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DOJ Criminally Prosecutes First No-Poach Agreement on Heels of First Criminal Wage‑Fixing Indictment

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After years of foreshadowing, the DOJ has made true on its promise to criminally prosecute "no-poach agreements," announcing on January 7, 2021, that a grand jury indicted Surgical Care Affiliates LLC (SCA), a unit of UnitedHealth Group, for allegedly entering into agreements with two other unnamed healthcare companies to not poach each company's senior-level employees.

This is the agency's first criminal indictment for no-poach agreements and comes on the heels of the DOJ's first criminal indictment for wage-fixing agreements in December 2020, based on alleged agreements among competing therapist staffing companies to set lower wages for physical therapists and physical therapist assistants.

Given DOJ's prior statements that it considers naked wage-fixing and no-poaching agreements to be per se illegal, and the incoming administration's critical view of such agreements, it is a business imperative for companies to raise awareness that improper agreements in the labor market could expose them to criminal charges and puts a premium on implementing a robust antitrust compliance program.

Criminal prosecutions a long time coming; when it rains, it pours

The antitrust agencies first took the position that DOJ would criminally prosecute no-poach agreements and other forms of collusion in the labor market back in 2016, when the DOJ and FTC issued joint guidance for HR professionals about the application of the federal antitrust laws to hiring practices and certain employment agreements. The agencies pointedly warned the business community: "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements." Wage-fixing, a form of price-fixing, includes agreements among firms to fix salaries at a certain level or within a certain range, while a no-poach agreement is an agreement among firms not to solicit each other's employees.

After releasing this guidance, the DOJ continued to foreshadow criminal charges with Makan Delrahim, assistant attorney general of the DOJ's Antitrust Division, saying in September 2019: "I want to reaffirm that criminal prosecution of naked no-poach and wage fixing agreements remains a high priority for the Antitrust Division." And, in April 2020, with the spread of the COVID-19 pandemic, the agencies issued a Joint Agency Statement on Competition in the Labor Markets, noting that the agencies are on "alert" and carefully observing the hiring, recruiting, retention or placement of workers to identify collusive and anticompetitive conduct, including wage-fixing, no-poach agreements, the exchange of competitively sensitive information and non-compete agreements.

Yet, until recently, the DOJ had not brought criminal charges for such agreements, instead bringing a limited number of public actions and investigations civilly. This all changed in December 2020 when the DOJ announced a federal grand jury returned an indictment against a former owner of a therapist staffing company for conspiring with competing therapist staffing companies to agree to lower wages for physical therapists. As a result of the charges, the individual faces up to 10 years in prison and a $1 million fine, in addition to an obstruction charge relating to the FTC's separate investigation of the wage-fixing conduct, which carries a statutory maximum penalty of five years imprisonment and a $250,000 fine.

On January 7, 2021, the DOJ announced a federal grand jury in Texas had indicted SCA, a unit of UnitedHealth Group and the owner and operator of outpatient medical care facilities across the US, for entering into two separate conspiracies with other healthcare companies to suppress competition between them for the services of senior-level employees.

As evidence of the alleged agreements, DOJ's indictment cites emails between SCA and the unnamed co-conspirators, including, for example, an email in which one co-conspirator's CEO emailed its employees: "I had a conversation w [SCA's CEO] re people and we reached agreement that we would not approach each other's proactively." Another email from a co-conspirator to SCA's CEO states, "Just wanted to let you know that [recruiting company] is reaching out to a couple of our execs. I'm sure they are not aware of our understanding." The indictment further contains allegations of the impact of the agreement, with an HR employee at one company emailing a recruiter, stating that although a candidate looked great, she "can't poach her" because the candidate worked for SCA.

As a result of the charges, SCA faces a statutory maximum penalty under the Sherman Act of up to $100 million in fines. No individuals have been charged at this time.

Implications for companies: Antitrust scrutiny will continue, implement an antitrust compliance policy and look for red flags

In announcing the charges, Delrahim said, "The charges demonstrate the Antitrust Division's continued commitment to criminally prosecute collusion in America's labor markets." Going forward, companies should expect further criminal enforcement, particularly with the upcoming change in the administration. Biden tweeted in December 2019, "It's simple: companies should have to compete for workers just like they compete for customers. We should get rid of non-compete clauses and no-poaching agreements that do nothing but suppress wages."

These statements, along with these recent criminal prosecutions, demonstrate that the antitrust agencies are fully focused on anticompetitive conduct in labor markets. Antitrust counsel can provide tools and training that companies can use to identify red flags and manage antitrust risk regarding labor markets. In addition, companies should review current non-solicitation provisions and non-compete clauses with antitrust counsel and develop a company antitrust compliance policy with clear guidelines designed to prevent and detect antitrust violations. Robust compliance programs are further critical because in July 2019 the DOJ issued guidance to incentivize antitrust compliance, including indicating that the DOJ will consider the effectiveness of a company's antitrust compliance program in deciding whether to bring criminal charges. Thus, the presence of an effective antitrust compliance program could be relevant in the DOJ's decision to proceed criminally or not.

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Key Contacts

Dee Bansal Washington, DC	dbansal@cooley.com +1 202 728 7027

Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Beatriz Mejia San Francisco	mejiab@cooley.com +1 415 693 2145
Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704
Julia R. Brinton Washington, DC	jrenehan@cooley.com +1 202 962 8364

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