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What Employers Need to Know About the Changing Antitrust Ramifications of No-Poach Agreements and Other Agreements Affecting Employee Compensation

DoJ Follows Through on 2016 Change in Enforcement Policy and Alleges Criminal Violations of the Antitrust Laws Arising from Wage-Fixing Agreements and No-Poach Agreements in Three Recent Indictments

SUMMARY

In 2016, the Antitrust Division of the U.S. Department of Justice (“DoJ”) announced that it intended to proceed criminally against “naked wage-fixing or no-poaching agreements.” Four years later, the DoJ has followed through on that announcement, with indictments returned (1) in December 2020 against an individual for allegedly agreeing to fix the prices paid to physical therapists and physical therapist assistants, (2) in January 2021 against an outpatient care facility for allegedly agreeing not to poach the senior-level employees of two of its competitors, and (3) in March 2021 against a health care staffing company and its former manager for allegedly agreeing to fix the wages of nurses and not to poach nurses from a competitor. All employers should be aware of these developments and build appropriate protections into their compliance and training programs, focusing in particular on human resources executives (who may be unfamiliar with the intersection of antitrust and HR issues) and senior executives (who may view agreements with a competitor about employees as a way to lower costs and ensure continuity of business operations without appreciating the antitrust implications). Clients that become aware of inappropriate conduct within their organization should also consider self-reporting to the DoJ to obtain the benefits of the DoJ’s leniency program.

WAGE-FIXING AND NO-POACH AGREEMENTS

U.S. antitrust law prohibits contracts and conspiracies “in restraint of trade.”¹ Although many violators of the U.S. antitrust laws face civil litigation, the DoJ can also bring criminal charges for antitrust violations, which can result in significant adverse consequences for business organizations (including large fines) and prison sentences for individuals.

The typical antitrust concern involves agreements between competing *sellers* of a product or service. For instance, the DoJ has brought charges against makers of generic pharmaceuticals alleging that they agreed to charge higher prices than the prices that would have prevailed in the absence of the alleged agreements.² But it is also possible for competing *buyers* to violate the antitrust laws by agreeing to pay too little for a product or service. A recurring example of that concern is the worry that farmers are paid too little for crops as a result of anticompetitive agreements among agricultural processors.³

Employers competing for the same pool of labor can violate U.S. antitrust law when they propose or enter into agreements limiting competition with other employers (who are, from the perspective of the antitrust laws, competing buyers of employees’ services). These outlawed agreements often take two forms: (1) wage-fixing agreements through which competing employers agree to fix compensation (of any kind, including benefits) for employees at an agreed-upon level and (2) no-poach agreements through which competing employers agree not to solicit employees from one another.

The DoJ moved against those kinds of agreements in 2010 when it brought a high-profile civil action against several major technology companies alleging a series of bilateral agreements not to cold call the other’s employees to offer competing employment opportunities.⁴ Notably, each unlawful agreement resulted from discussions among the defendants’ senior executives.⁵ The DoJ alleged these agreements constituted a *per se* violation of the antitrust laws—meaning that no economic justification could exculpate the agreement.⁶ The DoJ pursued a similar enforcement action against another technology company in 2013.⁷ Private plaintiffs also brought suit on similar theories.⁸

In 2016, the DoJ amplified its concern about these unlawful agreements when it, along with the Federal Trade Commission (“FTC”), published Guidance for Human Resources Professionals.⁹ In the Guidance, the DoJ and FTC claimed that, except when narrowly tailored as a necessary part of a legitimate collaboration between competitors, these kinds of agreements are *per se* illegal.¹⁰ Crucially, the DoJ also indicated that, going forward, it intended to pursue criminal charges against “both individuals and companies” that entered into “naked wage-fixing or no-poaching agreements.”¹¹

In December 2020, the DoJ carried through on that stated intention and announced the return of an indictment involving a wage-fixing agreement.¹² The named defendant in the indictment, an individual, owned a staffing company that contracted with physical therapists and physical therapist assistants to

provide in-home physical therapy services.¹³ The DoJ alleged that the defendant's company entered into agreements with competitors to fix the prices paid to those physical therapists and physical therapist assistants.¹⁴ Although the alleged wage-fixing agreement lasted for only seven months in 2017,¹⁵ the allegations carry the potential for up to 15 years imprisonment and \$1,250,000 in fines.¹⁶

Similarly, in January 2021, the DoJ announced the return of an indictment for allegedly engaging in no-poach agreements, carrying the possibility of up to \$100 million in fines.¹⁷ That indictment charges that a limited liability company and its successor-in-interest engaged, through its executives and employees, in two no-poach agreements with an unspecified number of co-conspirators in the outpatient care industry.¹⁸

Most recently, the DoJ announced the return of an indictment against a health care staffing company and its former manager for allegedly entering both a no-poach and a wage-fixing agreement with a competitor.¹⁹ The indictment alleges that the defendants and unnamed co-conspirators agreed, in various communications, not to recruit or hire nurses engaged by their co-conspirators and assigned to a particular Nevada school district, and further agreed to refuse to negotiate any wage increases with those nurses.²⁰

In light of the DoJ's increased focus on criminal prosecutions in this area, employers should include guidance on these issues in their compliance and training programs. Senior executives and HR professionals should be made aware of the substantial adverse consequences of entering into these kinds of agreements, both for their companies and for themselves as individuals. In our experience, HR professionals are sometimes entirely unaware that their work can have antitrust implications, and senior executives are sometimes not attuned to the antitrust implications of agreements involving labor inputs. It is worth noting that all three recent indictments involve relatively small firms in the health care industry that lack substantial market power. Put another way, even small companies or subsidiaries can run into problems in this area.

Competition authorities outside the United States have not made no-poach and wage-fixing agreements a major focus as yet. Employers should be aware, however, that non-U.S. competition authorities often pay close attention to the DoJ's enforcement initiatives. Those authorities may well bring their own enforcement mechanisms to bear on no-poach and wage-fixing agreements in the future.²¹

Finally, if a business becomes aware of potentially problematic conduct within its organization, serious consideration should be given to reporting that conduct to the DoJ to take advantage of its leniency program, which in general offers the potential for reduced liability.

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ENDNOTES

- 1 15 U.S.C.A. § 1.
- 2 E.g., Press Release, Department of Justice Office of Public Affairs, *Sixth Pharmaceutical Company Charged In Ongoing Criminal Antitrust Investigation* (July 23, 2020), available at <https://www.justice.gov/opa/pr/sixth-pharmaceutical-company-charged-ongoing-criminal-antitrust-investigation>.
- 3 E.g., Press Release, Department of Justice Office of Public Affairs, *Justice Department Requires Divestiture in Tyson Foods Inc. Acquisition of the Hillshire Brands Company* (Aug. 27, 2014), available at <https://www.justice.gov/opa/pr/justice-department-requires-divestiture-tyson-foods-inc-acquisition-hillshire-brands-company>.
- 4 Complaint, *United States v. Adobe Sys., Inc.*, No. 10 CV 1629, 2011 WL 10883994 (D.D.C. Mar. 18, 2011).
- 5 *Id.*
- 6 *Id.*
- 7 *United States v. eBay., Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013).
- 8 See *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167 (N.D. Cal. 2013); *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175 (N.D. Cal. 2015); *Garrison v. Oracle Corp.*, 159 F. Supp. 3d 1044 (N.D. Cal. 2016).
- 9 DOJ and FTC Antitrust Guidance for Human Resource Professionals (Oct. 2016), available at <https://www.justice.gov/atr/file/903511/download>.
- 10 *Id.* at 3.
- 11 *Id.* at 4.
- 12 Press Release, Department of Justice Office of Public Affairs, *Former Owner of Health Care Staffing Company Indicted for Wage Fixing* (Dec. 10, 2020), available at <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>.
- 13 Indictment, *United States v. Neeraj Jindal*, No. 4:20-cr-00358-ALM-KPJ (N.D. E. Tex., Dec. 9, 2020) at 2.
- 14 *Id.* at 2-10.
- 15 *Id.*
- 16 *Id.* at 13.
- 17 Press Release, Department of Justice Office of Public Affairs, *Health Care Company Indicted for Labor Market Collusion* (Jan. 7, 2021), available at <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>.
- 18 Indictment, *United States v. Surgical Care Affiliates, LLC, et al.*, No. 3:21-cr-00011-L (E.D. Tex., Jan. 5, 2021).
- 19 Press Release, Department of Justice Office of Public Affairs, *Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses* (Mar. 30, 2021), available at <https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses>.
- 20 Indictment, *United States v. Ryan Hee, et al*, No. 2:21-cr-00098-RFB-BNW (D, Nev., Mar. 26, 2021).

ENDNOTES (CONTINUED)

- ²¹ The Canadian Competition Bureau has recently addressed its enforcement policy in this area. See Competition Bureau Canada, *Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements* (Nov. 27, 2020), available at <https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html>.

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