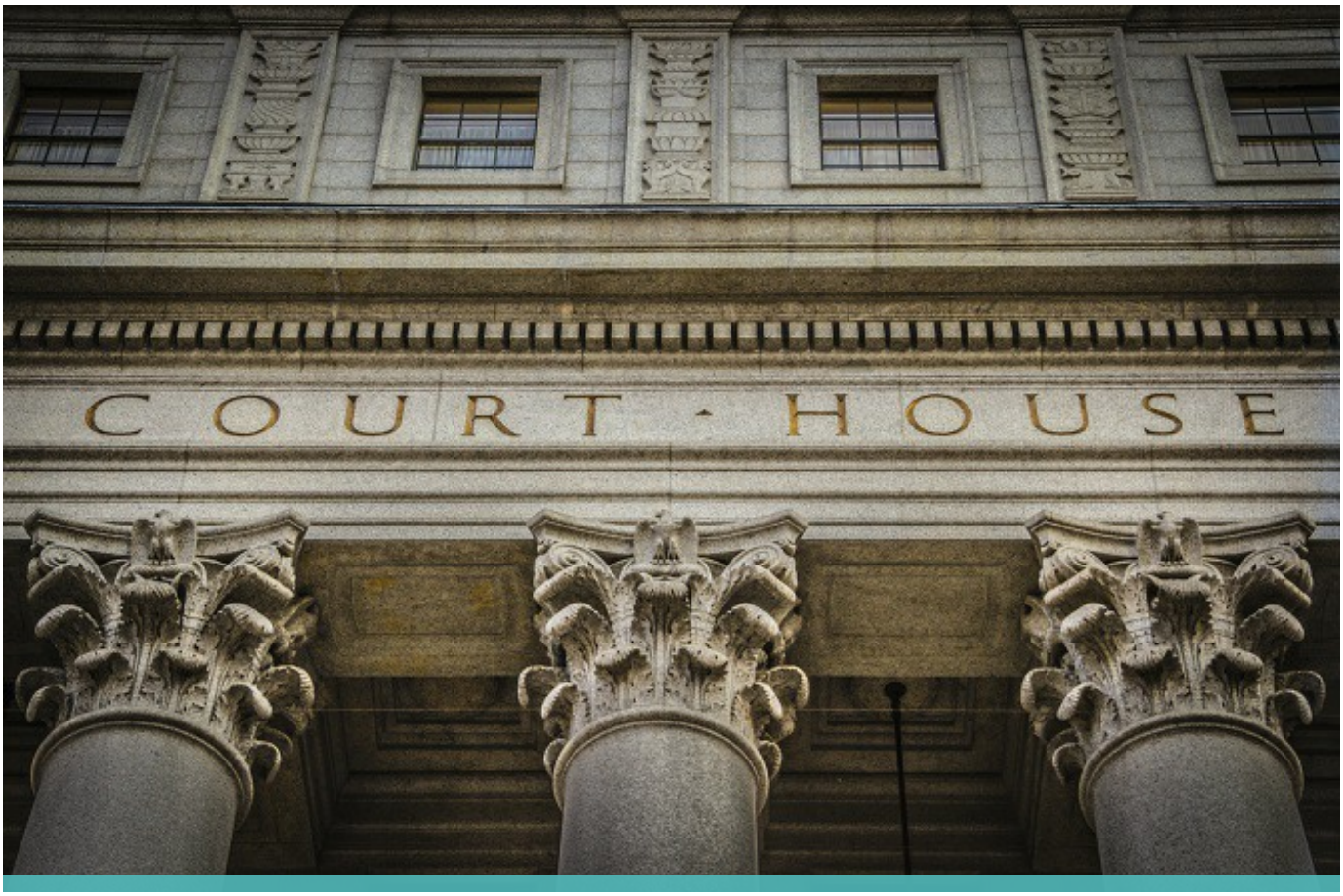
No poach agreements between employers play a starring role in recent federal multi-district litigation class action lawsuits



Jennifer Dowdell Armstrong | Wednesday, August 8, 2018

The Judicial Panel on Multidistrict Litigation recently consolidated three class action cases by employees of two of the world's largest rail equipment suppliers in federal court in Pennsylvania. All three lawsuits accuse the competitor companies of agreeing not to solicit, recruit, or hire each other's workers without permission from the hiring company. The agreement allegedly started in 2009, ran through 2016, and impacted various skilled employees, including project managers, engineers, executives, business unit heads, and corporate officers. The class action complaints allege that the agreement suppressed employee salaries and benefits and, as a result, violated Sections One and Three of the federal antitrust Sherman Act.

This case is one of at least a dozen filed in the wake of the rail equipment suppliers' settlement with the United States Department of Justice. According to the DOJ's settlement press release, the two rail equipment companies reached **agreements** not to solicit, recruit, hire without prior approval, or otherwise compete with one another for employees. For example, in a letter dated January 28, 2009, a director of one company wrote to a senior executive at the other's headquarters: "[Y]ou and I both agreed that our practice of not targeting each other's personnel is a prudent cause for both companies. As you so accurately put it, 'we compete in the market." In another e-mail in October 2011, a senior executive explained that he had a discussion with an executive at another company that "resulted in an agreement between us that we do not poach each other's employees. We agreed to talk if there was one trying to get a job." Company employees filed dozens of class action suits comprising thousands of potential class members after the settlement became public.

And the risk to employers who enter into no-poach agreements with competitors goes beyond the significant potential class action monetary settlements or judgments. Indeed, in the wake of DOJ's **settlement with Silicon Valley technology companies regarding no-poach agreements**, DOJ **announced** guidance to human resource professionals in 2016 that "going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements." Significantly, DOJ said the only reason the rail equipment suppliers escaped criminal investigation was by stopping their arrangement before the human resource guidance was issued. In the **DOJ Antitrust Division's Spring 2018 Update**, the DOJ reported it is actively pursuing "no poach" and wage fixing agreements between employers. The DOJ Antitrust Division also warned: "Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy."

The takeaway here is government enforcement and private federal class action lawsuits are heating up regarding no poach agreements. Employers who have reached no-poach agreements – either formally or informally - should consult with experienced antitrust counsel at their earliest opportunity to discuss how to mitigate risk and devise pragmatic and proactive solutions that serve to both protect their business and comply with applicable antitrust laws. We are here to help.

No poach agreements between employers

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