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No-Poach and Wage-Fixing Agreements in Spotlight as DOJ Brings First Indictments

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As discussed in our alert from April 23, 2018, the Antitrust Division of the Department of Justice (the "DOJ") and the Federal Trade Commission (the "FTC") have repeatedly warned that naked agreements between employers not to solicit, recruit, hire without prior approval, or otherwise compete for employees — so-called "naked no-poach" agreements — are prohibited by the Sherman Act (the "Act") and may be criminally prosecuted. Until recently, the DOJ had only pursued civil actions under the Act, but has now begun to follow through on its earlier warnings. In December, DOJ secured its first criminal indictment against the owner of a therapist staffing company, for agreeing with others on pay rates for physical therapists.[1] On January 5, 2021, a federal grand jury in Texas indicted a health care company and an affiliate that allegedly agreed with competitors not to solicit senior-level employees.[2] These indictments—and particularly the SCA indictment—mark an important milestone in the DOJ's declared war on naked no-poach agreements and may serve as a model for future prosecutions.

Recent History of DOJ Enforcement and Related Guidance

In 2016, the DOJ and the FTC announced a new focus on naked no-poach and other illegal employment agreements and issued extensive guidance to HR professionals and managers.[3] The enforcement agencies warned that such no-poach agreements are illegal per se and could subject perpetrators to criminal prosecution.[4] The DOJ demonstrated its commitment to an aggressive enforcement policy by pursuing a civil action against two rail industry equipment suppliers that had no-poach agreements in place for over seven years. In doing so, the DOJ declined to pursue the case criminally in part because the agreements had terminated prior to 2016.[5]

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[1] Indictment, *United States v. Jindal*, No. 4:20-cr-358 (E.D. Tex. Dec. 9, 2020).

[2] Indictment, *United States v. Surgical Care Affiliates, LLC*, No. 21-cr-0011-L (N.D. Tex. Jan. 5, 2021).

[3] United States Dep't of Justice & Fed. Trade Comm'n, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016) ("HR Guidance"), available at https://www.justice.gov/atr/file/903511/download.

[4] *Id*. ("Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws….Depending on the facts of the case, the DOJ could bring a criminal prosecution against individuals, the company, or both.").

[5] See Proposed Final Judgment and Competitive Impact Statement, *United States v. Knorr-Bremse* AG, 83 Fed. Reg. 16382 (D.D.C. Apr. 16, 2018).

More recently, in April 2020, the DOJ and FTC issued a Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets (the "COVID-19 Statement").[6] Consistent with prior statements, the COVID-19 Statement warned that the DOJ and FTC were "on alert for employers, staffing companies (including medical travel and locum agencies), and recruiters, among others, who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked."[7] The DOJ again threatened to "criminally prosecute companies and individuals who enter into naked wage-fixing and no-poach agreements."[8]

The Jindal and SCA Indictments

The December indictment of Jindal was the first criminal indictment returned. It alleged a straightforward conspiracy to agree on pay rates, effected through text messages. The January indictment of SCA, alleges that by agreeing with competitors to not actively solicit senior-level employees, defendant Surgical Care Affiliates, LLC ("SCA") and its co-conspirators engaged in a "per se unlawful, and thus unreasonable, restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act."[9] The indictment relies on several specific communications that purportedly demonstrate a naked no-poach agreement. For example, a senior human resources employee at a competitor company instructed a recruiter "Please do not schedule a call w/[candidate], thanks. She would have had to apply for the job first. We cannot reach out to SCA folks. Take any SCA folks off the list."[10] Employees of a competing company also discussed whether to interview a candidate employed by SCA in light of the "verbal agreement not to poach their folks."[11]

If convicted, the defendants face criminal monetary penalties totaling $100 million or more, and it faces the prospect of millions more in damages to private parties in follow-on class action lawsuits. The first of these was filed on January 20, 2021 in federal court in Illinois.[12]

Key Takeaways

Corporate and human resources counsel sometimes consider "active" no-hire agreements that entirely bar the employment of an individual to carry more antitrust risk than "passive" agreements that permit a hire if the individual applies for a job. The SCA indictment in particular should serve as a serious reminder to HR departments that passive non-solicitations may be no less risky than active ones.

The indictment alleges that the parties entered into a "naked" no-poach agreement, an important distinction from a non-solicitation agreement that may be ancillary to a broader business arrangement. Often, non-solicitation agreements can facilitate a cooperative agreement that promotes competition. The government should not and will not proceed criminally against legitimately ancillary agreements.

All of the Jindal alleged conduct occurred in 2017, but the SCA indictment alleges that SCA's non-solicitation agreements with competitor companies were entered into in 2010. Only two of the specific non-solicitation allegations came after the DOJ and FTC's 2016 guidance. Although the alleged SCA no-poach agreements "continu[ed] until at least as late as

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[6] United States Dep't of Justice & Fed. Trade Comm'n, JOINT ANTITRUST STATEMENT REGARDING COVID-19 AND COMPETITION IN LABOR MARKETS ("COVID-19 Statement"), available at https://www.justice.gov/opa/press-release/file/1268506/download

[7] *Id*.

[8] *Id*.

[9] Indictment, *supra* note 1.

[10] *Id*.

[11] *Id*.

[12] *Roe v. Surgical Care Affiliates, LLC et al.*, Civ. Action No. 21-cv-305 (N.D. Ill. Jan. 19, 2021).

October 2017,"[13] most of the alleged prohibited conspiratorial conduct occurred before the guidance. Both indictments confirm that, at least for now, the DOJ is prioritizing cases where the no-poach conduct began or continued after 2016.

Finally, until Biden Administration Antitrust Division leadership is nominated and confirmed, it will not be entirely clear whether the DOJ will continue its strong push on this issue, but odds are that it will. The initiative began prior to the Trump Administration, with the 2016 HR Guidance and even earlier civil actions against Silicon Valley no-poach agreements. Moreover, the HR Guidance was a joint effort between the DOJ and the FTC, and condemnation of no-poach agreements is bipartisan. Likewise, with the most significant actions coming in the transportation and health care sectors, there has been no focus on a specific industry. The Biden DOJ will likely continue and build on this initiative in the coming months.

Suggested Employer Action

Employers should review their practices and ensure compliance measures have been implemented in order to avoid criminal liability. Companies should consider:

- Updating or adopting company-wide policies to curb unlawful conduct from occurring. Ensure that all antitrust training materials explicitly ban all employees from engaging in naked no-poach, non-solicitation, non-recruitment, wage fixing or similarly restrictive agreements or discussions with a competitor for employee services.

- Training management and HR professionals to address issues that may arise in the context of recruitment, hiring and wage fixing. Consider training that enables employees to identify and decline invitations to collude.

- Conducting an internal audit, including interviews of Human Resources and senior management, to determine whether there are any existing potential violations or communications suggesting possibly illegal agreements. Not all non-solicitation agreements are unreasonable or illegal; DOJ's enforcement focus has been on "naked" agreements that are not ancillary to a legitimate business arrangement. A non-solicitation agreement may well be justified, depending on the circumstances.

- If an audit reveals the existence of an agreement that may entail risk, engage antitrust counsel immediately to assess and mitigate the risk, and to help you determine a path forward.

If you have any questions regarding the topics discussed in this article, please contact **Brian K. McCalmon** at +1 (202) 312 3334, **Aleksandra Rybicki** at +1 (202) 312 3336, or any Vedder Price attorney with whom you have worked.

[13] Indictment, *supra* note 1.