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Employee “No-Poaching” Agreements Remain in the Antitrust Crosshairs

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There have been a series of investigations, class action suits and high value settlements involving agreements not to solicit employees. In addition, the Department of Justice (DOJ) Antitrust Division made a splash a few months ago when it announced that it would criminally investigate and prosecute employers that engage in certain “naked” no-poach or wage-fixing agreements.

WHAT HAPPENED:

- Employees filed a civil class action against the Carl’s Jr. hamburger chain because of a no-hire provision in its franchisee agreements.

- The plaintiffs allege that Carl Karcher Enterprises (CKE), the franchisor, includes the no-hire provisions in its standard agreement to prevent its restaurants from hiring each other’s shift leaders. According to the complaint, the clause appears in the same part of the agreement that also prevents franchisees from competing for each other’s customers.

WHAT THIS MEANS:

- The plaintiffs’ bar continues to view employee no-hire/non-solicitation agreements as a profitable area to bring class actions.

- The DOJ’s policy guidance states that only “naked” agreements among employers will justify criminal enforcement. This means agreements that are not ancillary to some other joint competitive activity. Here, the restraint is arguably ancillary to operating a franchise chain.

- Plaintiffs’ success likely will hinge on whether they can show that the agreement between the

franchisor and its franchisees is really among separate entities rather than a single economic unit under the *Copperweld*

- The Franchisor's business justifications also are likely to be important as this litigation progresses.

- Companies need to be sensitive to employment restrictions involving other employees such as non-solicitation or no-hire agreements.

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