

SEP 13 2018

SUPERIOR COURT CLERK

EXP07

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IN RE: FRANCHISE NO POACHING
PROVISIONS

NO. **18-2-22882-4SEA**

PIZZA HUT, LLC ASSURANCE OF
DISCONTINUANCE

The State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney General (the "Attorney General"), and Eric S. Newman, Assistant Attorney General, files this Assurance of Discontinuance ("AOD") pursuant RCW 19.86.100.

I. PARTIES

1.1 In February 2018, the Attorney General initiated an investigation into Pizza Hut, LLC ("Pizza Hut") relating to certain provisions in Pizza Hut's franchise agreements.

1.2 Pizza Hut is a Delaware limited liability company with its principal offices or place of business in Plano, Texas. Pizza Hut is a franchisor, and its corporate- and franchisee-operated locations are in the business of offering pizza, pasta, and other Italian-style food items, among other food products, for sale to consumers. Pizza Hut enters into franchise agreements with franchisees for the operation of traditional Pizza Hut® restaurants and enters into license agreements with licensees for the operation of non-traditional Pizza Hut® businesses. In this AOD, unless otherwise specifically stated, references to franchisees and franchise agreements also includes licensees and license agreements.

1 1.3 For purposes of this AOD, Pizza Hut shall include its directors, officers,
2 managers, agents acting within the scope of their agency, and employees as well as its successors
3 and assigns, controlled subsidiaries, divisions, groups, affiliates, partnerships joint ventures, and
4 predecessor franchisor entities.

5 **II. INVESTIGATION**

6 2.1 There are approximately 131 Pizza Hut® locations operating under eight Pizza
7 Hut franchise agreements in the State of Washington as of the date hereof. There are no
8 additional signed franchise agreements for locations that have yet to open. All of these locations
9 are independently owned and operated by franchisees that operate traditional restaurant locations
10 and licensees that operate "Express" Pizza Hut® businesses at non-traditional locations.

11 2.2 For some time, the franchise agreements entered into between Pizza Hut and its
12 franchisees included a prior-consent provision that expressly applied only to employees at the
13 level of restaurant manager ("RGM") and above. Pursuant to this provision, Pizza Hut and the
14 signing franchisee agreed that if either one wanted to hire a person who in the previous six
15 months had worked as an RGM or above for Pizza Hut or another franchisee, then the entity
16 seeking to hire that person first had to get written consent from the previous employer. ("No-
17 Poaching Provision").

18 2.3 The Attorney General asserts that the foregoing conduct of Pizza Hut and its
19 franchisees constitutes a contract, combination, or conspiracy in restraint of trade in violation of
20 the Consumer Protection Act, RCW 19.86.030.

21 2.4 Pizza Hut expressly denies that the conduct described above constitutes a
22 contract, combination, or conspiracy in restraint of trade in violation of the Consumer Protection
23 Act, RCW 19.86.030, or any other law or regulation, and expressly denies it has engaged in
24 conduct that constitutes a contract, combination, or conspiracy in restraint of trade, or violates
25 any other law or regulation or that had any anti-competitive effect. This is because, among other
26 reasons, the No-Poaching Provision was a prior-consent or notice provision, and in any event

1 was restricted to the most senior managerial employees and was intended to encourage Pizza
2 Hut franchisees to invest the time and resources necessary to train managers. Pizza Hut is
3 entering into this AOD to avoid protracted and expensive litigation. Pursuant to RCW
4 19.86.100, neither this AOD nor its terms shall be construed as an admission of law, fact,
5 liability, misconduct, or wrongdoing on the part of Pizza Hut or any of its current or former
6 franchisees, and may not be used for any of those purposes.

7 **III. ASSURANCE OF DISCONTINUANCE**

8 3.1 Subject to Section 2.4 above, Pizza Hut agrees:

9 3.1.1. As of late 2017, Pizza Hut had already removed the No-Poaching
10 Provision from new franchise agreements.¹ It will no longer include the No-Poaching Provision
11 in any of its franchise agreements in the United States signed after the date hereof.

12 3.1.2. It will not enforce the No-Poaching Provision in any of its existing
13 franchise agreements in the United States and will not seek to intervene in any action brought by
14 the Attorney General's Office against a current Pizza Hut franchisee in Washington to defend
15 an existing No-Poaching Provision, provided such action is brought in accordance with, and
16 consistent with, the provisions of this AOD.

17 3.1.3. It will notify all of its current franchisees in the State of Washington of
18 the entry of this AOD and make a copy available to them.

19 3.1.4. If, after 60 days of entry of this AOD, Pizza Hut becomes aware of a
20 franchisee who owns a Pizza Hut® location in the State of Washington attempting to enforce the
21 No-Poaching Provision, Pizza Hut will notify the Attorney General.

22 3.2 Within 30 days of entry of this AOD, Pizza Hut will send a letter to all of its
23 current franchisees who own Pizza Hut® locations in the State of Washington, stating that the
24 Attorney General has requested that the existing No-Poaching Provision be removed from
25 existing franchise agreements. The letter that Pizza Hut will send to its current franchisees in

26 ¹ Pizza Hut has also removed the No-Poaching Provision from its standard license agreement as of the date hereof.

1 the State of Washington will be substantially in the form of the letter attached hereto as Exhibit
2 A. That letter will enclose the proposed amendment that Pizza Hut is requesting that each of its
3 franchisees in the State of Washington agree to, which amendment will remove the No-Poaching
4 Provision. The proposed amendment that will be included with each letter will be substantially
5 in the form of the amendment attached hereto as Exhibit B.

6 3.3 In addition to sending the letter to its current franchisees in the State of
7 Washington pursuant to Section 3.2 above, Pizza Hut will respond promptly to any inquiries
8 from such franchisees regarding the request to amend the terms of the franchise agreement and
9 will convey its recommendation that its current franchisees in the State of Washington sign the
10 proposed amendment. However, for the avoidance of doubt, Pizza Hut is under no obligation to
11 offer its franchisees any consideration—monetary or otherwise—in order to induce them to sign
12 the proposed amendment, nor will Pizza Hut be required to take, or threaten to take, any adverse
13 action against such franchisees if they refuse to do so. Within 60 days of entry of this AOD,
14 Pizza Hut will provide copies of all executed amendments it has obtained with its current
15 franchisees in the State of Washington to the Attorney General's Office. A decision by a
16 franchisee not to amend its franchise agreement, or not to do so within 60 days of this AOD,
17 shall not mean that Pizza Hut has not complied with its obligations under this AOD.

18 3.4 If Pizza Hut learns that a current franchisee in the State of Washington intends in
19 good faith to sign the proposed amendment but is unable to do so within the time period specified
20 in Section 3.3, Pizza Hut will notify the Attorney General's Office to seek a mutually agreeable
21 extension. During any such extension, the Attorney General's Office will not take further
22 investigative or enforcement action against a franchisee.

23 3.5 As Pizza Hut renews existing franchise agreements during the ordinary course of
24 business, or generates new ones in conjunction with certain transactions, the No-Poaching
25 Provision will not be included in any franchise agreements in the United States, unless expressly
26 prohibited by law.

1 3.6 Within 30 days of the conclusion of the time periods referenced in Section 3.3,
2 Pizza Hut will submit a declaration to the Attorney General's Office signed under penalty of
3 perjury stating whether all provisions of this agreement have been satisfied.

4 **IV. ADDITIONAL PROVISIONS**

5 4.1 This AOD is binding on, and applies to, Pizza Hut.

6 4.2 This is a voluntary agreement, and it shall not be construed as an admission of
7 law, fact, liability, misconduct, or wrongdoing on the part of Pizza Hut or any of its current or
8 former franchisees. Pizza Hut and its current and former franchisees neither agree nor concede
9 that the claims, allegations, and/or causes of action which have or could have been asserted by
10 the Attorney General have merit, and Pizza Hut and its current and former franchisees expressly
11 deny any such claims, allegations, and/or causes of action. However, proof of Pizza Hut's failure
12 to comply with its obligations under this AOD shall be *prima facie* evidence of a violation of
13 RCW 19.86.030, thereby placing upon Pizza Hut the burden of defending against imposition by
14 the Court of injunctions, restitution, costs, and reasonable attorneys' fees, and civil penalties of
15 up to \$2,000.00 per violation.

16 4.3 Pizza Hut will not, nor will it authorize any of its officers, employees,
17 representatives, or agents to, state or otherwise contend that the State of Washington or the Attorney
18 General has approved of, or has otherwise sanctioned, the conduct described in Section 2.2 with
19 respect to the No-Poaching Provision in Pizza Hut franchise agreements.

20 4.4 This AOD resolves all issues raised by the State of Washington and the Antitrust
21 Division of the Attorney General's Office under the Consumer Protection Act and any other related
22 statutes pertaining to the acts of Pizza Hut and its current and former franchisees as set forth in
23 Sections 2.1 – 2.3 above that may have occurred before the date of entry of this AOD, or that occur
24 between the date of the entry of this AOD and the conclusion of the 60-day period identified in
25 Section 3.3 above, and concludes the investigation thereof. Subject to Section 4.2, the State of
26 Washington and the Antitrust Division of the Attorney General's Office shall not file suit or take

1 any further investigative or enforcement action with respect to the acts set forth above that occurred
2 before the date of entry of this AOD, or that occurs between the date of the entry of this AOD and
3 the conclusion of the 60 day period identified in Section 3.3 above, against Pizza Hut or any of its
4 current franchisees in the State of Washington that sign the proposed amendment described in
5 Section III, any of its former franchisees in the State of Washington, or any of its current or former
6 franchisees located outside the State of Washington. The Attorney General reserves the right to
7 take further investigative or enforcement action against any current franchisee in the State of
8 Washington identified pursuant to Section 3.1.4 or any current franchisee in the State of Washington
9 that does not sign the proposed amendment described in Section III.

10
11 APPROVED ON this _____ day of 9/13, 2018.

12 **HENRY H. JUDSON**

13 SEP 13 2018

14 COURT COMMISSIONER

15 
16 JUDGE/COURT COMMISSIONER

1 Presented by:

2 ROBERT W. FERGUSON
3 Attorney General

4 

5 ERIC S. NEWMAN, WSBA #
6 Assistant Attorney General
7 Chief Litigation Counsel
8 Antitrust Division
9 Attorneys for State of Washington
10 Office of the Attorney General
11 800 Fifth Avenue, Suite 2000
12 Seattle, WA 98104

13 Agreed to and approved for entry by:

14 PERKINS COIE LLP

15 

16 Cori Gordon Moore, WSBA No. 28649
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18 1201 Third Avenue, Suite 4900
19 Seattle, WA 98101
20 Phone: 206.359.3849

21 Attorneys for Pizza Hut, LLC

22 PIZZA HUT, LLC

23 

24 Pizza Hut, LLC

25
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Exhibit A

TO: Pizza Hut Franchisees Located in the State of Washington

FROM: Lauren Leahy, Chief Legal, Pizza Hut, LLC

RE: Washington Attorney General Civil Investigative Demand Regarding "No-Poaching" Provision in the Pizza Hut Franchise Agreement

Earlier this year, Pizza Hut, LLC ("Pizza Hut") received a Civil Investigative Demand from the Attorney General's Office of the State of Washington ("OAG") requesting information regarding whether Pizza Hut's franchise agreements contain any restrictions on the hiring or solicitation of employees among franchisees or among Pizza Hut and its franchisees (sometimes referred to as "no-poaching" provisions). We understand that the OAG's inquiry was part of a broader investigation into the use of such clauses in the restaurant industry. After engaging in significant negotiations with the OAG, we have determined that continuing to respond to the OAG's inquiry and defending any subsequent allegations would require a costly expenditure of time and resources on the part of Pizza Hut and possibly all Pizza Hut franchisees located in the State of Washington. Therefore, Pizza Hut has entered into an Assurance of Discontinuance ("AOD") with the OAG to end the OAG's investigation. Sending this communication to each of you was an agreed-upon component of the AOD. Please give it your full and prompt consideration.

The OAG has taken the position that provisions in franchise agreements that restrict the hiring or solicitation of employees violate Washington law. Such provisions are common in franchise agreements, and various forms of Pizza Hut franchise agreements that are in effect today contain a no-poaching provision ("Pizza Hut Provision"). Pizza Hut disagrees with the OAG's view of these provisions and believes that it has acted lawfully and appropriately at all times. Moreover, we believe that the Pizza Hut Provision, specifically, is a prior-consent, or notice, provision that is restricted to the most senior managerial employees and was always intended to encourage Pizza Hut franchisees to invest the time and resources necessary to train managers. The Pizza Hut Provision was never intended to help suppress wages or to serve any other anti-competitive end, and Pizza Hut specifically rejects any suggestion otherwise.

Nevertheless, as stated earlier, continuing to respond to the OAG's inquiry and defending any subsequent allegations would require a costly expenditure of time and resources. Therefore, even though Pizza Hut believes that the Pizza Hut Provision is lawful and provides value to the franchise system, Pizza Hut has agreed to take the following steps, among others:

1. Pizza Hut will not include the Pizza Hut Provision in any Pizza Hut franchise agreement that is signed after the date of the AOD, and it will not enforce the Pizza Hut Provision in any existing franchise agreement.
2. As to Pizza Hut franchise agreements that are currently in effect in the State of Washington, the OAG is requiring that Pizza Hut propose to each franchisee that the parties enter into the attached amendment to Pizza Hut's franchise agreement ("Amendment"). The proposed Amendment simply removes the Pizza Hut Provision and related third-party beneficiary provision from your Pizza Hut franchise agreement. If you sign this proposed Amendment, the OAG has agreed that it will not file suit, or take any investigative or enforcement action, against you relating to the Pizza Hut Provision. If you do not sign this proposed Amendment, the OAG has indicated that it will reserve the right to either file suit or take investigative or enforcement action against you relating to the Pizza Hut Provision. We strongly encourage you to sign the proposed Amendment and return it to us no later than [enter date that is 30 days from the date the communication is sent].

If you have any questions about the issues raised in this correspondence, please call Erika Burkhardt, Sr. Counsel at 972-338-7212; however, we cannot provide you any legal advice regarding this matter, and we encourage you to seek advice from your own independent legal counsel.

Thanks,

Lauren

Exhibit B

**AMENDMENT TO
PIZZA HUT, LLC FRANCHISE AGREEMENT**

This Amendment to Pizza Hut, LLC Franchise Agreement (“**Amendment**”) is entered into by and between Pizza Hut, LLC (“**Pizza Hut**”) and the undersigned franchisee/licensee (“**Franchisee**”) and will be effective upon execution by Pizza Hut (“**Effective Date**”). Capitalized terms used in this Amendment but not defined herein have the meanings given to them in the Franchise Agreement (defined below).

RECITALS

A. Pizza Hut and Franchisee are parties to the Pizza Hut, LLC franchise agreement (or license agreement, as applicable) identified below (“**Franchise Agreement**”), pursuant to which Franchisee operates the Pizza Hut® restaurant identified below in the State of Washington.

B. In connection with the position taken by the State of Washington’s Attorney General’s Office regarding “no-poaching” provisions in franchise agreements (“**AOG Position**”), Pizza Hut and Franchisee have determined that it is in each of their best interests and the best interests of the Pizza Hut® system to amend the Franchise Agreement as set forth below in order to mitigate claims that could arise out of, or as a result of, the AOG Position.

Therefore, Pizza Hut and Franchisee agree as follows:

AGREEMENT

1. Interference. As of the Effective Date of this Amendment, the “Interference” provision (“**Interference Provision**”), in which Pizza Hut and Franchisee agree to seek written consent from the previous employer before hiring a person who had worked as a restaurant manager or above for Pizza Hut or another Pizza Hut franchisee in the previous six months, is deleted from the Franchise Agreement.

2. Third-Party Beneficiary. As of the Effective Date of this Agreement, any provision granting Franchisee third-party beneficiary status with respect to the Interference Provision is deleted from the Franchise Agreement.

3. Miscellaneous. Except as specifically modified by this Amendment, the provisions of the Franchise Agreement remain in full force and effect. This Amendment is fully incorporated into the Franchise Agreement. If there is an inconsistency between this Amendment and the Franchise Agreement, the terms of this Amendment will control. This Amendment constitutes the entire agreement between the parties hereto, and there are no other oral or written representations, understandings, or agreements between them, relating to the subject matter of this Amendment. This Amendment inures to the benefit of the parties hereto and to their respective successors and assigns and will be binding upon the parties hereto and each of their respective successors, assigns, and legal representatives. This Amendment may be executed in multiple counterparts, but all such counterparts together will be considered one and the same instrument.

The parties hereto have executed and delivered this Amendment on the dates set forth below.

Franchise Agreement Number:

Relevant Franchise Agreement Section/Article Number (Interference): _____

Relevant Franchise Agreement Section/Article Number (Third-Party Beneficiary): _____

Effective Date of Franchise Agreement: _____

Pizza Hut, LLC

[Franchisee Entity]

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____