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DOJ Announces First Criminal Indictments for Labor Market Antitrust Violations

- The Antitrust Division of the U.S. Department of Justice (DOJ) has announced the first criminal indictments for “no-poach” and wage-fixing agreements.
- These indictments follow a change in policy announced by the DOJ several years ago to pursue such violations as criminal matters, and not merely civil violations.
- Companies with antitrust compliance programs should consider reflecting in their training programs and monitoring mechanisms the DOJ’s stance that naked “no-poach” or wage-fixing agreements are subject to criminal prosecution, and might also consider instituting methods to identify and evaluate such agreements.

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On January 7, 2021, the DOJ announced that a federal grand jury in Texas returned an indictment charging Surgical Care Affiliates, Inc. with two counts of Sherman Antitrust Act violations for allegedly entering into agreements with two different companies not to solicit each other’s senior-level employees. And late last year, the former owner of a physical therapist staffing company in Texas was indicted on wage-fixing charges. These indictments are the first-ever federal criminal charges for antitrust violations in the labor market, and are a very significant development for antitrust enforcement. While the indictments come at the end of the current administration, they reflect a years-long focus in this area, which is likely to carry over into the next administration.

Background

Over the past several years, the DOJ’s enforcement approach to anticompetitive agreements affecting labor markets has evolved.

Prior to 2016, the DOJ treated employee non-solicitation – or “no-poach” – agreements as, at most, civil offenses. For example, in 2010, the DOJ alleged that several high-technology companies harmed competition for high-tech employees by entering into agreements not to solicit each other’s employees. The DOJ entered into civil settlements with these companies.

In October 2016, however, the DOJ and U.S. Federal Trade Commission (FTC) issued guidance for HR professionals, and the DOJ stated that going forward, it intended to criminally prosecute naked wage-fixing

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or "no-poach" agreements. Generally speaking, naked "no-poach" agreements are agreements among competitors relating to the solicitation of employees that are not reasonably necessary for a separate, legitimate business transaction or collaboration. In early 2018, the DOJ announced that for agreements that either began after the date of the October 2016 announcement, or began before but continued after, the Antitrust Division would pursue criminal charges where appropriate.

Thus, the DOJ's new position is that naked "no-poach" agreements among competitors are *per se* violations subject to criminal liability, while other types of "no-poach" agreements are evaluated under the rule of reason and would at most carry civil penalties.[1] (Under the rule of reason, several factors are weighed, including the reasonableness of the conduct and the company's degree of market power.) Until now, there had been no publicly announced criminal charges in this area.

It is important to note that not all employment-related agreements are subject to criminal liability under the DOJ's enforcement policy. Only "*per se*" illegal agreements are subject to this treatment. There are numerous examples of agreements related to employment which are not subject to *per se* treatment: as the DOJ has stated, "under the 'ancillary restraints doctrine,' a horizontal agreement ordinarily condemned as *per se* unlawful is 'exempt from the *per se* rule' if it is ancillary to a separate, legitimate venture between the competitors." In the franchising context, the DOJ has stated that while, in its view, "horizontal no-poach agreements between rival employers within a franchise system are subject to the *per se* rule," a "restriction in a franchise agreement that forbids franchisees from poaching each other's employees . . . is subject to the rule of reason in the absence of agreement among the franchisees because it is a vertical restraint." Further, "if there is alleged agreement among the franchisees, the restraint is subject to the rule of reason so long as it is ancillary; that is, separate from, and reasonably necessary to, the legitimate franchise collaboration."

***U.S.* v. *Surgical Care Affiliates*: First Criminal Indictment for Employee Non-solicitation Agreements**

In the indictment announced on January 7, Surgical Care Affiliates and a successor entity (together, SCA) were charged with two counts of violating the Sherman Antitrust Act for allegedly entering into two separate agreements with other unnamed companies to engage in a *per se* unlawful "conspiracy to suppress competition between them for the services of senior-level employees by agreeing not to solicit each other's senior-level employees." According to the indictment, SCA and the other companies "owned and operated outpatient medical care facilities across the United States" and "were competitors in the recruitment and

[1] According to the DOJ, "companies can be competitors in the labor market but not competitors in product or service markets" because "[c]ompanies in different industries can compete in the same market for employees." However, if companies "are not competitors in the labor market but instead are, for example, vertically related in their industry, then any agreement among them is subject to the rule of reason."

retention of senior-level employees across the United States." The first conspiracy allegedly lasted from at least May 2010 until October 2017 and the second from at least February 2012 through July 2017.

The indictment alleges several actions taken in furtherance of the conspiracies, including: conversations between CEOs about not approaching each other's employees, communications between a human resources employee and a recruiter about not scheduling a call with a job candidate from the other company, an email stating that SCA had an "agreement" with the other companies that it "would only speak with senior executives" of the other companies "if they have told their boss already that they want to leave and are looking," and communications appearing to indicate that SCA employees were required to provide such notice.

U.S. v. *Neeraj Jindal*: First Criminal Indictment for Wage-fixing Agreement

In an indictment filed on December 9, 2020, the former owner of a physical therapist staffing company was charged with violating the Sherman Antitrust Act by allegedly engaging in a *per se* unlawful "conspiracy to suppress competition by agreeing [with a competitor] to fix prices by lowering the pay rates to" physical therapists and assistants (PTs and PTAs) from March to August 2017. According to the indictment, "the Defendant and his co-conspirators, among other things, provided and received non-public rates paid to PTs and PTAs; communicated about rate decreases; discussed and agreed to decrease rates paid to PTs and PTAs; implemented rate decreases in accordance with the agreement reached; and paid PTs and PTAs at collusive and noncompetitive rates." The indictment also charges the defendant with obstruction of the FTC's separate investigation of this alleged conduct.

Conclusion

Companies with antitrust compliance programs should consider reflecting in their training programs and monitoring mechanisms the DOJ's stance that naked "no-poach" or wage-fixing agreements are subject to criminal prosecution. For example, companies could provide antitrust compliance training on "no-poach" and wage-fixing agreements, especially for employees with responsibilities that touch on the recruitment and retention of employees and human resources personnel. Companies might also consider instituting methods to identify and evaluate such agreements. This is especially wise in light of the DOJ's policy, announced in 2019, of allowing credit for antitrust compliance programs at the charging stage of criminal investigations. Indeed, the DOJ's guidance accompanying the announcement of this policy specifically references the HR function in its discussion of the importance of effective risk assessments and the design and comprehensiveness of corporate compliance programs.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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