

Fox Rothschild Podcast

Featuring Partner John Gotaskie

We're talking today on FoxCast with partner John Gotaskie in Pittsburgh about renewed efforts to end "naked no-poaching" provisions in franchise agreements. John represents individuals, partnerships and companies in diverse legal matters including franchising issues, complex commercial litigation and bankruptcy litigation. John also edits the firm's [Franchise Law Update](#) blog. John, good morning.

John Gotaskie: Glad to be here.

Question: What do franchisors need to be doing in light of these poaching questions?

John Gotaskie: Well, what franchisors need to be doing is that they need to review their agreements and take immediate action in response to the recent onslaught of legal action, primarily from the government but also on the civil side of things. In a typical agreement, the franchisor will prohibit a franchisee from poaching its employees or those of other franchisees during the term of the agreement, and for a period of time after it ends. Until now, these so-called "naked" poaching provisions were fairly commonplace. Franchisors argue that these provisions are intended to protect each franchisee's investment of time and money in training its employees, especially general managers who sometimes participate in extensive training programs.

Question: What's the flip side of the argument?

John Gotaskie: Well the flip side is driven largely by the economic community. Some economists argue that the practice of these no-poaching agreements keeps wages for the affected employees low and that this is a manipulation of the free market. Worker advocacy groups are also here, and they argue and have long pushed for an end to this alleged "anti-competitive" practice. Economists generally agree that no-poaching provisions do have a negative impact, especially on the employees of low-wage-level employees.

Question: What is the position of the U.S. Department of Justice?

John Gotaskie: Well this is interesting, because two years ago, the Department of Justice and the Federal Trade Commission issued joint guidance that naked no-poaching agreements are "per se" illegal – meaning that their very existence violates the Antitrust law and sets companies up for criminal charges. The DOJ further stated that it intended to criminally prosecute companies employing naked no-poaching agreements. Now, while most observers expected that the DOJ under President Trump and Attorney General Jeff Sessions would retreat from this position, it has not, citing pro-competitive concerns. In fact, earlier this year, the Department of Justice initiated a criminal complaint against a number of companies respecting naked no-

poaching agreements. Now, while the case settled with only civil penalties imposed, the DOJ expressly stated that it was reserving the criminal question and planned to “zealously enforce” the law.

Question: Some major brands have changed their practices after the Attorney General filed suit.

John Gotaskie: That’s true. This past summer, seven international brands agreed to no longer enforce the no-poaching provisions in their agreements in response to a lawsuit being led by the Attorney General of the State of Washington. Eight more large brands then followed.

Additionally, several state attorneys general, led by Massachusetts but including the attorneys general of California, Illinois, Maryland, Minnesota, New Jersey, New York, Oregon and Pennsylvania – in other words, a lot of the biggest commercial states in the union have sent investigation letters to eight large international franchisors regarding each of their non-poaching agreements.

Question: How far will this go?

John Gotaskie: It’s hard to say, but there’s strong belief that this is only the beginning of the attack. In the past year, in addition to all of the government action, civil antitrust actions have been filed by employees of franchisees of several large international brands. The potential liability under these actions could be substantial because the class sizes could be immense. Treble damages and attorneys’ fees could potentially be awarded in any employee victory.

Question: In a case where a complaint was filed against a well-known fast food brand, the company lost a bid for dismissal.

John Gotaskie: Yes. A recent motion to dismiss was denied so the case against that company will proceed. The outcome of this case, and any other test cases, will be closely watched. The need to act is further supported by the fact that some leading senators are strong advocates of removing the “no-poaching” provisions and have introduced legislation to make these contract provisions illegal.

Question: What else are you seeing?

John Gotaskie: Well in addition to all of this, the Department of Justice is out there, and it appears to be in the process of bringing a criminal antitrust complaint against franchisors for what they call vertically assisted, horizontal conspiracies. These types of cases are difficult to win, but they involve allegations of fixing labor rates, allegedly in violation of Section 1 of the Sherman Antitrust Act.

Question: What can franchisors do to protect their interests?

John Gotaskie: Look, the time to address naked no-poaching provisions is now. We are recommending that franchisors should not wait until the update of their franchise disclosure



documents or agreements in 2019. Instead, any franchisors thinking about this should act now. Moreover, any franchisors needing assistance navigating this process should contact us at Fox Rothschild's franchising team.

Narrator: Well, thank you John. Listeners, to confidentially discuss your organization's exposure to "naked no-poaching," please contact John Gotaskie in Pittsburgh at 412-394-5528 or at jgotaskie – that's J-G-O-T-A-S-K-I-E – at foxrothschild.com.

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