DOJ Action Is A Cautionary Tale On Employer No-Poach Pacts

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In what should be a warning for businesses and in-house counsel, an employee no-poach agreement led the U.S. Department of Justice to indict Surgical Care Affiliates LLC and its successor SCAI Holdings LLC, or SCA, on antitrust conspiracy charges in January.

According to **the two-count indictment**, believed to be the first to arise from a no-poach agreement, executives of SCA met with two of its competitors and agreed not to solicit each other's senior-level employees.

Email correspondence among SCA employees and between SCA employees and third-party recruiters described employees working for those competitors as off limits.

Other unidentified companies and individuals, deemed uncharged co-conspirators in the indictment, knew of and participated in conduct that the DOJ alleged constitutes a per se violation of the Sherman Antitrust Act.

When viewed alongside other recent legislative developments, the SCA indictment is quite significant.

Just weeks before, former President Donald Trump signed into law the Criminal Antitrust Anti-Retaliation Act, or CAARA, amending the Antitrust Criminal Penalty Enhancement and Reform Act.[1]

CAARA protects employees, agents, and others who report or cause to be reported criminal antitrust violations from adverse action by an employer.[2]

Much like other anti-retaliation statutes, CAARA prohibits employers from retaliating against a reporter so long as the reporter reasonably believes that a criminal violation occurred, even if it didn't.[3]

And, also like other anti-retaliation statutes, an individual who faces an adverse action after reporting a suspected violation may seek damages, attorney fees, costs and other remedies from the secretary of labor, and a civil court in some circumstances.[4]

The SCA indictment gives legitimacy to a person's claim that no-poach practices in the workplace violate federal criminal antitrust laws.

Consequently, CAARA protects individuals who report no-poach agreements from retaliation and arms them with the power to file a claim against a retaliating person.

For the franchising community, this tune rings a familiar, unpleasant bell.

Three years ago, franchisers and franchisees across the country became the focus of an antitrust investigation by Washington Attorney General Bob Ferguson for their use of no-poach clauses in franchise agreements.

Though each system may have used different language, the no-poach clauses generally prohibited a franchisee from hiring an employee who worked for a different franchisee within the same system, or for the franchiser.

The clauses drew ire because they interfered with the ability for low-wage employees to secure new and better employment benefits and conditions from a different franchisee, leading to stagnant wages and reducing competition.[5]

Shortly after the Washington investigation began, many state attorneys general in Massachusetts, California, Illinois, New York and other states joined in, each calling for an end to no-poach agreements in the franchising industry.[6]

The Washington investigation ended just seven months ago, and by that time 237 franchisers had signed agreements pledging to remove no-poach clauses from their franchise agreements.[7]

Governmental declarations and franchiser pledges aside, however, the investigation did not result in universal acceptance that no-poach clauses violate federal antitrust laws in the franchise context.

Nor did the class actions that followed. In fact, quite the opposite occurred. At least one federal court concluded that franchisers and franchisees cannot conspire to violate antitrust laws,[8] others have concluded that no-poach clauses in the franchise context are arguably per se illegal restraints,[9] and still others fall in between.[10]

While it may be several years before the circuit courts or the U.S. Supreme Court provide guidance on the question, as a practical matter, the franchise industry now has sufficient incentive to put the use of no-poach clauses to bed.

If it was not already the case, the SCA indictment gives covered individuals plenty of reasonable belief that no-poach clauses violate criminal antitrust laws.[11]

It follows that, even if no-poach clauses are actually legal in the franchise context, giving reprieve from substantive antitrust claims, franchisers and franchisees are still likely to find themselves on the latter half of the "v." in workplace retaliation suits.[12]

The cost of litigating no-poach clause retaliation suits may quickly eclipse the cost employers incur replacing employees who move around within the same franchise system.

While some franchisers have signed pledges and/or faced lawsuits for antitrust violations, they represent just a fraction of brands franchising throughout the U.S.

The enactment of CAARA, together with the indictment of SCA, indicate that no-poach agreements must become a thing of the past. The franchising community and businesses in general should keep a close eye on their employment practices in this regard.

Franchisers should diligently review their franchise agreements to ensure that explicit no-poach clauses are eliminated.

Handshake agreements, if they exist, must cease, and employees who become aware of no-poach practices within their organization should not be afraid to speak up.

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[1] 15 U.S.C. § 7a-3(a)(1) (2020).

[2] Id.

[3] Id.

[4] Id.

[5] See Press Release, Washington Office of the Attorney General, AG Report: Ferguson's Initiative Ends No-Poach Practices Nationally at 237 Corporate Franchise Chains (June 16, 2020) (available at https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate).

[6] Stein, Jeff, States launch investigation targeting fast-food hiring practices, Washington Post (July 9, 2018).

[7] Id.

[8] Arrington v. Burger King Worldwide, Inc., 448 F.Supp.3d 1322, 1331 (S.D. Fla. Mar. 24, 2020) (unity of interest precludes antitrust claim), appeal filed, Arrington v, Burger King Worldwide, Inc., Case No. 20-13561 (11th Cir.).

[9] Fuentes v. Royal Dutch Shell PLC, et al, Civ. No. 18-5174, 2019 WL 7584654, at *1 (E.D. Pa. Nov. 25, 2019) (per se rule may apply and collecting similar holdings).

[10] Ogden v. Little Caesar Enterprises, Inc., 393 F.Supp.3d 622, 639-40 (E.D. Mich. July 29, 2019).

[11] 15 U.S.C. § 7a-3(a)(1).

[12] Moreover, CAARA broadly defines who is a "covered individual" and who is an "employer." Given the position that franchisors have universally taken when facing substantive antitrust claims—that they and their franchisees are "not separate economic actors" who cannot conspire—it is reasonable to expect affected individuals to argue that the franchisor's influence and control over franchisee policies and practices make each of them arguably liable for any retaliatory conduct. 5 U.S.C. § 7a-3(a)(3) (defining a "covered individual" to mean an "employee, contractor, subcontractor, or agent" of an employer, and "employer" to mean "a person, or any officer, employee, contractor, subcontractor, or agent of such person."); see Brief of Defendants-Appellees, Arrington et al v. Burger King Worldwide, Inc. et al, Case No. 20-13561, at 15-17 (Filed Jan. 27, 2021) (acknowledging that "although some employee management decisions are left to the discretion of the franchisee," Burger King's "continuous oversight is part of [its] substantial control over the training of key employees who are tasked with managing the day-to-day operations of franchised restaurants.").