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Franchise industry examines restrictions on worker mobility

By Steven B. Feirman

Franchising has come under increasing scrutiny this month as federal legislators and state regulators have been examining the legality of so-called "no-poach" or "no-hire" provisions in franchise agreements. These provisions prohibit franchisees from soliciting or hiring the employees of other franchisees in the same franchise system. Some economists believe that no-poach restrictions unfairly decrease competition for workers and reduce opportunities for workers to achieve economic advancement. Critics of these restrictions point to the fact that workers hired by franchisees are unaware that they are not allowed to transfer to other locations of the same brand.

On July 12, Senators Cory Booker and Elizabeth Warren sent letters to the CEOs of 90 franchisors requesting information on the franchisors' no-poaching clauses and requesting that they remove from their franchise agreements "any language that imposes limits on worker mobility." Citing a 2017 Princeton University study by economists Alan Krueger and Orley Ashenfelter that described the pervasiveness of no-poaching clauses in the franchise industry, "Theory and Evidence on Employer Collusion in the Franchise Sector," Senators Booker and Warren expressed concern that no-poaching provisions are contributing to wage stagnation. They have asked franchisors to provide the requested information by August 10, 2018. We are tracking several federal legislative proposals that would prohibit no-poach provisions and similar restrictive employment practices, including the End Employer Collusion Act, the Workforce Mobility Act, and the Economic Freedom and Financial Security for Working People Act.

Also on July 12, Washington State Attorney General Bob Ferguson announced that Washington State had reached agreements with seven national franchisors to eliminate restrictions on the movement of workers. According to Ferguson, such restrictions violate Washington State antitrust laws, but the "assurances of discontinuance" he entered into with the franchisors extend nationwide to over 25,000 restaurants. Specifically, the companies have agreed to refrain from enforcing language in their franchise agreements that would stop workers from moving to other positions within the franchise system, and to remove such language from new and renewed contracts. Ferguson has similar investigations underway and has indicated that if other franchisors do not follow suit and end their no-poach practices, they could face lawsuits by the State of Washington.

Separate from the Washington State investigations, eleven state attorneys general, led by Massachusetts Attorney General Maura Healey, sent a letter on July 9 to several national franchisors seeking information and documents about provisions in franchise agreements that restrict franchisees in the same chain from hiring workers away from each other. According to this letter, the state enforcers are concerned that such restrictions in franchise agreements may negatively impact fast-food industry employees in their respective states.

In response to these inquiries and investigations, and because the legality of these restrictions are uncertain under existing antitrust laws, many franchisors are re-thinking the advisability of continuing to enforce no-poach provisions. We are working with the International Franchise Association's Anti-Poaching Task Force in defending the interests of the franchising industry. Stay tuned as we continue to monitor developments in this area. And, of course, please reach out to us if you would like to discuss how these developments could affect your business.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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