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THE LATEST: DOJ Distinguishes 'No-Poach' Agreements

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WHAT HAPPENED:

- The Department of Justice filed a Statement of Interest in three related cases in the Eastern District of Washington yesterday dealing with alleged "no-poach" (or non-solicitation) agreements between franchisors like Carl's Jr, Auntie Anne's and Arby's and their franchisees.

- In the statement, the DOJ distinguished between "naked" no-poach agreements between competitors and the kinds of no-poach agreements in the franchise context that are typically vertical restraints between the parent company and the individual franchisee.

- According to the DOJ, naked no-poach agreements should be analyzed as *per se*, or presumptively anticompetitive and illegal under Section 1 of the Sherman Act, while most vertical restraints should be analyzed under the rule of reason which requires some balancing of potential harms and benefits.

- The statement did, however, distinguish two scenarios where franchise agreements could still merit *per se*

- In a situation where the "franchisees operating under the same brand name agreed amongst themselves (and wholly independent from the franchisor), for example, not to hire any person ever previously employed by another franchisee that is a party to the agreement." *Stigar v. Dough Dough, Inc. et al*., No. 2:18-cv-00244-SAB, Statement of Interest of the United States of America at 11 (Mar. 7, 2019).

- In an agreement between a franchisor and franchisee relating to competition in a market where they actually compete. "If operating in the same geographic market, they both could look to the same labor pool to hire, for example, janitorial workers, accountants or human resource professionals. In such circumstances, the franchisor is competing with its franchisee." If such agreement is not ancillary to any legitimate and procompetitive joint venture, it would warrant *per se Id*. at 13.

WHAT THIS MEANS:

- For many franchises, the DOJ's distinction between "naked" and vertical no-poach agreements will represent welcome respite from the onslaught of class actions that have been filed recently.

- Franchisors and franchisees, however, will still need to demonstrate any past or future no poach agreements are not (1) between franchisees and independent of the franchisor, or (2) operating in the same geographic market where both entities actually compete.

- It also remains to be seen whether the court will adopt the DOJ's view on the topic, and how State Attorneys General will react.

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