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DOJ's First Criminal Charges for Wage-Fixing and No-Poach Labor Agreements: 6 Key Takeaways

With increased scrutiny of anticompetitive conduct in labor markets, companies need to adopt proactive compliance efforts to avoid prosecution.

The US Department of Justice's (DOJ's) Antitrust Division recently announced its first criminal prosecutions of employee no-poach and wage-fixing agreements between competing employers. These highly anticipated, and legally novel, cases come more than four years after the Antitrust Division first announced its intention to criminally prosecute these labor agreements. Prior to 2016, these types of labor agreements were treated exclusively as civil offenses. These recent prosecutions confirm that the risk landscape has changed, and companies are advised to take note.

This *Client Alert* offers six key takeaways about the Antitrust Division's enforcement efforts in labor markets and provides compliance advice for companies and individuals to protect themselves from criminal prosecution.

Background

December 2020 — DOJ's First Criminal Wage-Fixing Case

The Antitrust Division filed its first ever criminal wage-fixing case in December 2020, when it charged the former owner of a therapist staffing company for participating in a conspiracy to fix prices by lowering the rates paid to physical therapists and physical therapist assistants.[1] According to the indictment, Neeraj Jindal contacted owners of rival therapist staffing companies by text message, proposing that all of the companies lower rates paid to therapists to specific levels.[2] After Jindal reached out to his competitors about specific pay rates, Jindal's company allegedly began offering the lower rates. The indictment also charged Jindal with obstruction of proceedings before the Federal Trade Commission (FTC) for withholding information and making false and misleading statements to the FTC while it investigated Jindal's company and others for the same underlying conduct.[3]

January 2021 — DOJ's First Criminal Non-Solicit (No-Poach) Case

A federal grand jury returned a two-count indictment in January 2021 that charged Surgical Care Affiliates LLC and its successor entity (together, SCA), both outpatient medical care center operators, with violations of Section 1 of the Sherman Act for allegedly agreeing with competitors to forgo soliciting each other's senior-level employees. The indictment alleges that the company and its unnamed co-conspirators held several meetings and conversations during which they reached a non-solicitation

agreement and later instructed their employees not to solicit each other's senior-level employees.[4] To monitor the agreement, the companies allegedly required candidates to notify their current employers that they were seeking employment elsewhere, in order to ensure that applications were initiated by the employee rather than solicited by the hiring company.[5] SCA is contesting the charges as a "novel application of the antitrust laws … for which there is no precedent or foundation."[6] As the Antitrust Division charts new territory with these charges, it runs a risk that courts or juries will not share its view that the conduct amounts to per se violations appropriate for criminal prosecution. Even when the government cannot prove that a violation occurred, however, companies facing criminal no-poach investigations and related litigation suffer enormous costs. It is therefore advisable to undertake enhanced compliance efforts to reduce the chances that hiring practices will be scrutinized by an enforcer or private plaintiff.

1. The DOJ will criminally prosecute companies and individuals engaged in "naked" wage-fixing and no-poach agreements

The Antitrust Division and the FTC jointly announced in their October 2016 Antitrust Guidance for Human Resource Professionals that the Antitrust Division would for the first time criminally prosecute "naked" no-poach and wage-fixing agreements that were found to have occurred after the announced date of the new policy.[7] (See Latham's *Client Alert* on the new policy.) The Antitrust Division has explained that "[r]obbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment."[8] In its view, wage-fixing and no-poach agreements should be afforded the same treatment as market division or market allocation agreements.[9]

Despite the policy announcement in 2016, the Antitrust Division did not immediately file any criminal charges under the new policy. In fact, it took more than four years for the Antitrust Division to identify cases to indict. However, the delay in charges was not for lack of trying. Since 2016 the Antitrust Division has launched several investigations in a range of industries to uncover wage-fixing and no-poach agreements to prosecute, and many are still underway.[10]

Types of Agreements Subject to Criminal Prosecution

What are naked labor-restricting agreements subject to criminal prosecution? Wage-fixing agreements involve agreements between companies to fix wage or employee benefit levels, or agreements to not compete with each other on salaries, benefits, or other terms of employment. No-poach agreements involve agreements between companies to not solicit or hire each other's employees. As discussed below, these agreements are naked when they are not vertical or ancillary to certain legitimate agreements.

Notably, companies that do not make or provide the same products or services may still be competitors in the labor market and may be liable for no-poach or wage-fixing agreements if they compete in the same labor marketplace for employees. As long as two companies are competing for the same pool of employees, they are considered competitors for the purposes of wage-fixing and no-poach violations.

2. The DOJ has made antitrust enforcement in labor markets a top priority

Before the new policy announced in 2016, the Antitrust Division's most noteworthy no-poach conspiracy prosecution was a civil matter involving several major technology companies, who the government claimed agreed to forgo cold-calling each other's employees. The case settled with a final judgment that enjoined the defendants from the conduct without criminal charges.[11] Following this enforcement action, private plaintiffs secured approximately US$435 million in civil damages relating to the same conduct.[12]

The Antitrust Division has carved out labor market restrictions as a top criminal enforcement priority, and this will likely continue to be the case for years to come.[13] In addition to launching investigations, former Assistant Attorney General Makan Delrahim appointed a Counsel to the Assistant Attorney General specifically assigned to oversee these efforts.[14] DOJ leadership re-emphasized its focus on this area in speeches[15] and remarks before Congress.[16] It is expected that the Biden Administration will continue to prioritize these efforts, and recent new hires at the Antitrust Division will bring additional resources to pursue investigations.

3. Not all no-poach agreements will be prosecuted criminally

The Antitrust Division only criminally prosecutes antitrust violations that are per se illegal (i.e., the types of agreements that courts regard as inherently anticompetitive, such as price-fixing, bid-rigging, and market allocation). While its enforcement track record of criminal prosecution of no-poach agreements is limited, the Antitrust Division has made clear that it does not regard all no-poach or other labor-restricting agreements as per se illegal and therefore criminally prosecutable. The Antitrust Division has used its Amicus Program to file a number of statements of interest in private no-poach lawsuits to clarify its view on which agreements fall within this purview, maintaining that per se illegality is appropriate only when competitors enter into naked no-poach agreements that are not "vertical" or "ancillary" to separate, legitimate joint ventures. However, the Antitrust Division and Federal Trade Commission have not offered detailed guidance as to which no-poach agreements are "vertical" or "ancillary," and the analysis is heavily fact-dependent, leaving room for significant uncertainty.

Ancillary Restraints

The 2016 Antitrust Guidance explains that agreements made as part of legitimate joint ventures, such as appropriate shared uses of facilities, are not considered per se illegal under the antitrust laws.[17] Accordingly, tailored agreements to restrict hiring that are "reasonably necessary" for legitimate business collaborations may not violate the antitrust laws.

The civil settlements that the Antitrust Division entered into to resolve previous civil no-poach prosecutions offer additional insight into its priorities and approach. For example, one of the Antitrust Division's settlement agreements in *In re High-Tech Employee Antitrust Litigation* provided that a "no direct solicitation provision" would not be prohibited where it is contained within employment or severance agreements, or is reasonably necessary for M&A, investments or divestitures, joint ventures and other legitimate collaborations. The enumerated list of permitted practices also allows provisions "reasonably necessary" for the settlement of legal disputes or contracts with consulting services, auditors, outsourcing vendors, recruitment agencies, staffing companies, original equipment manufacturers or resellers, and other service providers.[18] Given that the landscape is changing rapidly, companies are cautioned not to rely solely on insights gleaned from prior cases without first consulting with antitrust counsel.

Vertical Agreements

The Antitrust Division has made clear that the rule of reason, and not the per se rule, applies when companies are vertically related rather than horizontal competitors in the market for labor.[19] According to the Antitrust Division, this position is consistent with black-letter law that vertical restraints are generally not per se illegal, and therefore not subject to criminal prosecution.[20] The Antitrust Division had the opportunity to weigh in on this issue in statements of interest it filed in a series of franchisor-franchisee civil lawsuits. The private litigation involved a series of restrictions under which franchisors required franchisees to forgo hiring or soliciting employees of another franchisee of the same franchisor.[21] While the plaintiffs argued that the restrictions were per se illegal because they created horizontal conspiracies, the Antitrust Division argued that the restrictions were vertical restraints in the absence of an agreement

between the franchisees.[22] And even if there were a horizontal no-hire agreement between franchisees, the Antitrust Division maintained that the agreement would still be considered ancillary if reasonably necessary to the legitimate franchise collaboration.[23] Whether an agreement is vertical or horizontal can also be a subject of debate if both companies arguably would hire from the same employee pool.

The Antitrust Division's decision as to whether a restraint is horizontal or vertical does not mean that district courts will follow their approach. Courts have taken varied approaches and have differed in how much weight they give to the Antitrust Division's view.[24] To be clear, although the Antitrust Division has stated its view that naked no-poach agreements are per se unlawful and susceptible to criminal prosecution, other than one ruling on a motion to dismiss, no court has yet held that no-hire and non-solicit agreements can be "manifestly anticompetitive" and, therefore, a per se violation.[25] But as discussed below, the Antitrust Division's decision to open an investigation can impose substantial costs before a court reaches a decision on liability.

Because case law and prosecutorial priorities are evolving, companies should consult with antitrust counsel to determine whether a no-poach agreement is covered by a safe harbor from prosecution.

4. No-poach and wage-fixing investigations can arise from HSR merger reviews and whistleblowers

Several wage-fixing and no-poach agreements have been uncovered during Hart-Scott-Rodino (HSR) merger reviews and unrelated civil investigations by the Antitrust Division and the FTC. Evidence of potential no-poach agreements has emerged from documents provided by companies in connection with mandatory merger clearance reviews. Therefore, it is important for companies involved in merger filings to be on a lookout for documents that may trigger no-poach or wage-fixing investigations. (See Latham's blog post No-Poach Prosecutions: A Growing Problem for M&A Deal Teams?)

In one recent example, the Antitrust Division sued to enjoin the partial acquisition of one Pennsylvania hospital by another.[26] The Antitrust Division's complaint revealed that during its merger review, it uncovered a no-poach agreement under which the hospitals agreed to forgo recruiting each other's nurses. Whether the Antitrust Division intends to criminally prosecute the no-poach agreement identified in the merger complaint is unclear. Regardless, the complaint has already led directly to a follow-on class action suit.[27]

With the recent increase in the number of HSR filings, merger reviews will most likely continue to be a source of new no-poach and wage-fixing investigations by the Antitrust Division. In the M&A context, broad antitrust due diligence should be conducted and should include interviews with senior staff responsible for human resources and other externally facing employees responsible for hiring and terms of employment. Merger agreements should be reviewed to ensure that any non-solicitation provisions are narrowly tailored and ancillary to a legitimate transaction.

Another source of cases comes directly from individual employees who learn of potential wage-fixing or no-poach agreements. The high-profile *Seaman v. Duke University* litigation, for example, involved an alleged no-poach agreement between the University of North Carolina at Chapel Hill (UNC) and Duke University regarding medical faculty. An assistant professor of radiology at Duke University School of Medicine filed suit against Duke in June 2015 after she was informed that her employment application for a position at UNC had been rejected because the deans of UNC and Duke had previously agreed to block lateral moves of faculty between the universities.[28] With the recent passage of whistleblower protection laws for criminal antitrust violations, individual employee whistleblowers are likely to become a growing source of cases for the Antitrust Division and class action plaintiffs' lawyers.[29]

In addition, civil litigation involving no-poach agreements in one market can lead to newly discovered no-poach agreements in another market, thus creating a cascade of follow-on no-poach class action lawsuits. For example, while the *Seaman* medical faculty litigation settled and released claims by medical faculty, it did not release claims by non-medical faculty. According to the plaintiffs in subsequent litigation, once certain evidence was made public in the *Seaman* case, a broader no-poach understanding between Duke and UNC was revealed.[30] A second class action suit was filed in 2020, with the class comprised of faculty employed by Duke and UNC not covered by the *Seaman* settlement class.[31] The case is expected to settle, as the parties have reached a preliminary agreement.[32]

5. Penalties can be severe and inevitably lead to follow-on civil litigation

The Sherman Act authorizes criminal penalties of up to US$100 million for corporations, while individuals are subject to penalties of up to US$1 million and up to 10 years' imprisonment.[33] Criminal penalties would be in addition to follow-on civil damages claims from lawsuits brought by private plaintiffs to recover for the harm suffered as a result of the no-poach or wage-fixing agreement. Antitrust laws provide for treble civil damages, allowing private plaintiffs to recover three times the amount of actual injury suffered. Once plaintiffs learn of a government investigation, such lawsuits are routinely filed as class actions and can lead to astronomically high settlements. For example, the aforementioned civil suit, *In re High-Tech Employee Antitrust Litigation*, settled claims for a total of approximately US$435 million.[34] And in *Seaman v. Duke University*, Duke settled for US$54.5 million.[35]

6. Companies should protect themselves with proactive and robust compliance efforts

While the state of the law is unsettled, Antitrust Division investigations into labor and employment practices will continue. Even if criminal penalties and follow-on civil suits do not materialize, the investigations impose substantial burdens on targeted companies, including broad document requests and employee interviews, which distract from the core task of running the business. Companies are well advised to take steps to enhance their compliance efforts to minimize the risks and costs of such investigations. The Antitrust Division provides significant incentives to self-report, and in 2019 expanded the benefits of robust compliance programs and early reporting of anticompetitive conduct. (See Latham's *Client Alert* on the Antitrust Division's 2019 guidance.)

All companies should have up-to-date antitrust policies and should consider conducting training programs that include human resources staff and others responsible for hiring and setting salaries and wages, benefits, and other terms of employment. Companies should pay particular attention to senior staff members with involvement in industry groups and trade associations, along with those who have any other contact with competing employers, including outside recruiters or contractors retained to assist in hiring. Before sharing any competitively sensitive information about wages, hiring, or terms of employment with a competitor, companies should consult with experienced antitrust counsel.

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Endnotes

1 Indictment, *United States of America v. Jindal*, No. 4:20cr358 (E.D. Tex. Dec. 9, 2020), ECF No. 1.

2 *Id.* ¶11-12.

3 *Id.* ¶15-18.

[4] Indictment, *United States of America v. Surgical Care Affiliates, LLC*, No. 3-21CR0011-L (N.D. Tex. Jan. 5, 2021), ECF No. 1.

[5] *Id.* ¶11.

[6] Press Release, Surgical Care Affiliates, Surgical Care Affiliates Rejects Allegations (Jan. 7, 2021).

[7] Antitrust Division and FTC, Antitrust Guidance for Human Resource Professionals (Oct. 2016).

[8] US DOJ, Antitrust Division, Division Update Spring 2019: No-Poach Approach (2019).

[9] *See, e.g.*, Statement of Interest of the United States of America, *Seaman v. Duke University*, No. 1:15-cv-462, at 22 (M.D.N.C. March 7, 2019), ECF No. 325.

[10] Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are In The Works*, Law360 (Jan. 19, 2018) (quoting Delrahim as stating at a conference, "In the coming couple of months you will see some announcements [about criminal no-poach prosecutions], and to be honest with you, I've been shocked about how many of these there are, but they're real.").

[11] Final Judgment, *United States of America v. Adobe Systems, Inc. et al.*, No. 1:10-cv-01629 (D.D.C. March 17, 2011), ECF No. 17.

[12] *In re High-Tech Employee Antitrust Litigation*, No. 11-CV-02509-LHK, 2015 U.S. Dist. LEXIS 118051, at *12-13, *22-23 (N.D. Cal. Sept. 2, 2015).

[13] US DOJ, Antitrust Division, Antitrust Enforcement in Labor Markets: The Department of Justice's Efforts (March 1, 2019).

[14] US DOJ, Antitrust Division, Division Update Spring 2019: Looking Back, Looking Forward (2019).

[15] *See, e.g.*, US DOJ, Antitrust Division, Counsel to the Assistant Attorney General of the Antitrust Division Doha Mekki Testifies Before House Judiciary Committee on Antitrust and Economic Opportunity: Competition in Labor Markets (Oct. 29, 2019).

[16] *See, e.g.*, US DOJ, Antitrust Division, Statement of Makan Delrahim, Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary, U.S. House of Representatives (Dec. 12, 2018).

[17] Antitrust Division and FTC, Antitrust Guidance for Human Resource Professionals, p. 3 (Oct. 2016) ("Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.").

[18] *United States v. Adobe Sys.*, 10-cv-1629, 2011 U.S. Dist. LEXIS 83756, at *5-6 (D.D.C. March 18, 2011).

[19] US DOJ, Antitrust Division, Antitrust Enforcement in Labor Markets: The Department of Justice's Efforts, p. 11 (March 1, 2019).

[20] *Id.* at 11-12.

[21] Corrected Statement of Interest of the United States of America at 3-4, *Stigar v. Dough Dough, Inc. et al.*, No. 2:18-cv-00244-SAB (E.D. Wash. March 8, 2019), ECF No. 38.

[22] *Id.* at 16.

[23] *Id.*

[24] *Compare In re Ry. Indus. Emple. No-Poach Litig.*, 395 F. Supp. 3d 464, 485 (W.D. Pa. 2019) ("The court's decision in this respect is supported by the government's explanation in its statement of interest and at the hearing on the motion to dismiss. It explained that the federal agencies charged with enforcing the antitrust laws consider naked no-poach agreements per se violations of the Sherman Act and the DOJ will proceed criminally against those who enter into those kinds of agreements."), *with Conrad v. Jimmy John's Franchise, LLC*, No. 3:18-cv-00133-NJR-RJD, 2019 U.S. Dist. LEXIS 94411, at *6-7 (S.D. Ill. May 21, 2019) ("The DOJ's Antitrust Division is certainly a titan in this arena and carries a considerable burden in interpreting open questions in antitrust jurisprudence – that is without question. But DOJ is not the ultimate authority on the subject, especially in situations like this one: after the DOJ submitted its Statement of Interest, the American Antitrust Institute – another titan in the antitrust arena – penned a letter in staunch opposition to the DOJ. This dichotomy shows that the legal questions here are in their infancy, and this battle looks like one that will make its way through the courts for years to come.") (citation omitted).

[25] *See United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013).

[26] Complaint ¶42, *United States of America v. Geisinger Health*, No. 4:20-cv-01383-MWB (M.D. Pa. Aug. 5, 2020), ECF No. 1.

[27] Complaint ¶7, *Leib v. Geisinger Health*, No. 4:21-cv-00196-MWB (M.D. Pa. Feb. 3, 2021), ECF No. 1.

[28] Complaint ¶¶55, 57, *Seaman v. Duke University*, 1:15-CV-462 (M.D.N.C. Sept. 25, 2019), ECF No. 1.

[29] Criminal Antitrust Anti-Retaliation Act of 2019, 15 U.S.C. § 7a-3 (2020).

[30] Complaint ¶4, *Binotti v. Duke University*, No. 1:20-cv-470 (M.D.N.C. May 27, 2020), ECF No. 1.

[31] *Id.* ¶12.

[32] Joint Mot. to Stay All Deadlines, *Binotti v. Duke University*, No. 1:20-cv-470 (M.D.N.C. Dec. 28, 2020), ECF No. 38.

[33] 15 USC § 1.

[34] *In re High-Tech Employee Antitrust Litigation*, 2015 U.S. Dist. LEXIS 118051, at *12-13, *22-23 (N.D. Cal. Sept. 2, 2015).

[35] Mem Op. and Order at 1, 6, *Seaman v. Duke University*, 1:15-CV-462 (M.D.N.C. Sept. 25, 2019), ECF No. 388.