No-Poachers Beware: the DOJ and Class Action Plaintiffs Turn Attention to No-Hire Agreements

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Companies that engage in "no poach" agreements with competing employers do so at their peril. Following the October 2016 release of the DOJ/FTC Antitrust Guidance for Human Resources Professionals ("HR Guidelines") making clear that "no-poach" or "mutual no-hire" agreements would be a focus of enforcement going forward, the DOJ has made good on the promise to bring new enforcement actions in this area. Most recent among these is a DOJ civil settlement announced earlier this month against some of the world's largest rail suppliers. Imminently after the DOJ enforcement action and settlement was announced, a succession of class action complaints was filed on behalf of current and former employees of the target companies.[16] While the DOJ's enforcement efforts have so far been limited to civil procedings, there is every reason to expect that criminal prosecutions are forthcoming.

Antitrust in Employment: How Did We Get Here?

Antitrust enforcement in the employment space may seem like an unexpected focus for regulatory pursuit; it appears scrutiny in this area has caught some companies off-guard. Employment does not jump to mind as a typical market ripe for anticompetitive activity and Human Resources ("HR") personnel may not be on a company's radar screen as needing antitrust training. Yet the enforcement emphasis on competitive hiring is neither out of the blue nor inconsistent with traditional antitrust enforcement principles.

From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether they make or sell the same products or compete to provide the same services. Competition among employers benefits employees (actual and potential) by fostering higher wages, better benefits,

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[16] DOJ Press Release, "Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees," April 3, 2018, *available at* https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete; Complaint, United States v. Knorr-Bremse AG, et al., Case No. 1:18-cv-00747 (D.D.C. Apr. 3, 2018), Dkt. No. 1. *See also* Complaint, Theobald v. Knorr-Bremse AG, *et al.*, Case No. 2:18-cv-00526-CRE (W.D. Pa. Apr. 24, 2018) Dkt No. 1; Complaint, *Arcuri v. Knorr-Bremse AG, et al.*, Case No. 1:18-cv-01191-MJG (D. Md. Apr. 23, 2018), Dkt. No. 1.

and other terms of employment.17 Theoretically, consumers also benefit from competition among employers for employees because a more competitive workforce may create more or better goods and services.18

Recent enforcement efforts in this area date back to 2010, when the DOJ launched a series of investigations into the employment practices of several high-tech and media companies in Silicon Valley.19 The investigations revealed multiple bilateral agreements not to solicit and/or hire each other's employees with the effect of reducing competition between the various companies for talent. The specific agreements, which primarily impacted specialized technical employees, such as digital animators, software engineers, and computer scientists, included promises not to cold call, recruit and/or hire one another's employees and, in some cases, to notify the other company when making an offer to its employee.20 Subsequent follow-on class-action litigation resulted in a series of settlements totaling more than $400 million in 2015.21

> *"Firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the companies make or sell the same products or compete to provide the same services."*

Notably, HR employees were central to the implementation of the inter-company agreements. While the agreements were struck primarily by senior executives, HR staff were tasked with ensuring that the arrangements were followed and that employees of certain competitor companies were not recruited.22 Indeed, in some instances, the companies updated their internal hiring manuals to specifically state that employees from certain firms were off-limits.23

In the wake of the high-tech cases, momentum towards greater enforcement has been building. In October 2016, the DOJ and the FTC took the notable step of issuing the HR Guidelines, announcing that "naked wage-fixing or no-poaching agreements" or mutual no-hire agreements among employers, "whether entered into directly or through a

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17 Department of Justice Antitrust Division, Federal Trade Commission, "Antitrust Guidance for Human Resource Professionals," October 2016, *available at* https://www.justice.gov/atr/file/903511/download (hereinafter Guidance for HR Professionals).

18 Id.

19 *See, e.g.*, DOJ Press Release, "Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements," Sept. 24, 2010, *available at* https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

20 *See, e.g.*, DOJ Press Release, "Justice Department Requires Lucasfilm to Stop Entering into Anticompetitive Employee Solicitation Agreements," Dec, 21, 2010, *available at* https://www.justice.gov/opa/pr/justice-department-requires-lucasfilm-stop-entering-anticompetitive-employee-solicitation; DOJ Press Release, "Justice Department Requires eBay to End Anticompetitive "No Poach" Hiring Agreements," May 1, 2014, *available at* https://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements.

21 See Settlement Agreement, In re: High-Tech Employee Antitrust Litigation, Case 5:11-cv-02509-LHK, (N.D. Cal, Jan. 15, 2015), Dkt. 1033-1, *available at* http://www.hightechemployeelawsuit.com/media/264425/redacted_settlement_agreement.pdf; *see also* High-Tech Employee Antitrust Settlement website, *available at* http://www.hightechemployeelawsuit.com/ (announcing settlements of $435 million).

22 *See, e.g.*, Complaint, United States v. Adobe Systems, Inc., *et al.*, Case No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010), Dkt. 1, at 7, *available at* https://www.justice.gov/atr/case-document/complaint-0

23 *See, e.g.*, Id. at 5-6.

third-party intermediary, are per se illegal under the antitrust laws" and would be prosecuted criminally going forward.[24]

In subsequent speeches and public remarks, the DOJ has reiterated that employment is an area of antitrust scrutiny and that prosecutions are forthcoming:

- In September 2017, then-Acting Assistant Attorney Andrew Finch publicly emphasized the DOJ's intention to prosecute naked no-poach agreements.[25] Addressing defense lawyers in attendance, Finch pointedly noted that companies should be "on notice that a business across the street from them – or, for that matter, across the country – might not be a competitor in the sale of any production or service, but it might still be a competitor for certain types of employees such that a naked no-poaching agreement, or wage-fixing agreement, between them would receive per se condemnation."[26]

> *"Parties complying with the requirements of the HSR Act, and especially with Second Requests, should carefully review their document productions with an eye to any potential compliance issues."*

- In January of this year, at a Washington-area conference, newly confirmed Assistant Attorney General Makan Delrahim went further, noting that the DOJ has several "active" investigations and that he has been "shocked" at how widespread no-poach and mutual no-hire arrangements appear to be.[27] Delrahim expressed frustration that the no-poach conduct "has not been stopped, and continued [even after] the time when [the] DOJ's policy was made." At that time, he noted that "in the coming couple of months, you will see some announcements" of new cases from the DOJ and that conduct post-dating the HR Guidelines would be subject to criminal scrutiny.[28]

- And in February 2018 at the ABA's International Cartel Workshop, Delrahim reiterated that prosecutions were impending and clarified that if conduct began or continued after the 2016 HR Guidelines, the DOJ would prosecute criminally. In contrast, the DOJ would treat as civil violations any conduct that "ceased promptly" as of the HR Guidelines.

Knorr-Bremse: the DOJ Takes Action

On April 3, 2018, the DOJ announced a settlement with two major rail equipment suppliers to resolve allegations that the companies maintained long-standing agreements not to compete for employees.[29]

Knorr-Bremse AG ("Knorr") and Westinghouse Air Brake Technologies Corporation ("Wabtec") and their related entities are worldwide leaders in the development, manufacture, and sale of rail equipment and services. The DOJ

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[24] Guidance for HR Professionals at 3.

[25] DOJ Press Release, "Acting Assistant Attorney General Andrew Finch Delivers Remarks at Global Antitrust Enforcement Symposium," Sept. 12, 2017, available at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust.

[26] *Id.*

[27] Matthew Perlman, "Delrahim Says Criminal No-Poach Cases are in the Works," LAW360.COM, Jan. 19, 2018, available at http://www.klgates.com/assistant-attorney-general-announces-that-doj-antitrust-division-is-building-criminal-cases-against-companies-for-anti-poaching-agreements-01-31-2018/.

[28] *Id.*

[29] DOJ Press Release, *supra* note 1.

alleged that from at least 2009, Knorr and Wabtec agreed with French company Faiveley, which was the third-largest rail equipment supplier before it was acquired by Wabtec,[30] not to solicit or hire one another's employees.

According to the Complaint, Knorr and Wabtec (now including Faiveley) compete with one another and with other firms in the rail industry to "attract, hire, and retain skilled employees,"[31] as well as for customers. The anticompetitive arrangements and understandings allegedly affected project management, engineering, sales and corporate officer employment candidates.[32] Employees with rail experience in these fields are supposedly in high demand and low supply. As support for its allegations, the DOJ noted job vacancies in critical positions often remained open for months.[33]

"[There is] a familiar fact pattern in the Knorr-Bremse *allegations: (1) a long-term agreement; (2) among high-level executives; (3) evidenced through multiple written communications; (4) implemented as matters of corporate policy."*

According to the Complaint, the companies' most senior executives entered into the no-poach agreements, which were managed through direct communications among the companies' top personnel.[34] Through multiple written communications, high-level personnel at all three companies memorialized and, in some cases, policed the agreements.[35] The companies' internal and external recruiters then implemented the agreements: for example, outside recruiters were instructed not to solicit employees from the other companies.[36] Internal human resource professionals also were informed of the no-poach agreements and instructed not to consider applicants from the other company.[37]

Per the Complaint, the unlawful agreements ceased in July 2015, when Wabtec announced its intention to acquire Faiveley and Knorr executives directed the company's recruiters to "raid" Faiveley's talent pool.[38]

Lessons from the DOJ Action in Knorr-Bremse

Experienced practitioners will recognize a familiar fact pattern in the Knorr-Bremse allegations: (1) a long-term agreement; (2) among high-level executives; (3) evidenced through multiple written communications; (4) implemented as matters of corporate policy. In these respects, the case resembles prior DOJ price-fixing prosecutions in other markets.

However, the recent case differs in other respects, and may offer some lessons for the bar. Most obviously, the anticompetitive harm alleged was reduced wages to workers, rather than elevated consumer prices. This highlights a point that may not be obvious to HR professionals and other laypersons: the relevant competitors at issue are not a company's competitors in selling its goods or services. Rather, they are the companies competing for the same pool of workers.

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[30] Complaint, *United States v. Knorr-Bremse AG, et al.*, Case No. 1:18-cv-00747 (D.D.C. Apr. 3, 2018), Dkt. No. 1, at 4.
[31] Id. at 7-10.
[32] Id. at 7.
[33] Id. at 5.
[34] Id.
[35] Id. at 7-10.
[36] Id. at 7.
[37] Id. at 8.
[38] Id. at 9.

Relatedly, the case also highlights the need for antitrust counsel and training for HR personnel in particular and for others involved in upstream or "inputs" markets. Corporate compliance training has traditionally focused on sales and pricing personnel, leaving HR professionals perhaps under-trained in this respect and thus ill-equipped to spot potential compliance issues. The HR Guidelines took care to note that "HR professionals are often in the best position to ensure that their companies' hiring practices comply with the antitrust laws" and "can implement safeguards to prevent inappropriate discussions or agreements."39

There is also a lesson here for HSR practitioners. The no-poach agreements purportedly40 were uncovered while the DOJ was investigating the Wabtec-Faiveley merger, announced in July 2015. Thus, parties complying with the requirements of the Hart-Scott-Rodino ("HSR") Act, and especially with Second Requests, should carefully review their document productions with an eye to any potential compliance issues. These concerns apply equally for issues relating to information-sharing and gun-jumping concerns, both of which have also been recent focuses of the DOJ.41

There may be more cases on the horizon, and per the DOJ's recent pronouncements, future matters are likely to be criminal. Consistent with its stated position regarding conduct ceasing before the HR Guidelines were issued, the agreement reached with Knorr and Wabtec resolved a civil enforcement action rather than a criminal prosecution. The DOJ explained that the choice of a civil proceeding resulted from "prosecutorial discretion" and that the no-poach agreements between Knorr and Wabtec "were discovered by the Division and terminated by the parties before October 2016, prompting the Division to resolve its competition concerns through a civil action."42 Thus, it should be assumed that similar conduct occurring after October 2016 would be treated as a criminal matter.

"Given the repeated DOJ warnings in the area, recent no-poach/no-hire investigations may be only the beginning of a larger trend."

It is also notable that the settlement terms with Wabtec and Knorr included significant compliance provisions, including requirements that the settling companies:

- Each appoint an antitrust compliance officer and provide the name and contact information of the appointed compliance officers to the DOJ;
- Notify all U.S. employees of the settlement and its requirements with the manner of notification to be first approved by the DOJ;
- Annually brief top management and HR management regarding the requirements of the settlement and the antitrust laws;
- If a member of top management or HR management is replaced, the replacement of such person must be briefed on the requirements of the settlement within 60 days of succession;

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[39] Guidance for HR Professionals at 1.

[40] Complaint, *Arcuri v. Knorr-Bremse AG, et al.*, Case No. 1:18-cv-01191-MJG (D. Md. Apr. 23, 2018), Dkt. No. 1, at 2.

[41] Federal Trade Commission, "Avoiding antitrust pitfalls during pre-merger negotiations and due diligence," March 20, 2018, *available at* https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger.

[42] DOJ Press Release, *supra* note 1; *see also* Competitive Impact Statement, *United States v. Knorr-Bremse AG, et al.*, Case No. 1:18-cv-00747 (D.D.C. Apr. 3, 2018), Dkt. No. 3, at 12.

- Obtain annually from top management and HR management certifications that each of them has read and understands the terms of the settlement, is not aware of any violation, and understands that a failure to comply with the settlement terms may result in an enforcement action against individuals and/or the company;
- Inform all external recruiting and staffing agencies used by the companies about the requirements of the settlement;
- Have each company's CEO or CFO, and General Counsel, certify to the DOJ annually that the company has complied with the settlement terms;
- Publish notice of the settlement to the rail industry, including through print advertising in industry trade publications and the creation of dedicated website pages (to be maintained for at least one year); and
- Allow the DOJ to conduct periodic compliance inspections and interviews of the companies' records and employees. Moreover, in the event that a settling defendant violates the terms of the settlement and final judgment and the DOJ successfully moves to enforce the settlement against that company, the company must reimburse the DOJ for any attorney's fees, expert fees, and other costs incurred in connection with the DOJ's enforcement efforts, including the investigation of the potential violation.

For a settlement of a civil matter that was the first of its kind in several years, these are heavy compliance obligations. Even absent a criminal prosecution, these restrictions should put companies on notice that DOJ is taking concerns in the employment arena seriously.

After Knorr-Bremse, What's Next?

On April 11, 2018, the first class action was filed against Wabtec, Knorr, Faiveley and a number of their rail-related subsidiaries in connection with the conduct alleged in the DOJ Complaint. Filed in the Western District of Pennsylvania by a resident of Arlington, Texas who worked from 2013 to 2016 as a signal line engineer for a subsidiary of Wabtec, the class action complaint alleges that a conspiracy among Wabtec, Knorr, and Faiveley, including certain of their affiliates in the U.S., caused the plaintiff to earn less than he would have earned absent the conspiracy. The class action complaint is brought on behalf of *all employees* of Wabtec, Knorr and Faiveley (and their wholly owned subsidiaries) from 2009 until the present. Several additional similar class action complaints have been filed in recent days.

Conclusion

Given the repeated DOJ warnings in the area, recent no-poach/no-hire investigations may be only the beginning of a larger trend. The high risks of civil—and perhaps criminal—liability counsel in favor of increased antitrust training and diligence related to human resources and hiring matters.