

McDonald's Gets Support At 7th Circ. In No Poach Case

By **Matthew Perlman**

Law360 (January 11, 2023, 7:12 PM EST) -- Scholars and business groups including the U.S. Chamber of Commerce threw their support behind McDonald's Corp. as the fast food chain fights a Seventh Circuit appeal from workers alleging that its past use of no poach provisions in franchise agreements violated antitrust law.

Groups filed several amicus briefs with the Seventh Circuit on Tuesday supporting McDonald's in **an appeal** from former employees suing over so-called no poach terms that prevented franchisees from hiring workers from one another.

The **Chamber's brief** attacks the workers' definition of the market that the no poach provisions allegedly impacted, saying that a nationwide market only for McDonald's employees is "at once too narrow and too broad."

"Plaintiffs' approach is not only wrong as a matter of doctrine, but it would also potentially turn every business into a monopolist for its own employees," the brief says. "The prospect of making every company a viable antitrust defendant in this way would have major negative repercussions and chill procompetitive behavior by businesses."

The Chamber argues that the concept of a single-brand market for McDonald's employees is too narrow because it ignores the hundreds of other quick-serve restaurants where employees could also work and says evidence shows McDonald's recruits from other restaurants as well as from other large retailers.

At the same time, the brief states, a national market for McDonald's employees is implausible because potential workers are unwilling to move, making the labor markets local by nature.

"The Chamber therefore believes it is important to affirm the district court's rejection of plaintiffs' gerrymandered and implausible market definition," the brief says.

The International Center for Law & Economics and a group of scholars **filed a brief** on Tuesday criticizing the workers' market definition and also the legal standard that the suit contends applies to the no poach provisions.

While the workers say the no poach terms should be considered automatically illegal under antitrust laws, the amicus brief argues a full rule-of-reason analysis is needed to balance potential harms against potential benefits. This is because the restrictions were vertical, or between companies at different points in the supply chain rather than between direct competitors, the brief says, and because they're ancillary to the broader franchise agreements.

Geoffrey A. Manne, president and founder of the ICLE, told Law360 in an email Wednesday that with competition concerns in labor markets growing in significance, the case is particularly important for its application of antitrust law to franchise agreements. He said that vertical restraints like those at issue here are generally evaluated through a rule-of-reason analysis because they often foster competition between brands.

"While plaintiffs seek a departure from the rule of reason here, economic research confirms that vertical restraints — including franchisor/franchisee restraints — tend to be procompetitive," Manne

said.

The Restaurant Law Center and International Franchise Association also on Tuesday **filed a brief** supporting McDonald's that focused on both the market definition and the importance of franchising generally. In order to be successful, the brief says, franchisors have to exert control over their brands, including through restrictions in their agreements with franchisees.

"As a contractual and practical matter, franchisees must follow standards implemented by the franchisor to ensure uniformity and consistency of the goods, services, and methods of operation," the brief says, "which in turn is necessary to sustain a uniform customer experience and protect the brand value for the benefit of both the franchisor and franchisees."

U.S. District Judge Jorge Alonso **granted summary judgment** to McDonald's in June 2022 after concluding there was too much competition in the labor market to support the workers' antitrust claims. The judge found, and said previously when denying a **class certification** bid, that the workers needed to show McDonald's had power over the local labor markets at issue since the provisions must be analyzed under a full rule-of-reason test to balance harms and benefits.

The Federal Trade Commission and U.S. Department of Justice say in an **amicus brief** in November 2022 that the district court misapplied the ancillary restraints doctrine. The government argues that McDonald's should have been required to prove that the no-hire restraint was reasonably necessary to achieve other, pro-competitive goals of the franchise agreement.

McDonald's contends in the brief it filed with the Seventh Circuit last week that by limiting a franchisee's ability to hire employees from another operator, the no poach terms effectively encouraged competition with other fast-food restaurant brands — and argues that's in line with the primary purpose of antitrust laws.

A representative for the workers declined to comment Wednesday. Representatives for McDonald's, the Chamber of Commerce and the other amicus filers did not respond to requests for comment on Wednesday.

Deslandes and Turner are represented by Dean M. Harvey, Anne B. Shaver, Lin Y. Chan and Jessica A. Moldovan of Lieff Cabraser Heimann & Bernstein LLP, and Derek Y. Brandt, Leigh M. Perica, Connor P. Lemire and Dana R. Vogel of McCune Law Group.

McDonald's is represented by Rachel S. Brass, Caeli A. Higney, Julian W. Kleinbrodt and Amir C. Tayrani of Gibson Dunn & Crutcher LLP.

The Chamber is represented by Stephanie A. Maloney and Tyler S. Badgley of the U.S. Chamber Litigation Center, and Lauren Willard and Daniel G. Randolph of Covington & Burling LLP.

The Restaurant Law Center and International Franchise Association are represented by Angelo I. Amador of the Restaurant Law Center and Gabriel K. Gillett and Kelsey L. Stimple of Jenner & Block LLP.

The International Center for Law & Economics and a group of scholars is represented by Mark A. Perry, Josh Halpern and Mark I. Pinkert of Weil Gotshal & Manges LLP.

The cases are Deslandes v. McDonald's USA LLC et al., case number 22-2333 and Turner v. McDonald's USA LLC et al., case number 22-2334, both at the U.S. Court of Appeals for the Seventh Circuit.

--Additional reporting by Joyce Hanson, Hailey Konnath and Jess Krochtengel. Editing by Kristen Becker.