EMPLOYERS COULD HAVE EGG ON THEIR FACES WITH 'NO-POACHING' AGREEMENTS

Consistent with earlier policy announcements, on April 3, 2018, the Antitrust Division of the U.S. Department of Justice ("DOJ") announced that it reached a settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation ("Wabtec"), two large rail equipment suppliers. The settlement resolves a lawsuit alleging the companies had maintained unlawful agreements not to compete for each other's employees – also known as 'no-poaching' agreements – for years. According to the terms of the settlement, the companies are prohibited from entering, maintaining or enforcing no-poaching agreements and must implement rigorous notification and compliance measures to prevent entry in anti-competitive agreements in the future. Consistent with current DOJ practice, there are also several provisions in the settlement designed to improve the DOJ's ability to enforce the settlement. The parties agreed that the DOJ may prove any alleged violations of the decree by a preponderance of the evidence and the companies will reimburse for the costs of investigating and enforcing any violations.

Interestingly, the DOJ did not allege criminal violations despite comments by Makan Delrahim, Assistant Attorney General for the DOJ, on January 19, 2018 in which he stated that the DOJ would soon announce criminal antitrust enforcement actions against companies that have entered into no-poaching agreements. Delrahim stated that "in the coming couple of months you will see some announcements [of criminal charges], and to be honest with you, I've been shocked about how many of these [no-poaching agreements] there are, but they're real," confirming that the DOJ is currently involved in several active criminal investigations.

In his January announcement, however, Delrahim identified the October 2016 "Antitrust Guidance for Human Resource Professionals" (the "Antitrust HR Guidance") as a clear line separating conduct the DOJ will pursue criminally and conduct it will pursue civilly. If companies that were engaging in no-poaching activity prior to the date the Antitrust HR Guidance was issued continue such behavior, the DOJ will likely treat it as a criminal violation. If the illegal conduct stopped with the promulgation of the Antitrust HR Guidance, any enforcement action will be civil in nature.

Delrahim's comments continue an initiative started near the end of the Obama administration. In October 2016, the DOJ and the Federal Trade Commission ("FTC") jointly issued the Antitrust HR Guidance for human resources professionals and others involved in hiring and compensation decisions stating that the government would aggressively enforce antitrust laws, both civilly and criminally, against no-poaching agreements, wage-fixing agreements and other anti-competitive employment agreements. (For more information on the Antitrust HR Guidance, click here.)

Under the Antitrust HR Guidance, this anti-competitive conduct may be considered *per se* illegal, meaning that the conduct itself is inherently illegal and companies cannot escape liability by seeking to explain, defend or justify their conduct. The conduct is still considered illegal even if the agreements are unspoken "gentleman's agreements" or are through third-party intermediaries. Also, even if the invitation to enter into an illegal agreement goes unaccepted, the invitation itself may be considered an antitrust violation. Further, it makes no difference whether the companies compete to provide the same products or services. If they compete to hire and retain employees, then agreements, or solicitations to enter into agreements, to reduce competition in the employment marketplace are illegal under federal antitrust laws.

Antitrust risk can also arise in the private litigation context. In a recent example from the health care industry, on February 1, 2018, the U.S. District Court for the Middle District of North Carolina certified a class action lawsuit seeking treble damages in which a physician alleged that the deans of two medical schools affiliated with university-based health systems entered into a gentleman's agreement to forego hiring each other's medical facility faculty and staff. The court certified a class consisting of all persons employed as faculty members during the period beginning January 1, 2012 to the present at either medical school. The court declined to extend the class to include non-faculty physicians, nurses or skilled medical staff but indicated that they could bring their own separate suit. One of the medical schools settled the case, but the other now has the onerous task of defending against a class action suit that may last for years and cost millions of dollars to defend.

PRACTICAL TAKEAWAYS

In order to avoid running afoul of the federal antitrust laws, employers should consider the following takeaways when structuring and implementing hiring and compensation practices:

- Conduct that can trigger felony criminal prosecutions includes, but is not limited to, agreements among firms to recruit or hire each other's employees, to set a pay scale or wage rates, to cap wage growth or to limit employee benefits. These arrangements can be formal or informal, written or unwritten or spoken or unspoken.
- The DOJ emphasized, however, that traditional non-compete and non-solicitation agreements and other restrictive covenants in individual employment agreements remain legal if they have a legitimate business purpose and are narrowly tailored to conform to the purposes of the agreement.
- Human resources personnel and employers should review hiring and compensation practices to identify any potential violations. Companies should review all internal policies and practices to make sure human resources personnel are not engaging in conduct that could be considered a no-poaching or a wage-fixing agreement.
- Keep in mind that the cost to defend an FTC or DOJ investigation is incredibly high in terms of both money and time. In addition, any private party litigation may result in additional defense costs as well as trebled damages. Consult counsel if you have any questions related to current practices or if you have been or are approached by a competitor to enter into this type of arrangement.

If you have any questions or would like additional information about this topic, please contact one of the following members of Hall Render's Antitrust Practice or Labor & Employment Practice:

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