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News & Types: Litigation Update

DOJ Announces First-of-its-Kind Settlement Regarding "No-Poach" Agreement

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On April 3, 2018, the Antitrust Division of the U.S. Department of Justice ("DOJ") announced that it filed a civil antitrust lawsuit against, and simultaneously settled with, two of the world's largest rail equipment suppliers, to resolve the DOJ's claims that the defendant companies had for years maintained unlawful "no-poach" agreements not to compete for each other's employees.

THE COMPLAINT AND SETTLEMENT

The DOJ's complaint alleges that Knorr/Bremse AG ("Knorr") and Westinghouse Airbrake Technologies Corp. ("Wabtec"), and a third company acquired by Wabtec in 2016, Faiveley Transport S.A. ("Faiveley"), entered naked no-poach agreements beginning as early as 2009 and continuing until at least 2015, in violation of Section 1 of the Sherman Act. According to the complaint, the no-poach agreements between Knorr, Wabtech and Faiveley restricted competition for U.S. rail industry workers, which limited their access to better job opportunities, restricted their mobility and deprived them of competitively significant information that they could have used to negotiate for better terms of employment.

The settlement includes: (a) a broad injunction prohibiting each defendant from entering into or maintaining no-poach agreements for seven years; (b) rigorous compliance measures to preclude future violations; (c) an affirmative obligation to cooperate in any DOJ investigation of other potential violations; (d) a requirement that each defendant affirmatively notify its U.S. employees and recruiters and the rail industry at large of the settlement; and (e) new consent decree provisions designed to improve effectiveness and enforceability, including provisions allowing the DOJ to prove alleged violations of the decree by a preponderance of the evidence and to reimburse the government for the costs of investigating and enforcing violations.

BACKGROUND

The DOJ's pursuit of the Knorr/Wabtec matter reflects the Antitrust Division's continuing policy to investigate and prosecute no-poach and wage-fixing agreements.

By way of background, in October 2016, the Antitrust Division and the U.S. Federal Trade Commission issued *Antitrust Guidance For Human Resource Professionals* ("HR Antitrust Guidance") regarding the application of

federal antitrust laws to certain employment practices. In the HR Antitrust Guidance, the agencies identified two types of agreements as *per se* unlawful:

- Naked wage-fixing agreements – agreements with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range.
- Naked no-poaching agreements – agreements with individuals(s) at another company to refuse to solicit or hire that other company's employees.

Wage-fixing and no-poach agreements are "naked" if they are not reasonably necessary to any separate, legitimate business collaboration between the employers. According to the agencies, naked no-poach and wage-fixing agreements are *per se* unlawful because they eliminate competition "in the same irredeemable way as agreements to fix product prices or allocate customers."

The HR Antirust Guidance emphasizes that the sharing of information with competitors about terms and conditions of employment or implicit agreements concerning such matters can run afoul of the U.S. antitrust laws. For example, the Guidance states: "[e]ven if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information can serve as evidence of an implicit illegal agreement."

The Guidance makes clear that "going forward" the DOJ intends to proceed criminally against naked wage-fixing and no-poaching agreements.

TAKEAWAYS

Companies and HR professionals should take fair warning that prosecution of no-poach and wage-fixing agreements are a high priority for the U.S. antitrust enforcement agencies.

In its April 3, 2018 press release concerning the Knorr/Wabtec settlement, the DOJ noted that it exercised prosecutorial discretion in pursuing the no-poach agreements as *civil*, rather than *criminal*, violations only because the companies had formed and terminated their no-poach agreements prior to issuance of the October 2016 HR Antitrust Guidance.

In its annual Spring Update (April 11, 2018), the Antitrust Division reiterated:

"Market participants are on notice: the Division intends to zealously enforce the antitrust laws in the labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy."

As such, employers and HR professionals should expect criminal prosecutions to come next. Indeed, the DOJ has reported that several criminal investigations are in the works.

As noted in the HR Antitrust Guidance, HR professionals often are in the best position to ensure that their companies' hiring and other employment practices comply with the antitrust laws. To reduce legal risk, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.