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It’s Not a Threat, It’s a Promise: Timeline of the DOJ’s Statements and Actions Against Wage Fixing and No Poach Agreements

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Over the past year, the Department of Justice (“DOJ”) has increasingly been hot on the heels of suspected anti-competitive labor violations. To date, the DOJ has brought a few actions against employers across industries relating to wage-fixing and no-poach agreements. As these cases take hold, and potentially even head toward trial, this article examines the DOJ’s previous statements and current actions regarding its stance on anti-competitive labor violations.

DOJ Statements

In October 2016, the DOJ and Federal Trade Commission (“FTC”) jointly released their Antitrust Guidance for Human Resource Professionals. This Guidance was instrumental in setting the tone of the DOJ and FTC’s intent on targeting agreements to (1) fix salaries or compensation for employees, or (2) preclude companies from hiring or soliciting each other’s employees. The Guidance highlighted that, “[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements,” and that “the DOJ may . . . bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.”

In clarifying when the DOJ will begin to assess such conduct as antitrust violations, on January 23, 2018, Principal Deputy Assistant Attorney General Andrew C. Finch, while making remarks at the Heritage Foundation, stated that “the [DOJ Antitrust] Division expects to pursue criminal charges” for agreements that began after October 2016, as well as for agreements that began before but continued after that date. On April 10, 2018, the Antitrust Division further clarified that no-poach agreements formed and terminated before the advent of the October 2016 Antitrust Guidance will be pursued as civil violations.

After a period of relative quiet, the DOJ and FTC put out a joint statement in April 2020 regarding COVID-19 and the Competition Labor Markets. In their joint statement, the Agencies stated that they are "on alert" for employers "who engage in collusion or other anticompetitive conduct in labor markets." They highlighted that while the Agencies have challenged unlawful wage-fixing and no-poach agreements "for years," the DOJ Antitrust Division "may criminally prosecute companies and individuals who enter into naked wage-fixing and no-poach agreements." They further warned that individuals involved in anticompetitive conduct "run[] the risk of civil and/or criminal liability."

The Biden Administration was not far behind in affirming its support for criminal enforcement against such conduct. In its July 9, 2021 Executive Order on Promoting Competition in the American Economy, the Administration directed the Attorney General and FTC Chair to consider revising the 2016 Antitrust Guidance, and to work with the rest of the Commission to exercise the FTC's rulemaking authority to "curtail the unfair use of non-compete clauses." The Fact Sheet accompanying the Executive Order additionally encouraged "the FTC and DOJ to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another."

Not long afterwards, on October 1, 2021, Acting Assistant Attorney General Richard Powers of the Antitrust Division made Remarks at Fordham's 48th Annual Conference on International Antitrust Law and Policy, stating in relevant part that, "The [Antitrust] Division views rooting out collusion in labor markets to be part of its mission to deter, detect, and prosecute cartels more generally." He described the Antitrust Division as having invested substantial time and resources into the issue, and the importance of criminally prosecuting labor market conspiracies beyond its cartel program.

DOJ Prosecutions

The DOJ has also put its money where its mouth is, so to speak. At this point, the DOJ has begun prosecuting a handful of wage-fixing and no-poaching agreements.

In one of its first actions for criminal non-solicitation agreements, the DOJ focused on an alleged conspiracy between a few outpatient medical care center companies agreeing not to solicit senior-level employees from each other. In January 2021, a Texas federal grand jury indicted Surgical Care Affiliates, LLC for the alleged conspiracy. Then, in July 2021, a Colorado federal grand jury handed down a two-count indictment charging DaVita and ex-CEO Kent Thiry of conspiring with Surgical Care Affiliates LLC not to poach each other's senior employees. In a win for the DOJ, Colorado District Judge R. Brooke Jackson denied defendants' motion to dismiss the indictment in January 2022. The Colorado court remarked that while "[t[here is less precedent on *per se* treatment of horizontal market allocation agreements allocating employment markets, . . . anticompetitive practices in the labor market are equally pernicious—and are treated the same—as anticompetitive practices in markets for goods and services." Even as the court found there were no perfectly analogous cases, the court found that the non-solicitation agreements alleged would be considered horizontal market allocations and therefore, *per se* violations.

The DOJ touted its win in another non-solicitation and price-fixing prosecution it launched against Ryan Hee and VDA OC LLC, a health care staffing company, for allegedly conspiring with a competitor "to suppress and eliminate competition for the services of nurses by agreeing to allocate nurses and eliminate competition" by allocating nurses and fixing their wages. Following the DaVita decision, on February 3, 2022, the DOJ argued that, "with the issuance of this order, the argument that no federal court has held a no-poach agreement to be a *per se* criminal violation under the Sherman Act is foreclosed."

However, the DOJ's no-poaching actions have not been limited to the healthcare industry. As an example, in December 2021, the DOJ announced the criminal indictment of Mahesh Patel and five other aerospace outsourcing executives for allegedly conspiring to restrict the hiring and recruiting of engineers and other skilled workers. The indictment outlined allegations of Patel, as the leader of the conspiracy, having berated suppliers who cheated on the no-poaching agreement and threatening to punish such behavior.

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As the DOJ closes in on alleged labor antitrust violations, executives and HR professionals should take care to avoid creating even an inference of an agreement to not hire each other's employees or to fix wage standards. What may have once been considered the 'norm' may now be considered a criminal violation. If one thing is clear, it is that the DOJ plans to make good on its word to prosecute wage-fixing and anti-poaching agreements.

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