

Protecting Your Competitive Advantage

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In many high-technology industries, such as the computer software and next-generation automotive industries, companies sometimes enter into agreements with their closest competitors promising that each will not hire the other's employees.

Not losing key employees to competitors at crucial times is a useful method for maintaining your competitive advantage. Non-solicitation or "no-poach" agreements, common among high-tech companies, may look attractive to automotive companies seeking to retain their most highly-skilled employees.

Auto Companies Beware

The Department of Justice (DOJ), however, has determined that some of these agreements violate U.S. anti-trust laws.

The DOJ recently initiated actions against Apple, Google, Adobe Systems, Pixar, Intel, and Intuit asserting that each had entered into no-poach agreements with a competitor and that these agreements restrained competition between them for highly-skilled employees.

The DOJ's Complaint states that Apple and Google executives agreed not to cold-call each other's employees; that Apple and Adobe placed each other on a "do not call" list when recruiting new employees; and that Apple, Pixar, Google, Intel and Intuit took similar steps.

In the DOJ's view, these actions reduced the companies' ability to compete for employees, disrupted the normal price-setting mechanisms that apply in the labor market, and substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities.

The DOJ's proposed settlement against these companies requires them to discontinue such agreements, permit cold-calling of each other's employees, and prohibits them from entering into any other agreement that prevents any person from recruiting or otherwise competing for employees. The DOJ's press release notes that its action arose out of a larger investigation by the Antitrust Division into employment practices by high-tech firms and that the division continues to investigate other, similar agreements.

What can an automotive company do?

Adopt Written Internal Policies

Set forth, in clear terms which employees have access to confidential, sensitive, and trade secret data.

Limit Access

Take appropriate security measures to protect data, including requiring those with access to confidential and trade secret information to sign confidentiality and non-disclosure agreements, encrypting files containing trade secret information, and monitoring trade secrets to ensure that employees with access to them are not accessing the information more than is required.

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Make Use of Non-Compete Contracts

The final and most powerful weapon in an employer's arsenal is the use of non-competition and non-disclosure agreements. A non-compete agreement may prevent a former employee from improperly using confidential business data. Michigan law allows employers to utilize non-compete agreements that are "reasonable" in scope. That is, the agreement must be reasonable in duration, geographical area and type of employment or line of business.