

# COMPETITION MATTERS

Fostering Fair Competition in the Marketplace



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## Fast-Food Chains Agree to Remove No-Poach Agreements

Ever wonder if the grass is greener elsewhere? Employees of Dunkin' Brands, Arby's, Five Guy Burgers and Fries, and Little Caesars are now able to find out. In March of 2019, their respective companies reached a settlement with Maryland and other states' Attorneys General to end the use of agreements that prevent workers from moving from one franchise to another within the same restaurant chain.

So-called "no-poach" agreements are arrangements to not solicit another company's employees (or in this case another franchise's employees). These agreements are often made in secret and without the knowledge of employees and have the potential to restrict competition by preventing companies from recruiting or competing for employees based on competitive pay or favorable employment terms.

In July 2018, the Maryland Attorney General in conjunction with 14 other Attorneys General led an investigation into numerous fast food companies for alleged use of no-poach agreements. The Attorneys General requested documents from the companies to include copies of franchise agreements and communications related to no-poach agreements. As one Attorney General put it: "This practice gives franchise locations less incentive to give raises to employees and reduces competition for workers. This drags down the wages for millions of Americans."

Under the terms of the settlements, fast-food companies agreed to stop including no-poach provisions in any of their franchise agreements. In addition, they agreed to stop enforcing any agreements already in place. Employers are also required to post notices in all locations to inform their employees of the settlements. Ultimately, these actions will help low-wage workers secure better paying positions and for some it may prove true that the grass is indeed greener elsewhere.

No-poach agreements are not limited to specific industries. If you suspect or have knowledge that any of the vendors you deal with are taking actions like the ones outlined above, or have questions about how to recognize anticompetitive activity, please call the Antitrust Section of the Ohio Attorney General's Office at 614-466-4328.

## User-Friendly Tools Added to New 'Competitive Purchasing' Website

The Ohio Attorney General's Partnership for Competitive Purchasing is undergoing big changes. The modifications are designed to help us better help you – Ohio's public purchasers

– with bid-rigging detection and prevention.

The Partnership was rolled out in 2005 as a free, voluntary program in which Antitrust Section staff trained in bid-rigging detection selected one registered entity twice a year for an on-site review of bid records for pre-selected products or services. Any evidence uncovered during the review that vendors may have colluded was considered for further investigation and possible recovery of funds for the affected public entity.

Over the years, we have heard that many public purchasers declined to sign up for the program out of concerns that a review might create further strain on their already-scarce staff resources, or that registering might send the wrong message to their constituents. Hearing these concerns, we set to work re-tooling the program to address these issues while continuing to pursue the essential goal of protecting public dollars.

So, what does the Partnership look like today? If you visit the [Partnership page of the Ohio Attorney General's website](#), you'll see that the registration and on-site review components of the program are gone – replaced by a simple, user-friendly portal through which public officials or procurement professionals can report observations of unusual and/or concerning occurrences from their purchasing processes. From a simple price spike to the last-minute withdrawal of a bid under suspicious circumstances, every report is valuable. While one observation submitted by a single purchaser might seem unimportant, an influx of multiple similar observations from numerous purchasers in a given area can reveal the existence of a vendor scheme that otherwise would have gone undetected.

Reporting an observation takes just seconds on the new Partnership portal. A series of dropdown menus allow the purchaser to report key information with only a few clicks. Documents can be easily uploaded and submitted as well. And for those who wish to report the information anonymously, the new Partnership portal will accommodate that request. (But if you do report anonymously, please provide as much detail as possible since our investigators will be unable to follow up with you.)

The Ohio Attorney General's Office believes that facilitating a strong and active partnership with the cities, counties, townships, agencies, and other public purchasers of Ohio is a vital component of his mission to root out and remedy the anticompetitive vendor behavior that all-too-frequently victimizes state and local governments.

So, spend a moment on the Partnership page of the AGO website and take a look at the types of observations we hope you'll submit as they occur in the future. A few seconds of your time can help us immeasurably as we work to ensure that the competitive process works for all Ohioans.

### **Be on the Lookout for Anything that 'Smells Fishy'**

State and federal antitrust enforcers investigate various kinds of anticompetitive conduct that impede free and fair competition, and disadvantage consumers. One type of anticompetitive conduct is price-fixing, which occurs when two or more competing businesses conspire to raise, lower, or maintain the prices of goods or services at certain price points. Price-fixing, as a consequence, reduces the incentive for businesses to lower their prices or improve quality to attract prospective consumers, often resulting in consumers having to pay higher prices or tolerate deficient goods or inadequate services.

In September of 2019, the StarKist Company (“StarKist”) was sentenced by a federal court to pay a \$100 million criminal fine, which was the highest possible corporate fine that could be levied for violating the antitrust laws, and serve a 13-month term of probation for its role in participating in a conspiracy to fix the prices of canned tuna. According to court documents, StarKist conspired with its competitors, Bumble Bee Foods, LLC (“Bumble Bee”) and Chicken of the Sea, to inflate the prices consumers had to pay for canned tuna from as early as November of 2011 to December of 2013.

Earlier, Bumble Bee was sentenced in federal court to pay a \$25 million criminal fine for its participation in the price-fixing conspiracy in the canned tuna market. Conversely, Chicken of the Sea avoided criminal charges because it had served as a whistleblower and alerted antitrust enforcers to the unscrupulous behavior.

You may be wondering what public purchasers (who probably do not purchase a lot of tuna) can learn from this story. The StarKist story serves as a reminder that any purchase—whether or not it is made through a competitive bidding process—can be impacted by vendor collusion. Price-fixing is just as harmful to purchasers as bid-rigging. So be on the lookout, and report anything that smells fishy.

If you suspect unscrupulous behavior like this, or have questions about how to recognize anticompetitive activity, please call the Antitrust Section of the Ohio Attorney General’s Office at 614-466-4328.