

# United States Senate

WASHINGTON, DC 20510

November 21, 2017

The Honorable Jeff Sessions  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530

Dear Attorney General Sessions:

We write today regarding recent reports of collusion between franchise corporations and their subunits that may be suppressing workers' wages and job mobility. As you know, a competitive labor market is critical to the success of our economy. If our labor market is working efficiently, both workers and businesses benefit—workers from higher wages and businesses from more productive workers.

We are particularly concerned about the increasing use of collusive “no-poach” agreements between franchise companies (franchisors) and their franchise units (franchisees). In these agreements, franchisors prohibit franchisees from recruiting and hiring away workers currently employed by other franchisees affiliated with the franchisor. In some cases, they even preclude the hiring of individuals who have left the franchise for a period of time.<sup>1</sup> For example, as of 2016, none of the nearly 2,000 Jiffy Lube franchisees may hire an individual who is currently employed—or was employed less than six months ago—at any other Jiffy Lube franchise.<sup>2</sup> These barriers serve to limit workers' ability to move freely among jobs and translate their productivity to higher wages and better benefits. More concerning, these agreements are forged between the franchisor and franchisee, meaning that workers are wholly unaware of the limits imposed on their mobility.

In a new study, economists at Princeton University examined the franchise agreements of all franchisors with at least 500 franchise units operating in the United States. They found that fully 58% of the 156 largest franchisors operating around 340,000 franchise units used some form of anti-competitive “no-poach” agreements. These agreements were especially common in low-wage and high-turnover industries, such as fast food.<sup>3</sup>

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<sup>1</sup> Krueger, A.B. & Ashenfelter, O. “Theory and Evidence on Employer Collusion in the Franchise Sector” [working paper]. *Princeton University & NBER* (Sept. 28, 2017). Online at: <http://dataspace.princeton.edu/jspui/bitstream/88435/dsp014f16c547g/3/614.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

The pervasiveness of these practices, which undoubtedly restrict competition in the labor market, is deeply concerning. The Department of Justice (the “Department”), through its role in enforcing federal antitrust laws, has a critical role to play in ensuring that anticompetitive practices do not stifle our labor market and prevent workers from reaching their full earnings potential.

We were pleased to see that in October of 2016, the Department issued guidance making it clear that “no-poach” agreements among competitors are violations of federal antitrust laws. In the Department’s *Antitrust Guidance for Human Resource Professionals* (the “October 2016 Guidance”), it clarified that agreements among employers “not to recruit certain employees” or “to refuse to solicit or hire that other company’s employees (so-called ‘no-poaching’ agreements)” are likely illegal.<sup>4</sup> The Department also specified that such “no-poaching agreements” are per se illegal, meaning that an agreement alone—even without evidence of harm—is automatically unlawful. The Guidance further stated that the Department intended to “proceed criminally against naked wage-fixing or no-poaching agreements” and may “bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies” that have “agreed among themselves...not to solicit or hire each others’ employees.”<sup>5</sup>

Despite this clear guidance, no-poach agreements continue to proliferate in franchise agreements, even though many franchise companies claim that they are not joint employers regarding their franchisees. In order to better understand the Department’s efforts to combat collusive no-poach agreements, we respectfully request that you answer the following questions by December 11, 2017.

1. Does the Department believe that the October 2016 Guidance applies to “no-poach agreements” among franchisees within a single corporate entity?
2. Has the Department changed its position on “no-poach agreements” articulated in the October 2016 Guidance? If so, please describe any policy or guidance changes and provide any documentation reflecting those changes.
3. Does the Department have any plans to revisit the October 2016 Guidance?
4. Is the Department currently investigating the use of no-poach agreements in franchise agreements? If so, how many active investigations are open?
5. Is the Department currently pursuing legal action against any franchisors for their use of no-poach agreements? If so, please include a list and summary of each case.

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<sup>4</sup> “Antitrust Guidance for Human Resource Professionals.” *Department of Justice Antitrust Division & Federal Trade Commission* (Oct. 2016). Online at: <https://www.justice.gov/atr/file/903511/download>.

<sup>5</sup> *Id.*

6. Does the Department believe that further Congressional action is needed to curtail the use of collusive no-poach agreements? If so, please discuss any recommendations for Congressional action.

We look forward to working with you to ensure that workers and businesses are competing on a level playing field. Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren  
United States Senator



Cory A. Booker  
United States Senator