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Department of Justice Brings the First Employment-Related Antitrust Case Since the October 2016 Guidance Statement

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In October 2016, the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) jointly issued a guidance statement about the application of antitrust laws to hiring and compensation decisions. Antitrust laws, the agencies explained, "apply to competition among firms to hire employees." Thus, in the eyes of the law, employers are competitors for employee talent. Therefore, just as two competing manufacturers are not permitted to agree to refrain from competing with one another for customers, two rival employers are not permitted to agree to refrain from competing with one another for talent. (There are exceptions, however, for no-hire or non-solicit clauses that are ancillary to larger, legitimate transactions or collaborations, as frequently happens in things like staffing agreements and in sales of business units.) In fact, since the DOJ and FTC released the October 2016 guidance statement, it has been the policy of the DOJ to "proceed criminally" against improper no-poaching agreements where warranted.

Last week, the DOJ brought its first case since the 2016 guidance statement. On April 3, 2018, the DOJ filed a civil complaint against Knorr-Bremse AG ("Knorr") and Westinghouse Air Brake Technologies Corporation ("Wabtec"), alleging that the two competing rail companies engaged in a series of no-poaching agreements since at least 2009. The complaint alleges that Knorr and Wabtec "are each other's top competitors for rail equipment," and that they compete not only for the sale of products but also for hiring skilled talent. The complaint also alleges that "[t]here is high demand for and limited supply of skilled employees who have rail industry experience." Accordingly, Wabtec and Knorr allegedly entered into a series of agreements not to "poach" one another's employees away. According to the DOJ, these "no-poach" agreements "restrained competition for employees and disrupted the normal bargaining and price-setting mechanisms that apply in the labor market," allegedly depriving employees of the "ability to negotiate for better salaries and other terms of employment."

The DOJ has submitted a proposed consent decree that, if accepted by the Court, will prohibit the two companies from entering into or maintaining similar no-poach agreements. Notably, the proposed settlement specifically preserves the companies' rights to enter into a "reasonable" non-solicit or

non-hire agreement, provided that the agreement "is ancillary to a legitimate business collaboration," a so-called "non-naked restraint." The settlement also requires the companies, among other things, to notify all of their U.S. employees about the consent decree, to notify all of their staffing and recruitment agencies about the consent decree, to provide annual trainings and reminders to employees, to cooperate with the DOJ in any further related investigation or litigation, and to appoint an Antitrust Compliance Officer to guard against future violations.

There are three main takeaways from this case:

Civil Versus Criminal. It is notable that the DOJ's first post-guidance challenge to a naked no-poach agreement was brought as a civil case, rather than a criminal one. However, the DOJ is warning others not to rely on this as precedent for future cases. In the press release announcing the complaint and later public commentary, the DOJ explained that because the alleged agreements between Knorr and Wabtec concluded before the October 2016 guidance statement was released, the DOJ exercised its prosecutorial discretion not to pursue the companies criminally. However, the October 2016 guidance statement still stands, and the DOJ has made clear that it intends to bring criminal cases in the area of no-poaching or wage-fixing in the coming months even for conduct that pre-dates the October 2016 guidance if the prohibited conduct continued after October 2016. Therefore, companies or individuals that discover ongoing no-poaching agreements or wage-fixing agreements should, in consultation with counsel, give consideration to disclosing these agreements to the DOJ in an effort to qualify for criminal leniency.

Monetary Liabilities. Companies or individuals that enter into naked no-poaching or wage-fixing agreements should be prepared not only for criminal or civil action by the government, but they also face the risk of private lawsuits by the affected employees, including on a class-action basis. The competitive impact statement filed in connection with the proposed consent decree makes clear that, even though the companies have settled their case with the DOJ, this settlement "will neither impair nor assist the bringing of any private antitrust action."

"Naked" No-Poaching Agreements. Finally, this case underscores that the DOJ and FTC's antitrust concerns stem from so-called "naked" no-poaching agreements. A "naked" agreement is one that serves as an end in itself, rather than as a means to support a broader, legitimate end. No-poaching agreements that serve only to stifle competition for talent are "naked" agreements, but no-poaching agreements that merely protect a legitimate transaction or collaboration, like the sale of a business unit or a staffing/consulting arrangement, generally are not. It therefore is telling that the consent decree specifically preserves the companies' rights going forward to enter into agreements not to solicit, recruit, or hire employees when those agreements are "ancillary to a legitimate business collaboration."

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