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DOJ Announces First Settlement Under Trump Administration Regarding "No-Poach" Agreement

Law and the Workplace Blog on **April 19, 2018**

On April 3, 2018, the Antitrust Division of the U.S Department of Justice ("DOJ") announced that it had reached a settlement in a matter involving a "no-poaching" agreement between employers—the first such enforcement action under the Trump Administration. The DOJ's pursuit of the matter reflects the Department's continuing scrutiny of employment and hiring agreements between corporations.

Background on Antitrust Enforcement of Employment and Hiring Agreements Between Companies

Near the end of the Obama Administration, the DOJ Antitrust Division began to take particular interest in examining the employment and hiring practices of large corporations, including no-poaching agreements—that is, agreements between companies not to recruit or hire each other's employees. As a result of this heightened scrutiny, the DOJ at the time brought a series of civil lawsuits against several large Silicon Valley corporations, alleging that the companies had entered into illicit no-poaching agreements with their competitors. The collective payouts from these civil lawsuits totaled nearly $1 billion.

Subsequently, in October 2016, the DOJ Antitrust Division, along with the Federal Trade Commission ("FTC"), jointly issued comprehensive Guidance for Human Resource Professionals ("HR Guidance") regarding the application of the federal antitrust laws to hiring practices and compensation decisions. In the Guidance, the agencies identified the following types of agreements between corporations as *per se* unlawful:

- "naked wage-fixing" agreements: agreements "about employee salary or other terms of compensation, either at specific level or within a range"; and
- "no-poaching" agreements: agreements "to refuse to solicit or hire that other company's employees."

The HR Guidance explained that such agreements could be written or unwritten, formal or informal, express or implicit, and they could include one-way communications (*i.e.* mere invitations to collude). Notably, the HR Guidance indicated the DOJ's intention to begin pursuing such improper agreements through criminalprosecutions, in addition to civil enforcement.

DOJ Settlement

In its civil complaint in the current matter—*US v. Knorr-Bremse AG and Westinghouse Air Brakes Technologies*—the Antitrust Division alleged that the companies "entered into pervasive no-poach agreements that spanned multiple business units and jurisdictions" between the period of 2009 and 2016. The complaint further alleged that both companies also entered into separate no-poaching agreements with a third competitor that was subsequently acquired by one of the companies.

Under the terms of the settlement, the companies are "prohibited from entering, maintaining, or enforcing no-poach agreements with any other companies, subject to limited exceptions." The settlement also requires the companies to "implement rigorous notification and compliance measures to preclude their entry into these types of anticompetitive agreements in the future."

In announcing the settlement agreement, the DOJ noted that, in the present matter, it exercised its prosecutorial discretion to treat the no-poaching agreements as civil, rather than criminal, violations because the companies in question had both formed and terminated the agreements before the DOJ and FTC issued the HR Guidance. The DOJ, however, emphasized its continued intention going forward to pursue "naked" no-poaching agreements via criminal prosecution.

Takeaways

Employers and HR professionals should be aware that both civil enforcement action and criminal prosecutions of wage-fixing and no-poaching agreements are now a high priority for the antitrust enforcement agencies. The DOJ's Antitrust Division has stated that, as of January of this year, it already has a handful of criminal cases in the works.

It is important to recognize that – for decades – there was virtually no enforcement, no guidance, and no cases addressing this issue. Many companies may have reasonably believed that their formal or informal discussions with their commercial partners was a matter of profession courtesy and was perfectly lawful, only to find out now – after the publication of the DOJ and FTC guidelines – that their conduct may have crossed the line, or may even constitute a criminal offense.

In most cases, these agreements are also not top of mind for in-house counsel or HR professionals, but only get discovered during the course of some other investigation or transaction. For example, it is notable that, in the above-discussed case, the no-poaching agreement that prompted the investigation (and led to the discovery of the numerous other violative agreements) was uncovered during an examination by the DOJ into one of companies' merger with a third-party competitor. Consequently, companies contemplating mergers subject to antitrust review are well-advised to address potential antitrust issues—including preexisting wage-fixing or no-poaching agreements—as part of the due diligence process.

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