

Analysis of Agreement Containing Consent Order to Aid Public Comment

In the Matter of Guardian Service Industries, Inc., File No. 241 0082

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) with Guardian Service Industries, Inc. (“Guardian” or “Respondent”). The proposed Decision and Order (“Order”), included in the Consent Agreement and subject to final Commission approval, is designed to remedy the anticompetitive effects that have resulted from Guardian’s use of restrictive covenants in some of its contracts with building owners and managers that limit the ability of those building owners and managers to solicit or hire Respondent’s employees (“No-Hire Agreements”). The term No-Hire Agreement refers to a term in an agreement between two or more companies that restricts, imposes conditions on, or otherwise limits a company’s ability to solicit, recruit, or hire another company’s employees, during employment or afterwards, directly or indirectly, including by imposing a fee or damages in connection with such conduct, or that otherwise inhibits competition between companies for each other’s employees’ services.

The Consent Agreement settles charges that Guardian has engaged in unfair methods of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by entering into No-Hire Agreements with customers. Guardian’s No-Hire Agreements constitute unreasonable restraints of trade that are unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, and are thus unfair methods of competition in violation of Section 5 of the FTC Act. Independent of the Sherman Act, Guardian’s use of the No-Hire Agreements constitutes an unfair method of competition with a tendency or likelihood to harm competition, consumers, and employees in the building services industry, in violation of Section 5.

The proposed Order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received and will decide whether it should withdraw from the Consent Agreement and take appropriate action or make the proposed Order final.

II. The Respondent

Guardian is a privately held business headquartered in New York, NY. Guardian provides facility maintenance services, including janitorial, security, engineering and operations, pest control, lighting and electric, window cleaning, concierge, front desk, and surface restoration services. Guardian employs approximately 2,800 employees throughout the Northeast, New England, and Mid-Atlantic regions. The complaint focuses on Guardian’s conduct in New York City and Northern New Jersey.

III. The Complaint

The complaint alleges that Guardian sells building services to building owners and property management companies, primarily consisting of the labor of janitors, security guards, maintenance workers, and concierge desk workers who are directly employed by Guardian. These employees perform their work at residential and commercial buildings in various states, but predominantly in New York City and Northern New Jersey.

The complaint also alleges that Guardian and its building owner and property manager customers are direct competitors in labor markets for building services workers. These include the markets for workers to perform concierge, security, janitorial, maintenance, and related services.

As alleged in the complaint, Guardian uses standard-form agreements with some of its customers that include No-Hire Agreements. The No-Hire Agreements restrict the ability of Guardian's customers to (1) directly hire workers employed by Guardian and (2) indirectly hire workers employed by Guardian through a competing building services contractor after the competitor wins the customers' business away from Guardian. These restrictions apply during the term of Guardian's contracts and for six months to one year thereafter. The No-Hire Agreements apply not just to those Guardian employees identified by Guardian and staffed to provide services for a customer, but to all Guardian building services employees.

The complaint alleges that Guardian's No-Hire Agreements are anticompetitive because they are horizontal agreements among competitors not to compete. Guardian and its customer building owners and property managers are competitors for the labor of building services workers like Guardian's employees. The No-Hire Agreements are horizontal agreements that prohibit buildings and property management companies from hiring building services workers, thereby undermining competition for labor, reducing worker bargaining power, and suppressing wages. For these reasons, the complaint alleges that the No-Hire Agreements constitute unreasonable restraints of trade that are unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, and are thus unfair methods of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Independent of the Sherman Act, the complaint alleges that Guardian's conduct constitutes an unfair method of competition with a tendency or likelihood to harm competition, consumers, and employees in the building services industry, in violation of Section 5 of the FTC Act. According to the complaint, the No-Hire Agreements limit the ability of building owners and managers to hire Guardian's employees. This harms Guardian's employees because it limits their ability to negotiate for higher wages, better benefits, and improved working conditions. Employees may suffer further hardship if the building they work at brings services in-house because the No-Hire Agreements force them to leave their jobs in some circumstances. The complaint further alleges that the No-Hire Agreements harm building owners and managers because they may be foreclosed from bringing services in-house due to the prospect of losing long-serving workers with extensive, building-specific experience.

IV. Proposed Order

The proposed Order seeks to remedy Guardian's unfair methods of competition. Section II of the proposed Order prohibits Guardian from entering or attempting to enter, maintaining or attempting to maintain, enforcing or attempting to enforce, or threatening to enforce a No-Hire Agreement, or communicating to a customer or any other person that any Guardian Employee is subject to a No-Hire Agreement.

Paragraph III.A of the proposed Order requires Guardian to provide written notice to customers that are subject to No-Hire Agreements that (i) the restriction is null and void, and (ii) any customer or a subsequent building services contractor for a customer is no longer subject to the restrictions or penalties related to the No-Hire Agreements in Guardian's contracts.

Paragraph III.B of the proposed Order requires Guardian to provide various written notices to employees who are subject to a No-Hire Agreement. Paragraph III.C requires that Guardian post clear and conspicuous notice that employees are not subject to No-Hire Agreements and may seek or accept a job with the building directly, or any company that wins the building's business.

Paragraphs IV.A and IV.B of the proposed Order provide a timeline according to which the obligations enumerated in Section III must be met. Paragraphs IV.C-E set forth Guardian's ongoing compliance obligations.

Other paragraphs contain standard provisions regarding compliance reports, requirements for Guardian to provide notice to the FTC of material changes to its business, and access for the FTC to documents and personnel. The term of the proposed Order is ten years.

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The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order to aid the Commission in determining whether it should make the proposed Order final. This analysis is not an official interpretation of the proposed Order and does not modify its terms in any way.