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Expert Analysis

DOJ Brings First 'No-Poach' Prosecution Since Issuing Guidance for HR Professionals

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On April 3, 2018, the Department of Justice's Antitrust Division announced its first challenge to a "no-poaching" agreement—where companies agree not to recruit or hire each other's employees—under the Trump Administration. The settlement that the Antitrust Division reached with the offending companies is noteworthy because the Division opted to treat the companies' no-poaching agreement as a civil antitrust violation even though the Division's guidelines for human resource professionals—which were issued toward the end of the Obama Administration—and recent remarks by its senior leadership team indicated that such agreements would be treated as criminal violations. However, this settlement should not be viewed as a retreat from the Antitrust Division's promise to criminally prosecute no-poaching and "wage-fixing" agreements—where companies agree on the compensation (e.g., wages, salary, and benefits) they will make available to current or prospective employees. Nor should this settlement be seen as signaling that the Antitrust Division's current leadership team views no-poaching or wage-fixing agreements as less serious antitrust offenses.

> In announcing this settlement, the Antitrust Division made clear that vigorous enforcement in the employment area will continue to be one of its top priorities.

As discussed below, a careful review of this settlement and the Antitrust Division's accompanying press release indicates that there is a significant likelihood that no-poaching and wage-fixing agreements that were entered into or that continued after the Antitrust Division issued its guidelines for human resource professionals will be prosecuted as criminal violations. Moreover, in announcing this settlement, the Antitrust Division made clear that vigorous enforcement in the employment area will continue to be one of its top priorities. For instance, the Antitrust Division made a point to stress that it has several active no-poaching investigations involving various industries and that this settlement is only part of its broader effort to ensure that workers are not harmed by anticompetitive employment practices. The Antitrust Division also indicated that it may soon be announcing additional no-poaching enforcement actions by emphasizing that the settling companies are required to fully cooperate with the Division's ongoing investigations into no-poaching agreements that they may have entered into with other competitors.

The DOJ's Recent Policy Shift Toward Criminally Prosecuting No-Poach and Wage-Fixing Agreements. The antitrust laws apply to competition to hire employees just as much as they do to competition to sell goods and services. Therefore, the Antitrust Division (and the Federal Trade Commission (FTC)) has repeatedly investigated and prosecuted companies for participating in no-poaching and

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wage-fixing agreements. However, the Antitrust Division historically treated these agreements as civil, rather than criminal, antitrust violations. In 2010, for example, the Antitrust Division brought a series of civil lawsuits against several Silicon Valley companies for entering into no-poach agreements with their competitors. These cases resulted in settlements enjoining the companies from participating in these types of agreements and requiring them to institute appropriate training and compliance programs. These companies also had to collectively pay nearly $1 billion in order to settle several follow-on private lawsuits.

In October 2016, the Antitrust Division and FTC issued "Antitrust Guidance for Human Resource Professionals," which, among other things, announced that no-poach and wage-fixing agreements will generally be treated as criminal antitrust offenses going forward. In doing so, the agencies made clear that companies could be criminally prosecuted for entering into such agreements if they compete for the same employees, irrespective of whether they compete to sell the same products or services.

In January 2018, the new head of the Antitrust Division—Assistant Attorney General Makan Delrahim—publicly stated that the Division has several ongoing no-poach investigations and would soon be bringing enforcement actions in these investigations: "In the coming couple of months, you will see some announcements, and to be honest with you, I've been shocked about how many of these [no-poach agreements] there are, but they're real." This warning followed public remarks by the Antitrust Division's second-in-command—Principal Deputy Assistant Attorney General Andrew Finch—late last year indicating that companies and their executives "should be on notice" that they could be criminally prosecuted for participating in no-poach or wage-fixing agreements regardless of whether they compete to sell the same products or services.

The DOJ's Recent Civil No-Poach Settlement. In announcing its recent no-poach settlement (*United States v. Knorr-Bremse AG and Westinghouse Air Brakes Technologies*), the Antitrust Division explained that it exercised its prosecutorial discretion to treat the no-poach agreements as civil, rather than criminal, violations because the settling companies "formed and terminated [these agreements] before" the Antitrust Division and FTC issued their Antitrust Guidance for Human Resource Professionals.

> The Antitrust Division will likely be announcing additional no-poach enforcement actions in the near future.

Notably, the Antitrust Division also explained that it had uncovered these no-poach agreements during a separate investigation into one of the settling companies' acquisition of a third competitor, which once again reminds merging parties to use the due diligence process to check for any possible antitrust issues prior to entering into a merger subject to the antitrust agencies' review.

In its complaint, the Antitrust Division alleged that the settling companies "entered into pervasive no-poach agreements that spanned multiple business units and jurisdictions" between 2009 and 2016. The complaint also alleged that both companies entered into separate no-poach agreements during this same period with the third competitor that was subsequently acquired by one of the settling companies. According to the complaint, these no-poach agreements harmed various types of rail equipment employees—such as project managers, engineers, sales executives, business unit heads, and corporate officers—by "den[ying] … [them] access to better job opportunities, restrict[ing] their mobility, and depriv[ing] them of competitively significant information that they could have used to negotiate for better terms of employment."

Moreover, the Antitrust Division alleged that senior executives were actively involved in entering into and enforcing these no-poach agreements. To support these allegations, the Antitrust Division cited a number of communications involving the companies' senior executives. For instance, the Antitrust Division cited a letter exchanged between the companies where a senior executive wrote: "[Y]ou and I both agreed that our practice of not targeting each other's personnel is a prudent cause for both companies. As you so accurately put it, 'we compete in the market.'" The Antitrust Division also cited communications indicating that the companies instructed their internal and external recruiters to avoid targeting each other's employees due to their no-poaching agreements. In addition, the Antitrust Division cited communications showing that the companies declined to hire highly qualified candidates—who submitted unsolicited applications—in order to avoid violating their no-poaching agreements.

The settlement not only enjoins the companies from participating in any

unlawful no-poach agreements, but requires that they affirmatively institute "rigorous notification and compliance measures to preclude their entry into these types of anticompetitive agreements in the future." The settlement also requires the companies to fully cooperate with the Antitrust Division's ongoing investigations into any other no-poach agreements that they may have entered with other competitors. Moreover, the settlement requires the companies to reimburse the Antitrust Division for any costs associated with investigating and prosecuting their failure to comply with the settlement. Finally, the settlement provides that the Antitrust Division need only satisfy the preponderance of the evidence standard in any action brought to enforce the settlement—including a civil contempt action—rather than the clear and convincing standard that typically governs such actions.

In return, the Antitrust Division has agreed that it will not "bring any further civil actions or criminal charges against [the settling companies] in connection with any other potential no-poach agreements that the companies disclosed to the [Division] prior to [the] lawsuit."

Key Takeaways for Companies And Their Advisors

(1) In announcing its recent no-poach settlement, the Antitrust Division stated that it has decided, "[i]n an exercise of prosecutorial discretion," to "pursue as civil violations no-poach agreements that were formed and terminated prior to [the issuance of the Antitrust Guidance for Human Resource Professionals in October 2016]." Thus, no-poach agreements (and presumably wage-fixing agreements) that either were entered into or continued after the Antitrust Division issued its guidelines for human resource professionals are likely to be prosecuted as criminal antitrust offenses, which significantly increases the risks for companies and executives involved in such agreements. For instance, corporations found guilty of participating in a criminal no-poaching or wage-fixing agreement could be required to pay up to $100 million in fines while individuals could be required to pay up $1 million in fines. (Alternatively, prosecutors could seek a fine up to twice the gross financial loss or gain resulting from the violation.) Moreover, individuals criminally prosecuted for participating in a no-poach or wage-fixing agreement could face up to 10 years in prison. (In recent years, prison sentences for criminal antitrust violations have averaged approximately two years.)

(2) The Antitrust Division will likely be announcing additional no-poach enforcement actions in the near future. In the Antitrust Division's press release, Assistant Attorney General Delrahim emphasized that "[t]oday's complaint is part of a broader investigation by the Antitrust Division into naked agreements not to compete for employees," and that the settling companies are "required to cooperate with the Antitrust Division in any investigation into additional no-poach agreements to which they may have been counterparties." In addition, press reports have cited Antitrust Division officials as stating that the Division "still has open civil and criminal investigations into other no-poach agreements in the rail equipment industry as well as in other sectors."

(3) As part of their due diligence process, companies contemplating a merger that is subject to review by the antitrust agencies should investigate whether there is evidence suggesting that their employees or the other company's employees have participated in an unlawful no-poach agreement or other anticompetitive conduct. If so, the merging companies should take appropriate steps to terminate any offending conduct and determine whether they should or are required to self-report it. As part of their antitrust risk analysis, the merging companies should also determine whether the discovery of an unlawful no-poach agreement or other anticompetitive conduct increases the likelihood that the reviewing agency will challenge the merger or open a separate investigation into such conduct. The Antitrust Division's recent no-poach settlement represents the latest example of numerous civil and criminal actions that the antitrust agencies have brought based on evidence uncovered during a merger investigation. The corporate and individual guilty pleas that the Antitrust Division has secured in its ongoing criminal investigation into price-fixing in the packaged tuna industry are additional examples of enforcement actions that the Antitrust Division has brought based on evidence uncovered during a merger investigation.