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An Update On Anti-Poach Enforcement And Class Actions

By **Robin van der Meulen and Brian Morrison** (July 11, 2018, 4:39 PM EDT)

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In recent years, no-poach agreements have caught the attention of government regulators and are now subject to close scrutiny both by the U.S. Department of Justice's Antitrust Division and private class action plaintiffs. A no-poach agreement is an agreement between two or more companies not to compete for each other's employees, such as by not soliciting, interviewing or hiring them.[1] Unlike many other types of anti-competitive conduct, which involve increasing the price of a good, the anti-competitive harm here occurs in the context of labor services, i.e., employees are injured through suppressed wages, fewer benefits and reduced opportunities for advancement. Recognizing the real and potentially large impact no-poach agreements can have on workers, in October 2016, the Antitrust Division issued guidance on the illegality of no-poach agreements, and announced that from that point onward, it intended to proceed criminally against naked no-poach and wage-fixing agreements.[2]

Following this announcement, in April 2018, the Antitrust Division filed a civil antitrust lawsuit against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. (Wabtec) and simultaneously announced a civil settlement.[3] The DOJ's complaint alleged that these companies — two of the largest rail equipment suppliers — reached naked no-poach agreements beginning as early as 2009 and continued until 2016, a per se violation of Section 1 of the Sherman Act.[4] The DOJ also alleged that the companies entered into similar no-poach agreements with rail equipment supplier Faiveley Transport SA before Faiveley was acquired by Wabtec in November 2016.[5] As the DOJ explained in its competitive impact statement, no-poach agreements are per se unlawful because they "eliminate competition in the same irredeemable way as a customer- or market-allocation agreement," and they "were not reasonably necessary to any separate, legitimate business transaction or collaboration between the firms."[6] The no-poach agreements "suppressed and eliminated competition to the detriment of employees by depriving workers of competitively important information that they could have leveraged to bargain for better job opportunities and terms of employment."[7]

While the DOJ's proposed settlement includes an injunction barring the companies from entering into or maintaining no-poach agreements, with themselves or others, the DOJ's civil settlement gave employees of these companies no compensation for years of depressed wages and lost job opportunities. The important role of the private plaintiff class action bar is thus clear. Private plaintiffs

enforce the federal antitrust laws, as the laws encourage, and can seek treble damages from defendants who have violated those laws in an effort to at least partially repay class members who were harmed by the defendants' unlawful conduct. Shortly following the DOJ's announcement of its complaint and settlement against Knorr and Wabtec, private plaintiffs began filing class actions on behalf of those employees to recover damages suffered by them and others like them as a result of years of no-poach agreements between the two companies.[8] These plaintiffs are seeking damages to compensate the employees for years of limited access to better job opportunities and the opportunity to negotiate for better employment terms, including salary and benefits.

Recent Investigations

The DOJ and the private bar have litigated several recent cases challenging high-profile examples of similarly problematic no-poach agreements. Two of those cases have already resulted in substantial classwide settlements, and the other is still being litigated.

The High-Tech No-Poach Investigation

One case — the High-Tech Employee Antitrust Litigation — was spawned from a DOJ investigation into a group of powerful Silicon Valley companies: Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd. and Pixar Inc.[9] This investigation was more complicated than the ordinary bilateral no-poaching agreement because each of the companies had independent agreements with some, but not all, of the other companies, and those agreements each had slight variations. For example, Apple and Google agreed not to directly solicit each other's employees, while Google and Intuit prevented Google from directly soliciting Intuit employees. At bottom, each of the company's conduct had the effect of reducing competition for employees to switch jobs in the high technology sector, and each company was in clear violation of Section 1 of the Sherman Act.

The DOJ filed simultaneously a civil complaint and a proposed settlement on Sept. 24, 2010, and final approval was granted several months later. The companies were enjoined "from attempting to enter into, entering into, maintaining or enforcing any agreement with any other person to in any way refrain from, requesting that any person in any way refrain from, or pressuring any person in any way to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person."[10] Notably, the DOJ settlement did nothing to compensate affected employees.

Class actions were later filed on behalf of affected employees in 2011 and shortly thereafter consolidated before Judge Lucy H. Koh in the Northern District of California. The consolidated complaint alleged that, without the knowledge or consent of employees, the companies entered into "an interconnected web of express agreements to eliminate competition," including "agreements not to recruit each other's employees," "agreements to notify each other when making an offer to another's employee," and agreements that the companies would cap compensation in the event of an offer of employment.[11] On the companies' first round of motion to dismiss briefing, the court largely denied the motion, finding the allegations to be plausible.[12] The case proceeded to a combined $435 million in settlements with all the involved companies, including a $20 million settlement with Intuit, Lucasfilm and Pixar in May 2014,[13] and a $415 million settlement with the remaining defendants in September 2015.[14]

The Animators Case

In the Animation Works Antitrust Litigation, private plaintiffs, representing animation and visual effects

employees of the defendants, pursued class action litigation against Blue Sky Studios Inc., DreamWorks Animation SKG Inc., Two Pic MC LLC (f/k/a ImageMovers Digital LLC), Lucasfilm, Pixar, Sony Pictures Animation Inc., Sony Pictures Imageworks Inc. and The Walt Disney Company. The plaintiffs alleged that the defendants violated federal and state antitrust laws by conspiring to suppress compensation paid to their respective employees by agreeing not to solicit each other's employees and by coordinating compensation policies.

Specifically, the plaintiffs alleged that defendants entered into a "gentlemen's agreement" to: (1) not cold-call each other's employees; (2) notify each other when making an offer to an employee of the other company; and (3) not increase the compensation offered to the prospective employee if the company currently employing the employee made a counteroffer.[15] Following the court's denial of the defendants' motion to dismiss the plaintiffs' second consolidated amended class action complaint and extensive discovery, the court, in May 2016, certified a class of all animation and visual effects employees employed by one or more of the defendants in the United States who held a list of jobs identified by the plaintiffs' expert during set time periods.[16] The plaintiffs ultimately settled with all defendants for $168.95 million.

The UNC/Duke Case

In 2015, a class action was filed against the University of North Carolina and Duke University alleging that a no-poach agreement between the two universities violated antitrust laws. The plaintiff who filed the case, Dr. Danielle Seaman, was an assistant professor of radiology at Duke University School of Medicine who had applied for a similar position at UNC but was told that, although she was a strong candidate, she could not be hired by UNC due to an agreement with Duke not to hire each other's faculty.[17] In an email filed with the complaint, UNC's chief of cardiothoracic imaging stated that the arrangement with Duke had been in place for a few years and further suggested that the intent was prevent the two universities from having to compete with each other on compensation packages for their employees.[18]

The district court denied defendants' motions to dismiss in February 2016, and the Fourth Circuit subsequently denied defendant' petitions for permission to appeal the decision. Following discovery on class certification issues, the court approved an injunction-only settlement between Dr. Seaman and UNC in January 2018, which prohibited the UNC defendants from attempting to enter into or maintain any agreement with any other person that in any way prevents soliciting, cold calling, recruiting, hiring, or otherwise competing for employees of the other person.[19] Dr. Seaman sought only injunctive relief from UNC due to its status as a state entity.[20] Earlier this year, in February, the district court certified a class of faculty members at the Duke or UNC Schools of Medicine.[21] Duke remains a defendant in the case.

The Recent Uptick in No-Poach Investigations

Aside from the DOJ's recent announcement of its civil settlement with Wabtec and Knorr, the DOJ has expressed its intention to continue bringing enforcement actions against companies for illegal no-poach agreements under Section 1 of the Sherman Act. Indeed, not even two years ago, the DOJ and the Federal Trade Commission jointly issued "Antitrust Guidance for Human Resource Professionals."[22] The guidance made clear that the DOJ "intends to proceed criminally against naked wage-fixing or no-poaching agreements."[23] Despite the most recent case not being brought criminally, the DOJ officials have explained that they are actively investigating other companies that continue to enter into agreements not to solicit or hire each other's employees in various industries, including the

health care industry,[24] and the DOJ formally views these agreements as per se illegal under the Sherman Act.

And the DOJ officials are not the only federal officials focusing on no-poach agreements. In March 2018, Sens. Cory Booker, D-N.J., and Elizabeth Warren, D-Mass., introduced the End Employer Collusion Act, a bill that would expressly outlaw restrictive employer agreements whereby two or more employers "prohibit[] or restrict[] one employer from soliciting or hiring another employer's employees or former employees."[25] If passed, the act would permit affected individuals to bring a federal civil action to recover actual and punitive damages, along with reasonable attorneys' fees and costs of the action.[26]

A Human Side to Antitrust Enforcement

The recent government and private civil cases have brought to light how violations of federal antitrust laws can have an immediate and real impact on ordinary people and their livelihoods. The typical antitrust case involves price-fixing or manipulation of a particular commodity product, resulting in consumers paying higher prices. In no-poaching cases, however, the "products" are human resources, i.e., people themselves offering their services in the labor market. In a competitive market, employees are able to shop their experience and expertise to various potential employers that will ordinarily be competing to offer the most attractive salaries and benefits packages in order to hire and retain the best employees. But, if the employers agree with their competitors not to solicit each other's employees, then employees suffer an immediate and real harm: lower, non-negotiable wages, fewer benefits, and less opportunity for advancement.

Such agreements can also have a ripple effect across the company, which expands the harm. While the original focus of a no-poach agreement might be a subset of employees (e.g., employees highly skilled in a certain area), in practice the no-poach agreement may be enforced more broadly, affecting other employees, as well.

Conclusion

Given the DOJ's recent statements that it has ramped up its investigation into illegal no-poach agreements in a variety of industries, we expect more cases to come down the pipeline. As these investigations continue, and employees become more aware of potentially unlawful conduct, even more no-poaching agreements may come to light as employees "blow the whistle" on such conduct. One thing is for sure: Companies will face increased scrutiny by both federal agencies and the private bar for years to come.

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[1] U.S. Dep't of Justice ("DOJ"), No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No-Poach" and Wage-Fixing Agreements, Division Update Spring 2018 (Apr. 10, 2018), https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

[2] See DOJ, Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[3] Press Release, DOJ, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[4] Id.

[5] Id.

[6] Competitive Impact Statement, at 11-12, United States v. Knorr-Bremse, et al., No. 18-cv-00747 (D.D.C. Ap. 3, 2018), ECF No. 3.

[7] Id. at 12.

[8] Labaton Sucharow filed a class action complaint against Knorr and Wabtec, Sey v. Knorr-Bremse AG, et al., No. 18-cv-01433 (D. Md.).

[9] See Press Release, DOJ, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

[10] See Final Judgment, United States v. Adobe Systems, Inc. et al., Civ. No. 1:10-cv-1629 (D.D.C. Mar. 18, 2011), ECF No. 17.

[11] See Consolidated Amended Complaint at ¶ 1, In re High-Tech Employee Antitrust Litigation, Civ. No. 11-cv-2509 (N.D. Cal. Sept. 13, 2011), ECF No. 65.

[12] Order Granting in Part and Denying in Part Defendants' Joint Motion to Dismiss; Denying Lucasfilm Ltd.'s Motion to Dismiss, In re High-Tech Employee Antitrust Litigation, Civ. No. 11-cv-2509 (N.D. Cal. Apr. 18, 2012), ECF No. 119. The court also noted that such conduct is "either per se unlawful, or at least, alleged here, prima facie anticompetitive under the rule of reason." Id. at 11-12 n. 9.

[13] Order Granting Motion for Settlement at 3, In re: High-Tech Employee Antitrust Litigation, Civ. No. 11-cv-2509 (N.D. Cal. May 16, 2014), ECF No. 915.

[14] Order Granting Motion for Final Approval of Class Action Settlement, In re: High-Tech Employee Antitrust Litigation, Civ. No. 11-cv-2509 (N.D. Cal. Sept. 2, 2015), ECF No. 1111.

[15] See Second Consolidated Amended Class Action Complaint at ¶ 43, In re Animation Workers Antitrust Litigation, No. 5:14-cv-04062 (N.D. Cal. May 4, 2015), ECF No. 117.

[16] See Order Granting-in-Part and Denying-in-Part Plaintiffs' Motion for Class Certification, In re Animation Workers Antitrust Litigation, No. 5:14-cv-04062 (N.D. Cal. May 25, 2015), ECF No. 289, at 79.

[17] Memorandum Opinion and Order on Class Certification, Seaman v. Duke University, et al., No. 15-cv-00462 (M.D.N.C. Feb. 1, 2018), ECF No. 189.

[18] Second Amended Complaint, Seaman v. Duke University, et al., No. 15-cv-00462 (M.D.N.C. Oct. 4, 2017), ECF No. 109.

[19] See Brief in Support of Motion for Final Approval of Class Action Settlement, Seaman v. Duke University, et al., No. 15-cv-00462 (M.D.N.C. Dec. 14, 2018), ECF No. 174; see also Order Granting Final Approval of Class Action Settlement, Seaman v. Duke University, et al., No. 15-cv-00462 (M.D.N.C. Jan. 4, 2018), ECF No. 185.

[20] Id. at 5 ("As for the other UNC Defendants, even injunctive relief would have been impossible without the Settlement. That is because these entities are agents of the State of North Carolina for purposes of Eleventh Amendment immunity, barring suit without their consent.").

[21] Memorandum Opinion and Order on Class Certification, Seaman v. Duke University, et al., No. 15-cv-00462 (M.D.N.C. Feb. 1, 2018), ECF No. 189.

[22] Antitrust Guidance For Human Resource Professionals at 4, supra n. 3.

[23] Id. at 4.

[24] Bernard A. Nigro, Jr., Deputy Assistant Attorney General, Antitrust Division at DOJ, Keynote Remarks at the American bar Association's Antitrust in Healthcare Conference (May 17, 2018), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar.

[25] End Employer Collusion Act, S.2480, 115th Cong. § 2(B) (as referred to the committee on Health, Education, Labor, and Pensions Action by Senate Mar. 1, 2018).

[26] Of course, those employees already have a claim under Section 1 of the Sherman Act, but a clear civil statute on this conduct would be a welcome addition to the arsenal of an employee's claims.