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Antitrust/Labor & Employment ADVISORY ■

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With New Round of No-Poach Allegations, Government Fires a Shot Across the Bow at Anticompetitive Employment Practices

In the first of what is expected to be a new wave of antitrust challenges to agreements among companies not to recruit or hire each other's employees, the U.S. Department of Justice Antitrust Division (DOJ) recently announced its first prosecution under its 2016 guidelines on the subject.

On April 3, 2018, the DOJ filed and settled a complaint against two leading rail equipment companies, Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), alleging that the companies agreed not to hire each other's employees. The parties resolved the civil lawsuit by agreeing to refrain from entering or enforcing such no-poach agreements and implementing compliance and reporting measures to ensure that they do not enter into future anticompetitive employment agreements.

Threats of government enforcement against anticompetitive employment practices have been bubbling since fall 2016, when the Obama Administration's DOJ released guidelines stating for the first time that it "will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each [other's] employees." While the guidelines recognize the legitimate role of noncompetes in certain business contexts, the DOJ took aim at unjustified "naked" restraints it said only harmed employees. Both the DOJ and the Federal Trade Commission (which also signed on to the guidelines) had brought civil suits against anticompetitive employment agreements in previous years.[1] But the DOJ had not previously stated its intent to use its extensive criminal prosecution powers in this area. And, in a further surprise, after taking office in 2017, President Trump's political appointees at the DOJ revealed that there were multiple open investigations under the guidelines and publicly committed to pursuing them.

In the new case, Knorr-Bremse and Wabtec allegedly entered into "no-poach" agreements with each other and a third rail equipment supplier, Faiveley Transport (which Wabtec recently acquired) in violation of Section 1 of the Sherman Act. Specifically, through senior executives, the parties allegedly agreed not to solicit, recruit, hire without prior approval, or otherwise compete for employees. As a result, according to the government, the companies restrained competition for employees and disrupted the normal bargaining and price-setting mechanisms that apply in the labor market. Such agreements, the DOJ asserts, are per se unlawful restraints of trade, similar to other market allocation agreements.

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[1] In 2010, the DOJ brought civil antitrust cases against some of the largest high-tech companies, including Apple Inc., Google Inc., Intuit Inc., and Pixar, alleging that they had committed per se violations of Section 1 for entering into agreements to prohibit each company from "cold calling" each other's employees. *United States v. Adobe Systems Inc.*, No. 10-cv-01629 (D.D.C. Oct. 1, 2010). And in 2012, the DOJ also brought a civil suit against eBay for its agreement with Intuit not to recruit each other's employees. *United States v. eBay Inc.*, No. 12-cv-05869 (N.D. Cal. Nov. 16, 2012). The DOJ resolved both suits by consent decrees with the parties, but private plaintiffs sued for damages in class actions and won settlements of almost half a billion dollars.

The DOJ explained that it did not bring criminal charges in this case because the conduct, which it identified during its review of Wabtec's proposed acquisition of Faiveley, was halted before the issuance of the 2016 DOJ/FTC guidelines. The DOJ has made clear in public speeches that it intends to bring criminal charges against companies that continued to engage in illegal conduct after those guidelines were issued.

Even as it announced the settlement with Knorr and Wabtec, the DOJ reiterated that more prosecutions should be expected. "Today's complaint [against Knorr and Wabtec] is part of a broader investigation by the Antitrust Division into naked agreements not to compete for employees—generally referred to as no-poach agreements," Assistant Attorney General Makan Delrahim said in a DOJ press release. DOJ officials also confirmed to reporters that the division has open civil and criminal investigations into other no-poach agreements in the rail equipment industry and other sectors.

With these mounting warnings – and growing interest in protecting employees' rights to competitive labor markets from state attorneys general and Congress – executives and legal departments of companies active in the U.S. markets should reexamine whether any noncompete or nonsolicit agreements the company enters into could be considered "naked" restraints, rather than ancillary to a legitimate business purpose. Moreover, even when such agreements are justifiable as a critical element of a broader pro-competitive arrangement, companies must be prepared to demonstrate that the restrictions are appropriately limited in time and scope so as to minimize any potential anticompetitive effects. Given the role that both high-level executives and human resources departments often play in employment-related decisions, companies should reevaluate whether their antitrust compliance training and policies have appropriately sensitized the right people to the scope of these increased risks. And everyone will want to study the fact patterns of future cases brought by the DOJ – possibly involving less clear-cut "no poach" or "no hire" agreements – to further understand the government's priorities in this area.

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