

ANTITRUST

Expert Analysis

## Hiring Practices Draw Antitrust Scrutiny

In recent years, U.S. antitrust authorities and private plaintiffs have increasingly focused their attention on hiring and employment related conduct. Punctuating the seriousness of their concerns, the Department of Justice's Antitrust Division warned that it intends to bring criminal charges against "naked" no poaching or wage fixing agreements, which have been treated as civil violations until now.

Earlier this month, the Department of Justice announced the settlement of charges that leading rail equipment manufacturers entered into "no-poach" agreements to eliminate competition between them for employees in violation of §1 of the Sherman Act. In February, a district court certified a class of Duke University and University of North Carolina medical school faculty in a suit alleging that the universities agreed not to hire one another's professors and other employees. And in October 2016 the antitrust authorities issued antitrust guidance for human resource professionals.

Agreements to restrain competition in hiring differ from run-of-the-mill price fixing conspiracies in at least two key dimensions: First, antitrust

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conspiracies typically involve sellers of products or services rather than buyers of inputs, whether those may be raw materials or employment services. Second, labor and employment issues have a long and inconstant history in antitrust, complicating enforcement and compliance efforts. Nonetheless, federal enforcers have left no doubt that restraints on competition for employees may constitute serious antitrust violations.

### Rail Industry Hiring

Knorr-Bremse AG (Knorr) and Westinghouse Air Brake Technologies Corporation (Wabtec) settled charges brought by the Department of Justice (DOJ) that they entered into a series of unlawful agreements not to "poach" each other's employees. *United States v. Knorr-Bremse AG, et al.*, No. 18-cv-00747 (D.D.C. April 3, 2018). The complaint alleged that Knorr, Wabtec and Faiveley Transport S.A., a third company sub-

sequently acquired by Wabtec—the leading global rail equipment suppliers—completed with one another to attract, hire and retain skilled employees, including engineers, project managers, business unit heads, sales executives and corporate officers.

According to the complaint, the companies agreed not to solicit one another's employees and (in some cases) not to hire one another's employees without approval. DOJ asserted that direct solicitation performs a key function in hiring and competing for talent.

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An employee who has not otherwise applied for a job opening and is unresponsive to other recruiting methods may have the specialized skills and experience necessary for the vacant position. In addition, direct solicitation provides both parties with valuable information about demand for skills and compensation levels.

DOJ alleged that the agreements were executed and enforced by the companies' senior executives. For example, in

early 2016 an executive at Knorr complained directly to a Wabtec executive about an external recruiter who solicited a Knorr employee. The Wabtec executive investigated and reported back to Knorr that the recruiter had initiated contact independently and was instructed to stop contacting that candidate and to refrain from soliciting Knorr employees going forward, in accordance with the companies' agreement.

In another example included in the complaint, a Wabtec executive wrote to a colleague in an e-mail that a candidate "is a good guy, but I don't want to violate my own agreement" with Faiveley.

The complaint asserted that the no poach agreements denied employees access to better job opportunities, restricted their mobility and deprived them of competitively significant information that could have been used to negotiate for better terms. DOJ claimed the agreements constituted per se violations of §1 of the Sherman Act but did not bring criminal charges. A follow-on class action complaint was filed within about a week of DOJ's announcement.

Remarkably, the Department of Justice discovered the no poach agreements during its review of Knorr's proposed acquisition of Faiveley, serving as a reminder to antitrust counselors fashioning strategies to obtain antitrust approvals that lengthy and probing merger investigations may introduce enforcers to potentially anticompetitive conduct unrelated to the merger.

### Med School Faculty

Another recent no poach case involves an alleged agreement between

Duke University's School of Medicine and the University of North Carolina's School of Medicine. The private suit was brought by an assistant professor of radiology at Duke who claimed that she was rejected for a position at UNC because the schools' deans had agreed to block lateral moves (as opposed to promotions) between the universities. In February 2018, the district court certified a class of faculty members at the Duke or UNC Schools of Medicine but declined to include non-faculty physicians, nurses and other medical employees. *Seaman v. Duke University, et al.*, 15-cv-00462 (M.D.N.C. Feb. 1, 2018).

In January, the court approved an injunction-only settlement with UNC, leaving Duke to face class claims for damages. The plaintiff sought only injunctive relief from UNC because of its status as a state entity.

The settlement reached in the rail equipment case brought by DOJ prohibits the companies from maintaining or entering into no-poach agreements but does not prohibit reasonable hiring restraints ancillary to a legitimate business collaboration.

### Ancillary Restraints

"Naked" no poach agreements must be distinguished from hiring restraints that are reasonably related to a joint venture or other legitimate collaboration. A naked restraint has no purpose or justification other than the elimination of competition. Ancillary restraints, in contrast, arise from a legitimate collaboration between two companies. For example, if two firms wish to form a joint venture to

develop new products by combining their complementary know-how and skills, they may not agree to proceed without obtaining assurances that they will not lose key employees to the other company as a result of the collaboration. These kinds of restraints are evaluated under the rule of reason and are likely to be found lawful as long as the hiring restrictions are narrowly tailored and reasonably necessary for a legitimate transaction or collaboration. See, e.g., *Eichorn v. AT&T*, 248 F.3d 131, 143-44 (3d Cir. 2001). In addition, exchanges of employment-related information, without more, warrant review under the rule of reason because they may be procompetitive, depending on the circumstances.

### Buyer Collusion

Although antitrust courts and enforcers have condemned agreements among buyers and anticompetitive conduct by monopsonists (buyers with monopoly power), most antitrust cases involve conduct by sellers. And the harm most antitrust enforcement actions seek to redress is artificially elevated prices. Examining competitive markets on the buyers' side may seem to some like looking at a photographic negative. First, when buyers exercise market power, they generally lower prices below competitive rates. Since lower prices for consumers is often described as one of the policy goals of antitrust laws, conduct that lowers input costs does not fit neatly into public perceptions of the rationale for antitrust enforcement. Second, firms that compete as buyers of employment

services or office supplies do not necessarily compete in the products or services they sell to their customers. As such, they may not necessarily consider one another as rivals.

Yet as a matter of law and public policy, agreements among buyers to eliminate competition (as well as other anticompetitive conduct by buyers) can constitute antitrust violations. Disruption of the competitive process among buyers deprives sellers (or employees) of the benefits of competition and may lead to misallocation of economic resources. If buyers pay less than com-

labor. In the early years of federal antitrust jurisprudence, at the beginning of the 20th century, the Sherman Act was used to combat efforts at collective bargaining by laborers. This led to legislation exempting collective bargaining from antitrust scrutiny to enable implementation of a national labor policy. Section 6 of the 1914 Clayton Act declared that the “labor of a human being is not a commodity or article of commerce,” 15 U.S.C. §17. Courts created additional exemptions to shield employers, unions and employees involved in collective bargaining from antitrust liability. However, outside the context of organized labor, employment issues are not exempt from antitrust law. Still, courts continued to treat labor markets differently for decades. For example, in a “no switching” case, where encyclopedia publishers agreed to refuse to employ current and recently terminated employees of their competitors, the U.S. Court of Appeals for the Seventh Circuit observed that “the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such,” and indicated that the restraint’s effect on the encyclopedia and reference book market (not the labor market) should be examined under the rule of reason. *Nichols v. Spencer Int’l Press*, 371 F.2d 322, 335 (7th Cir. 1967).

Against the backdrop of this historical context, the Department of Justice asserted that market allocation agreements “cannot be distinguished from one another based solely on whether they involve input or output markets” and that labor markets are not treated

differently under antitrust law. See *Knorr* Competitive Impact Statement. Yet, DOJ appears to have acknowledged the unique and evolving status of hiring conspiracies when it decided not to bring criminal charges against Knorr and Wabtec because the agreements were uncovered and terminated before DOJ announced its intent to proceed criminally against these kinds of agreements in October 2016. DOJ indicated that even though naked no-poach agreements eliminate competition in the same way as hardcore cartels, it will not pursue criminal charges for conduct terminated before the October 2016 announcement of criminal prosecutorial intent contained in the guidance issued jointly with the FTC.

These matters and the accompanying statements of enforcement priorities should lead antitrust advisors and compliance officers to redouble training and monitoring efforts in human resources departments and with others involved in hiring and compensation decisions.

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petitive prices for inputs, the supply of those inputs is likely to fall below competitively efficient rates.

Anticompetitive conduct in labor markets introduces an additional wrinkle not present in many other antitrust cases. The individuals tasked with implementing and enforcing a no-poach or wage-fixing agreements may belong to the group of employees harmed, as they might seek employment at a rival company or to leverage a solicitation for better terms.

### **Evolving Approach**

The enforcement authorities’ strict approach to no-poach agreements may be helpfully contextualized within antitrust law’s evolving attitudes toward