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The Next Battlefront: So-Called 'No-Poaching' Provisions

Some franchisors include in their form of franchise agreement provisions prohibiting the franchisee from soliciting or hiring its employees of those of its other franchisees. These provisions promote franchisee investment in their employees and a stable workforce.

What Has Happened?

On October 20, 2016, the Federal Trade Commission issued guidance announcing the commission's intent to criminally investigate "naked no-poaching" agreements that are "unrelated or unnecessary to a larger legitimate collaboration" between employers. The guidance caught the attention of the class action bar and legislators. On June 28, 2017, a putative class action complaint was filed against McDonald's alleging that the *Interference with Employment Relations of Others* provision in McDonald's franchise agreement—prohibiting the franchisee from soliciting or employing current employees of McDonald's or other McDonald's franchisees—violates Section 1 of the Sherman Act. That case remains active and a few other cases have been filed against franchisors. And on March 1, 2018, Senators Corey Booker and Elizabeth Warren introduced Senate Bill 2480. The bill would make unlawful "restrictive employment agreements" among "employers"—per the Fair Labor Standards Act's broad definition—that prohibit or restrict one employer from soliciting or hiring another employer's employees or former employees. These include, according to the bill, agreements contained in a franchise agreement. While the bill's scope and terms are anything but clear, what is certain is that it targets franchisors and so-called 'no-poaching' provisions contained in franchise agreements. An identical bill was introduced to the House of Representatives on April 26, 2018 (H.R. 5632). Both bills have been referred to the appropriate committee.

What Is To Be Done?

For now, vigilance is warranted. Given the current composition of the House of Representatives and Senate, passage of the proposed federal statutes is unlikely any time before the mid-term elections in November. But this is one of the issues that franchisors will need to monitor should majority control of the House or Senate change hands. Franchisors whose form of franchise agreement prohibits its franchisees from soliciting or hiring its or its other franchisees' employees will want to watch developments in the pending litigation and consider how they or the passage of S. 2480 or H.R. 5632 might impact their form agreements, their systems and their franchisees' ability to continue to invest in their employees and maintain a stable and reliable workforce.

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