

# PUBLICATION

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## Antitrust Division on the Prowl to Prosecute No-Poach Agreements

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**In early April 2018, the Antitrust Division of the U.S. Department of Justice (DOJ) settled allegations against Knorr-Bremse AG and Wabtec, manufacturers of rail equipment. The claims involved a "no-poach" agreement barring competition for each other's employees.**

Assistant Attorney General Makan Delrahim used the occasion to reiterate that such no-poach (and "wage fixing") agreements – not tied to an otherwise proper transaction – could be criminally prosecuted. In October 2016, there was prior warning in a joint Federal Trade Commission-DOJ release that targeted no-poach or wage fixing agreements as illegal. Delrahim acknowledged open criminal investigations by the Antitrust Division as well.

At the American Bar Association Antitrust Spring Meeting in Washington, D.C., Antitrust Division officials confirmed that no-poach and wage fixing agreements are deemed to be *per se* offenses. If discovered by the company first, however, it can ask the Division for a marker to obtain possible leniency, assuming it is the first to report the violation.

What distinguishes civil from criminal exposure? When terminated before the DOJ's October 2016 pronouncement, any no-poach agreements may be pursued civilly, with new compliance and reporting requirements imposed, rather than corporate criminal fines or individual executive jail time and fines. For agreements existing after October 2016, criminal exposure exists. Under Section 1 of the Sherman Act, companies face up to \$100 million in fines for each criminal violation and individuals are subject to jail terms up to ten years and/or \$1 million in criminal fines. Under the alternative fines provision, the fine can be expanded to twice the gain or loss caused by the conduct.

Government contractors should pay particular attention to this new initiative. Suspension and debarment consequences may result from criminal convictions and even civil judgments or settlements of challenges to no-poach or wage fixing agreements. Moreover, bid disclosures and contracts with the Department of Defense, as well as other government agencies, may require certification that no such agreements exist.

For more information on this or other matters, please contact any member of Baker Donelson's [Government Enforcement and Investigations Group](#).