CLIENT ALERT

DOJ Challenges Agreements Not To Poach Rivals' Employees

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AUTHORS

Wesley R. Powell | Philipp Girardet | Agathe Richard

In January 2018, Makan Delrahim, Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice (the "Division") made headlines by announcing that the Division would soon file criminal charges against one or more corporations for participating in anticompetitive agreements not to recruit rivals' employees. Mr. Delrahim's announcement was the Division's most prominent statement that it would prioritize antitrust enforcement in employment markets since the Division and the Federal Trade Commission published their joint Human Resources Guidance in October 2016 (the "Joint HR Guidance").

Mr. Delrahim's announcement bore fruit on April 3, 2018, when the Division filed a civil antitrust complaint alleging that Knorr-Bremse AG ("Knorr"), Westinghouse Air Brakes Technologies Corporation ("Wabtec"), and Faiveley Transport S.A. ("Faiveley") entered into unlawful agreements not to solicit, recruit, or hire each other's employees ("No-Poach Agreements") in violation of Section 1 of the Sherman Act. The Division's filing made clear that it elected to pursue a civil rather than criminal action only because the defendants had terminated the challenged conduct prior to the October 2016 publication of the Joint Guidance. The Division, however, emphasized that "it may proceed criminally where the underlying No-Poach Agreements began or continued after October 2016" (Competitive Impact Statement at 11).

Allegations

- According to the Division, Knorr and Wabtec, the world's largest rail equipment suppliers, compete "to attract, hire, and retain skilled employees" (CIS at 4).

- Over a period of several years, Knorr and Wabtec entered into "pervasive No-Poach Agreements [not to solicit or hire one another's employees]" (CIS at 5) that "primarily affected recruiting for project management, engineering, sales, and corporate officer roles" (*Id*.). Faiveley entered into similar no-poach agreements with each of Wabtec and Knorr. Faiveley and Wabtech subsequently merged in 2016.

- The defendants' no-poach agreements, which the Division asserts were approved and actively enforced by the companies' most senior executives, "disrupted the normal bargaining and price-setting mechanisms that apply in the labor market" (CIS at 5).

- Although most restraints of competition are analyzed under the rule of reason, this is not the case for no-poach agreements that are not "reasonably necessary to any separate, legitimate business transaction or collaboration" (as was the case here), which are "properly considered per se unlawful market allocation under Section 1 of the Sherman Act" (CIS at 8). Indeed, the Division has repeatedly challenged no-poach agreements as per se violations in several enforcement actions in the high-tech industry (CIS at 10, citing the 2010 Adobe,[1] 2010 Lucasfilm,[2] and other complaints).

- The defendants' no-poach agreements were "naked restraints" that "eliminated competition to the detriment of employees" and, as such, should be considered per se unlawful market allocation agreements (CIS at 12).

Proposed settlement

- The Division simultaneously filed a proposed consent decree that if approved would enjoin the defendants from entering into or enforcing a "naked" no-poach agreement, defined as any agreement between two or more employers "that restrains any person from cold-calling, soliciting, recruiting, hiring, or otherwise competing" for employees hired to work in the United States. (CIS at 12, 13).

- The defendants, however, are permitted to enter into agreements not to solicit, recruit, or hire employees that are ancillary to a legitimate business collaboration, provided that any such new agreements meet the following conditions (CIS at 13): (1) "be in writing and signed by all parties thereto"; (2) "identify, with specificity, the collaboration to which the [a]greement is ancillary"; (3) "be narrowly tailored to affect only employees who are anticipated to be directly involved in the [a]greement"; (4) "identify with reasonable specificity the employees who are subject to the [a]greement"; and (5) "contain a specific termination date or event."

[1] Complaint, *United States v. Adobe Sys., Inc*., No. 10-cv-1629 (D.D.C. Oct. 1, 2010).

[2] Complaint, *United States v. Lucasfilm Ltd*., No. 10-cv-2220 (D.D.C. Dec. 28, 2010).

- The proposed settlement also imposes strict compliance and notification requirements on the defendants, such as the appointment of a compliance officer, internal communication obligations and the provision of an external notice of the obligations set forth in the settlement (CIS at 14, 15).

- Finally, the proposed settlement provides that in any action brought by the Division to establish a violation of the remedies, the Division may establish such violation by a preponderance of the evidence (CIS at 18). The Division may also apply for a one-time extension of the duration of the proposed consent decree – initially set for seven years – upon a violation of the remedies (CIS at 18, 19).

Takeaways

- This action confirms that the Division has prioritized antitrust enforcement in employment markets.

- Express no-poaching agreements or similar agreements that restrain competition in recruiting and retaining employees that occur post-October 2016 likely will result in criminal enforcement.

- Employee lawsuits will almost inevitably follow government enforcement actions. Following the Division's settlement with Knorr and Wabtec, private plaintiffs sued for damages.[3] Likewise, employees brought suit against several high-tech companies following the Division's enforcement actions against these companies' alleged no-poach agreements[4] and their claims were settled via a $415 million class action settlement.[5]

- Restrictions on competition that are ancillary to an otherwise legitimate agreement (e.g., a merger agreement) will not be pursued criminally and may not be deemed anticompetitive, but parties considering such restrictions should proceed with caution and consult counsel to ensure their agreements' compliance with the Joint HR Guidance.

- Companies should keep in mind that no-poaching (or non-solicitation) agreements may also violate the competition laws of other jurisdictions. For example, such agreements may draw scrutiny from the European Commission if they have anti-competitive effects in the EU, even if the agreement is struck in the U.S. As in the U.S., such agreements may be justified under EU law where they are ancillary to a legitimate commercial purpose, such as a merger transaction, a spin-off or a distribution agreement between independent companies.

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[3] See Michael Macagnone, *Rail Cos. Hit With Another Worker 'No Poach' Antitrust Suit*, *Law360* (April 24, 2018); Matthew Perlman, *Employees Sue Knorr, Wabtec After DOJ No-Poach Settlement* (April 16, 2018).

[4] *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. at 1122.

[5] Dan Levine, *U.S. Judge Approves $415 Mln Settlement in Tech Worker Suit,* Reuters.com (Sept. 3, 2015).

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

Wesley R. Powell
212 728 8264
wpowell@willkie.com

Philipp Girardet
44 203 580 4717
pgirardet@willkie.com

Agathe Richard
212 728 8190
arichard@willkie.com