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FRANCHISE ADVISORY

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To:	Clients of Holmes Lofstrom, PC
Subject:	Washington Enforcement and Legislative Activity

Over the past couple of years, the State of Washington has stepped up its efforts to protect employees from what it deems an employer "overreach." We want to bring two of Washington's recent policies targeting franchisors to your attention.

Enforcement Efforts Targeting "No Poaching" Provisions

As we have previously advised, Washington is among a handful of states that have taken aggressive steps to quash the use of franchise agreement provisions which prohibit a franchisee from soliciting or hiring employees of the franchisor or staff of the System's other franchisees, so-called "no poaching" provisions. Washington's Attorney General has vigorously pursued dozens of franchisors resulting in settlement agreements, called "assurances of discontinuance," wherein the franchisor must agree to remove such provisions in both existing and future franchise agreements. Franchisors have, almost uniformly, complied, opting to avoid expensive and time-consuming litigation with the state even though the Attorney General ***has insisted that such settlement agreements apply on a nationwide basis*** and not be limited solely to the state of Washington.

To date, we are not aware of any franchisors targeted by the Attorney General who have elected to proceed to litigation rather than agree to the terms demanded. This may be due, in part, to the fact that most franchisors are ambivalent about no-poach provisions, which typically manifest themselves in the form of a dispute between two franchisees, placing the franchisor in the unenviable position of having to decide a conflict with a lose-lose result. While many in the franchise community have expressed that they are somewhat taken-aback by Washington's reaction to a long-standing provision in a private contract, greater outrage seems to have solidified related to Washington's demand that its policy be implemented even outside its boundaries. If any state Attorney General were to employ this type of aggressive tactic to compel franchisors to change a more critical policy to their systems, we would expect to see much stronger resistance from not only franchisors, but the franchising community as a whole. In light of the complete lack of any legitimate interest by one state in regulating business and protecting consumers in other states, we hope to see some limits placed on this heavy-handed tactic.

In the meantime, the Washington Attorney General's office has been busy sending out Civil Investigative Demands (similar to subpoenas) to all franchisors who have registered FDDs in the state, relating to the

franchisor's current and past use of "no poach" provisions. If you receive such a Demand, please feel free to contact us for assistance.

New Law Restricting Non-Competition Agreements

On May 8, 2019, Washington Governor Jay Inslee signed a bill restricting non-competition agreements in the state. Among other things, this new law: i) renders an employee's non-competition agreement unenforceable unless the employee's annual earnings exceed $100,000; ii) creates a presumption that any non-competition agreement with a duration longer than 18 months is unreasonable and unenforceable; and iii) codifies the prohibition on "no poach" agreements in a franchise system. The new law takes effect as of January 1, 2020.

As most employees of franchisee-owned outlets earn well under $100,000, this law has the practical effect of banning non-competition agreements for franchisees' employees in the state of Washington. If your Franchise Agreement requires that franchisees obtain non-competition agreements from their employees, a short-term solution is to add language indicating that such a requirement is "subject to state law."

Franchisors that impose requirements to obtain non-competition agreements from franchisees' employees typically do so as a means of protecting confidential and proprietary information and trade secrets from being shared outside of the system. Non-disclosure agreements can serve the same purpose, although it is more difficult to prove that an employee has improperly shared confidential information than it is to prove that he or she is working at a competitor's store. Still, we recommend that franchisors require robust non-disclosure provisions/agreements related to their confidential and proprietary information and trade secrets, and either request or require that the franchisees enter into such agreements with their employees.

This is also a reminder to consider limiting access to system-specific information for franchisees' employees unless they have a legitimate need to know it in order to perform their jobs.

Best regards,

Holmes Lofstrom, PC