

# No Poach Approach Continues DOJ Secures First Criminal Conviction

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The Department of Justice (DOJ) Antitrust Division secured its first win in a criminal enforcement of labor market antitrust violations on October 27, 2022, when nurse staffing company VDA OC pleaded guilty to violating Section 1 of the Sherman Act by conspiring with an unnamed competitor to allocate nurses and suppress wages of school nurses.

The company was sentenced to pay a criminal fine of \$62,000, restitution of \$72,000 and a court-ordered assessment of \$400 by the US District Court for the District of Nevada.<sup>1</sup> The DOJ's win against VDA follows the DOJ's major trial losses just six months prior in other labor antitrust cases.

## Summary of *United States v. VDA OC, LLC*

A grand jury indicted VDA and its former regional director, Ryan Hee, in March 2021 for conspiring to allocate nurses and to fix the wages of nurses working for the Clark County School District from October 2016 until July 2017.<sup>2</sup>

VDA tried to dismiss the case, arguing, among other things, that the government's criminal prosecution violated its due process rights – in part because the DOJ guidance on criminal prosecutions for labor agreements was issued only a day before start of the conspiracy and because it would criminalize conduct never before recognized as criminal.<sup>3</sup> The district judge indicated that although he had not handled a case like this before, he was not inclined based upon his review of the law to grant dismissal, although he did not issue an actual denial of the motion to dismiss. Although the company has pled guilty, Hee is scheduled to go to trial in April 2023.

## What does this mean for you?

Although the fine imposed on VDA is relatively small, it is significant for a company of its size. The DOJ calculated the fine based upon wages paid to the affected employees during the relevant time period – here, less than a year. Thus, the fine amount could be exponentially higher for a larger company with a larger payroll, particularly if the conduct continued for a longer period of time.

This case further demonstrates that even limited agreements and conduct can lead to criminal prosecution. VDA has said that the conduct giving rise to this case involved one telephone conversation and an email communication between an employee of VDA and a competitor, with both communications occurring on a single day.<sup>4</sup>

Assistant Attorney General Jonathan Kanter said of the outcome that “[t]oday's guilty plea demonstrates our commitment to ensuring that workers receive competitive wages and a fair chance to pursue better work and that criminals who conspire to deprive them of those rights are held accountable.” Three other criminal labor market antitrust cases are currently pending in federal court. It is certain that the DOJ will use this success to build momentum, but it remains to be seen if this matter will serve as the shift in tide the DOJ has been waiting for.

## US civil enforcement also will continue

The Federal Trade Commission (FTC) has recently increased its attention to labor-related antitrust violations, announcing on July 19, 2022, that the agency and the National Labor Relations Board are engaging in

information sharing, cross-agency training, and outreach related to areas of common regulatory interest, which include “labor market developments relating to the ‘gig economy’ and other alternative work arrangements; claims and disclosures about earnings and costs associated with gig and other work; the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions; the extent and impact of labor market concentration; the impact of algorithmic decision making on workers; the ability of workers to act collectively; and the classification and treatment of workers.”

Thus, we can expect civil violations in labor markets to continue as well.

## Increase in labor market enforcement internationally

International scrutiny on labor agreements also is on the rise. In October 2021, European Commission (EC) Executive Vice President and Competition Commissioner Margrethe Vestager announced a new era for cartel enforcement in the European Union, with a focus on non-classic cartels, including “no-poach” agreements, commenting that such agreements can have an impact on competition where they are used to keep wages down and where they restrict talent moving to where it serves the economy best. Director-General Olivier Guersent of the EC’s Directorate-General for Competition confirmed at a June 2022 conference in Paris that the EC is “looking at how we could apply Article 101 [cartel prohibition] to these types of agreements in Europe.”<sup>5</sup>

Although the EC has yet to take action in this area, national competition authorities across Europe have started to examine these types of agreements in the context of anticompetitive behavior. Cases of interest have centered around high-profile employees, such as tech engineers and athletes, but also include other industries, such as fast-food franchising and luxury fashion retail.

### **Poland**

The Polish competition authority (Urząd Ochrony Konkurencji i Konsumentów) started an investigation into the exchange of sensitive information and suspected collusion in respect of salary suspensions and termination clauses of basketball players’ contracts in April 2021. In October 2022, the authority issued a combined fine of 197,616 euros to Energa Basketball Liga – Poland’s leading men’s basketball league – and its 16 clubs. This was the authority’s first no-poach infringement decision.

### **Portugal**

The Portuguese competition authority (Autoridade da Concorrência) investigated the Portuguese Professional Football League in relation to an agreement between 31 sports clubs to not hire a player who unilaterally terminated their contract for reasons relating to the COVID-19 pandemic. The authority’s statement of objection identified, among others, a reduction of quality in football matches as a result. In April 2022, the league and football clubs were fined a total of 11.3 million euros.

### **Romania**

In February 2022, Romania’s competition council (Consiliul Concurenței) opened an investigation into seven automotive industry and tech companies concerning agreements to not contact or employ each other’s staff. The authority also is examining suspected wage fixing.

### **Lithuania**

The Lithuanian competition authority (Konkurencijos) imposed fines on the Lithuanian Basketball League and basketball clubs from between 1,000 euros and 17,000 euros in November 2021 for concluding anticompetitive agreements to not pay players after the end of the 2019 – 2020 basketball championship season.

### **Hungary**

The Hungarian competition authority (Gazdasági Versenyhivatal) adopted a decision against the Association of Hungarian HR Consulting Agencies in December 2020 for including provisions in its ethical code relating to the fixing of minimum fees and the recruitment, hiring, and tender process. The no-poach condition intended to divide up the market between members of the association by preventing employees from moving between companies and securing higher wages elsewhere. The Hungarian competition authority identified those terms as

restricting competition.

## **France**

The French competition authority (Autorité de la concurrence) fined manufacturers of PVC floor coverings in 2017 for, among other things, the agreement to exchange confidential information concerning staff salaries and bonuses, including a gentlemen's agreement to not poach.

## **Netherlands**

As early as 2010, the Dutch court of appeal (Gerechtshof 's-Hertogenbosch) decided against a no-poach agreement among hospitals that banned former employees from returning to work as self-employed agency workers at any hospital for a 12-month period.

## **Spain**

Also in 2010, the Spanish competition authority (La Comisión Nacional de los Mercados y la Competencia) adopted a decision against an agreement between transport freight forwarding agents that prohibited the hire of their respective employees without consent. In 2011, the authority fined cosmetic product manufacturers for prohibiting cold calling or hire of respective staff without consent.

## **United Kingdom**

The UK Competition and Markets Authority (CMA) opened its first investigation into wage fixing on the labor market in July 2022. The CMA now is carrying out a cartel probe into four sports broadcasters allegedly fixing rates offered to freelancers.

## **Canada**

Competition law in Canada will soon go a step further and criminalize wage-fixing and no-poach agreements.

## **Other countries**

Labor market investigations also have been reported outside North America and the EU, including in **Mexico**, **Brazil**, **Peru**, and **Colombia**. And, earlier this year, a court in **China** held no-poach and employee compensation-fixing agreements to be illegal for the first time. Other investigations are certainly proceeding, and more are likely to come.

# **Next steps for companies**

In light of the increased agency activity regarding labor markets in the US and abroad, companies and employees should continue to consider implementing a robust antitrust compliance policy that not only covers the risks of price fixing or market sharing, but also addresses the potentially less obvious means of collusion. In addition, they should consider antitrust training programs and engaging antitrust counsel surrounding any conduct that appears to raise red flags, based on the current enforcement trends.

## **Notes:**

1. Plea agreement at paragraph 10, *United States v. VDA OC, LLC*, No. 2:21-cr-00098 (D. Nev. Oct. 27, 2022).
2. Indictment, *United States v. VDA OC, LLC*, No. 2:21-cr-00098 (D. Nev. Mar. 26, 2021).
3. Motion to dismiss at page 16-17, *United States v. VDA OC, LLC*, No. 2:21-cr-00098 (D. Nev. Sept. 3, 2021).
4. Plea agreement at paragraph four, *United States v. VDA OC, LLC*, No. 2:21-cr-00098 (D. Nev. Oct. 27, 2022).
5. New Frontiers of Antitrust Conference, Concurrences, Paris, June 21, 2022, as reported by [MLex](#).

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