

Client Alert

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Shopping for No-Poach: Plaintiffs Try On No-Poach Litigation in New Class Action Targeting Luxury Retailers

More retailers may soon find themselves in the crosshairs of private no-poach litigation, as a newly filed class action has targeted Saks Fifth Avenue and the luxury retailers that lease space within Saks Fifth Avenue department stores. These retail arrangements are also known as store-within-a-store or shop-in-shop. According to the complaint, Saks Fifth Avenue and the luxury retailers entered into agreements that restricted the luxury retailers from hiring Saks Fifth Avenue employees. The complaint asserts under the agreements, luxury retailers could only hire Saks Fifth Avenue employees if: (1) managers from both Saks Fifth Avenue and the luxury retailer approved the hire; or (2) the employee has not been employed by Saks Fifth Avenue for more than six (6) months. The plaintiffs argue that these agreements reduced competition for luxury retail employees, which led to suppressed wages.

No-poach agreements, where companies agree not to hire each other's employees, are increasingly under scrutiny as potential antitrust violations because they may unreasonably restrain competition for labor. These agreements have been in the spotlight since October 2016, when the Department of Justice Antitrust Division (DOJ) published new guidelines on the issue and announced that going forward such agreements could be investigated criminally. While the DOJ has been slow to bring criminal cases, the increased attention on the issue has led to private litigation in industries such as franchises and higher education. See December 2019 client alert, [New Cases Highlight the Risks and Uncertainty Surrounding Employee No-Poach Agreements](#).

As the Saks Fifth Avenue case suggests, department stores and other similarly situated retailers may be at risk of future no-poach litigation. However, not all no-poach agreements are problematic. In certain contexts and subject to conditions, companies may be able to create and enforce no-poach agreements without violating the law. The antitrust and employment teams at Hunton Andrews Kurth are actively monitoring developments in this area and stand ready to assist clients with their drafting and defense needs.

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