market power to depress the wages of delivery drivers in a particular city.

To keep things in perspective, *Butler* is an isolated district court decision which may remain an outlier. However, it serves as another example of how subjecting low wage workers to restrictive covenants can impose heightened litigation risk. *Butler* provides another reason (on top of the joint FTC/DOJ [Antitrust Guidance for Human Resources Professionals](#) and DOJ [enforcement actions](#) following through on that guidance) for employers to ensure their restrictive covenants are not only enforceable but compliant with antitrust law.



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[1] Jimmy John's has since [agreed](#) to remove the challenged provisions from their franchise agreements.

[agreements](#)