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CLIENT ALERT

U.S. Department of Justice Challenges "No-Poach" Agreements Reaching Foreign Conduct

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On April 3, 2018, the U.S. Department of Justice filed a civil antitrust complaint and proposed final judgment settling the action against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation for allegedly entering into "no-poach" agreements not to solicit or hire each other's rail equipment employees without obtaining prior approval from the other defendant. These filings come on the heels of the Antitrust Division's warnings that it will criminally pursue no-poach agreements that were not terminated before the Division's announcement of its policy shift towards criminal prosecution in October 2016. Defendants here appear to have just made the cut-off for a civil case seeking only equitable relief, with the last allegedly unlawful conduct taking place as late as February 2016.

The Complaint and Competitive Impact Statement filed last week echo prior warnings that criminal prosecutions are to come for companies that enter into naked agreements not to solicit or hire each other's employees, even when executed through an intermediary, such as a recruiter. When such agreements are not ancillary to a legitimate business collaboration, the Division has "made clear that it intends to bring criminal, felony charges against culpable companies and individuals who enter into naked No-Poach Agreements."

The Division did, however, reiterate that hiring or solicitation restrictions may be lawful where they are necessary to achieve the procompetitive benefits of a legitimate collaboration, and provided guidance helpful in determining what restrictions may be considered reasonable. Specifically, ancillary agreements should: "(1) be in writing and signed by all parties thereto; (2) identify, with specificity, the collaboration to which the Agreement is ancillary; (3) be narrowly tailored to affect only employees who are anticipated to be directly involved in the Agreement; (4) identify with reasonable specificity the employees who are subject to the Agreement; and (5) contain a specific termination date or event."

The Division also reiterated that competitors are not prohibited "from unilaterally adopting or maintaining a policy not to consider applications from employees of another person, or not to solicit, cold call, recruit or hire employees of another person." To ensure the conduct is truly unilateral, the Division provided the caveat that an entity instituting such a unilateral policy should not: "(1) request, encourage, propose, or suggest that another person adopt, enforce, or maintain such a policy; or (2) notify the other [entity] that the [company] has adopted such a policy."

While the above guidance has largely been provided by the Division before, this case is significant because it may be seen as a warning to multinational corporations with complex subsidiary relationships. The complaint was not

filed against U.S. subsidiaries engaged in the alleged conduct in the United States, but rather against the privately owned German parent, which holds several wholly owned rail subsidiaries in the United States. The filings explicitly referenced discussions concerning the no-poach agreements that took place outside of the United States and the knowledge of foreign executives pertaining to the agreements.

The proposed Final Judgment prohibits defendants from entering into "any Agreement, or part of an Agreement, among two or more employers that restrains any person from cold calling, soliciting, recruiting, hiring, or otherwise competing for (i) employees located in the United States being hired to work in the United States or outside the United States or (ii) any employees located outside the United States being hired to work in the United States." This prohibition is very broad, in that it covers not only conduct and employees in the United States, but also conduct in foreign countries as well as employees hired to work abroad. The case is also of note because it highlights the challenges multinational companies face when entering into arrangements that may have U.S. effects or may be implemented by subsidiaries both in the U.S. and abroad.

Should you have any questions about what types of agreements, policies, or conduct may run afoul of the U.S. Department of Justice's prohibition against no-poach agreements, please contact one of the attorneys listed below.

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