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# DOJ Targets No-Poach Agreements Among Competitors

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On April 3, 2018, the Department of Justice Antitrust Division ("DOJ" or "Antitrust Division") filed an antitrust complaint against Knorr-Bremse AG ("Knorr") and Westinghouse Air Brake Technologies Corporation ("Wabtec") for agreeing not to "solicit, recruit, hire without prior approval, or otherwise compete for employees" (collectively, "no-poach agreements"). According to the complaint, Knorr and Wabtec are "each other's top competitors for rail equipment used in freight and passenger rail applications" and also compete with each other to "attract, hire and retain various skilled employees, including rail industry project managers, engineers, sales executives, business unit heads, and corporate officers."


Article By Mintz
Dionne LomaxEmployment Matters Blog

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The DOJ challenged the no-poach agreements as a *per se* violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. Section 1 of the Sherman Act addresses anticompetitive conduct that results from concerted action. It prohibits contracts, combinations and conspiracies that unreasonably restrain trade. Under Section 1, particularly egregious agreements among horizontal competitors, such as price-fixing, market allocation, and group boycotts, are deemed *per se* unlawful.

However, not all agreements among competitors to refrain from hiring each other's employees are deemed *per se* unlawful. Similar agreements that are reached in the context of a legitimate business transaction or collaboration (e.g., joint venture or the sale of a business) between companies may be viewed as reasonably necessary to achieve the purpose of the transaction or collaborative arrangement. Thus, in the context of a larger legitimate business arrangement, no-poach provisions could be viewed as a valid ancillary restraint. To be clear, the DOJ does not prohibit all agreements related to employee solicitation and recruitment. In previous challenges to similar conduct, it has clarified that its enforcement actions do not prohibit non-solicitation provisions reasonably necessary for: (1) mergers or acquisitions (consummated or unconsummated), investments, or divestitures, including due diligence related actions; (2) contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers; and (3) the settlement or compromise of legal disputes. *U.S. v. Adobe Systems, Inc. et al.*, No. 1:10-cv-01629 (2010) (regarding antitrust claims against Adobe Systems, Inc., Apple, Inc., Google Inc., Intel Corporation, Intuit, Inc. and Pixar for engaging in a series of bilateral no-poach agreements).

The DOJ characterized the no-poach agreement between Knorr and Wabtec as a naked restraint that was not reasonably necessary to any separate transaction. It allegedly spanned several years and was "monitored and enforced by high-level company executives." According to the Antitrust Division, the no-poach agreement between Knorr and Wabtec "had the effect of unlawfully allocating employees between the companies," and resulted in harm to U.S. workers and consumers by limiting their access to better job opportunities, restricting their mobility, and depriving them of competitively significant information they could have used to negotiate for better terms of employment.

The DOJ simultaneously filed a proposed settlement setting forth the terms of the settlement (known as a consent decree) with the parties. The consent decree prohibits Knorr and Wabtec from entering into, maintaining, or enforcing no-poach agreements with another employer, subject to certain limited exceptions. Knorr and Wabtec each agreed to unilaterally withdraw from and to refrain from enforcing any prohibited no-poach agreement they may have had with any other employers related to employees located or being hired to work in the U.S. As part of the settlement, Knorr and Wabtec also agreed to cooperate with the DOJ in any investigation into additional no-poach agreements to which they may have been counterparties.

Notably, the Antitrust Division's press release highlights the announcements it began making in October 2016 regarding its intention to bring criminal charges against culpable companies and individuals who entered into similar no-poach agreements. It notes, however, that "[i]n an exercise of prosecutorial discretion, the department will pursue as civil violations no-poach agreements that were formed and terminated before those announcements were made." Knorr and Wabtec's no-poach agreements were discovered by the DOJ and terminated by the parties before October 2016.

From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace. This is true even if the products and services that they sell do not necessarily compete in the same product market. It is unlawful for competitors to expressly or implicitly agree not to compete with one another, even if they are motivated by a desire to reduce costs or obtain other efficiencies. As evidenced by a similar enforcement action brought against six technology companies in 2010 (who entered into a consent decree to settle the charges), the DOJ is vigilant regarding its enforcement of no-poach agreements and will undoubtedly bring criminal charges to resolve similar conduct going forward.

Entering into anticompetitive no-poach agreements can also spark private antitrust lawsuits by those injured by the anticompetitive conduct. In private antitrust actions, a prevailing plaintiff can recover three times their actual damages. Thus, private antitrust lawsuits can expose defendants to significant monetary penalties. Private antitrust actions often arise as follow-on complaints after a successful government case. As such, it was no surprise to see that on April 11, a proposed class of current and former employees of Knorr and Wabtec filed an antitrust complaint in federal court in Pennsylvania challenging the no-poach agreements as *per se* unlawful and seeking treble damages for the proposed class members. A similar private antitrust action was filed by a professor of radiology against Duke Medical School for allegedly entering into a no-hire agreement with the University of North Carolina, which allegedly cost the professor a job opportunity. In January 2018, a district court judge ruled that the professor's antitrust lawsuit could be expanded into a class action lawsuit.