DEPARTMENT OF JUSTICE BRINGS FIRST-EVER CRIMINAL CHARGES FOR ALLEGED ANTICOMPETITIVE CONDUCT IN LABOR MARKETS

Date: 26 January 2021

U.S. Antitrust, Competition, and Trade Regulation Alert

By: Michael E. Martinez, Lauren Norris Donahue, David C. Rybicki, Brian J. Smith

More than four years after first announcing its intent to criminally prosecute employers and individuals who enter into naked wage-fixing or no-poaching agreements with other employers,[1] the Department of Justice Antitrust Division (Antitrust Division) recently brought its first-ever criminal charges—in two different cases—for alleged anticompetitive conduct in labor markets. With these two criminal actions, it is clear that DOJ's public promises to prosecute anticompetitive conduct affecting U.S. labor markets were not just empty threats. Such charges highlight the criminal risks now associated with agreements between labor market competitors related to hiring, wages, and other terms of employment. Below we:

- Summarize the Antitrust Division's recent criminal indictments
- Discuss the effect of the antitrust laws on employment markets and the penalties for violating the antitrust laws.
- Provide practical guidance for all companies that compete for employees to help avoid running afoul of the antitrust laws.

ANTITRUST DIVISION'S RECENT CRIMINAL INDICTMENTS

First, in December, a grand jury in the Eastern District of Texas returned a criminal indictment against Neeraj Jindal, the former owner of a health care staffing company, for allegedly participating in a conspiracy to lower wages paid to physical therapists and their assistants (PTs and PTAs) in the Dallas and Fort Worth metropolitan area.[2] According to the indictment, Jindal's company competed with other therapist staffing companies "to contract with or employ" physical therapists and their assistants, who provide services through home health care agencies.

The government charged Jindal with forming and engaging in a conspiracy with other therapist staffing companies to lower the pay rates of PTs and PTAs, by allegedly sharing nonpublic rates paid to PTs and PTAs, and then allegedly agreeing to and implementing decreases in rates paid to PTs and PTAs, who were thus allegedly paid less pursuant to these "collusive and noncompetitive rates." In announcing the indictment, the Antitrust Division noted that these "charges . . . are an important step in rooting out and deterring employer collusion that cheats American workers—especially health care workers—of free market opportunities and compensation."[3]

In the second action, this month, a grand jury in the Northern District of Texas returned a criminal indictment against Surgical Care Affiliates, LLC—an owner and operator of outpatient medical care facilities—for allegedly

participating in a conspiracy with other outpatient medical care companies to “not solicit each other's senior-level employees” across the United States.[4] According to the indictment, the companies allegedly agreed not to “poach” each other's higher-ranking employees, and instructed “executives, employees, and recruiters” to monitor and engage in employee recruitment accordingly. Describing the alleged conspiracy as an unlawful “employee allocation agreement,” DOJ stated that these “charges demonstrate the Antitrust Division's continued commitment to criminally prosecute collusion in America's labor markets” and promised “that companies who illegally deprive employees of competitive opportunities are not immune from our antitrust laws.”[5]

THE EFFECT OF THE ANTITRUST LAWS ON THE EMPLOYMENT MARKET

The purpose of the antitrust laws is to promote a competitive marketplace. A competitive marketplace among employers “helps actual and potential employees through higher wages, better benefits, or other terms of employment.”[6] DOJ has taken the position that firms that compete to hire or retain employees can be considered competitors in the employment marketplace, even if those firms do not compete in the same product or service market. Employers may violate the antitrust laws when they agree not to compete for employees.[7] Some examples of illegal conduct provided by the Antitrust Division include:

- An agreement “with an individual at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements).”[8]
- An agreement “with an individual at another company to refuse to solicit or hire that other company's employees (so-called 'no poaching' agreements).”[9]

An agreement need not be formal or in writing to violate the antitrust laws—any kind of informal or “gentlemen's agreement” or other tacit or implied understanding concerning employee compensation or recruiting is similarly prohibited. In this regard, unlawful arrangements may be inferred from circumstantial evidence. For example, exchanges of competitively sensitive information related to terms of employment or recruitment strategies among competitors could be used to infer an agreement.

VIOLATIONS OF THE ANTITRUST LAWS CAN RESULT IN SEVERE PENALTIES

Violations of the antitrust laws can result in serious consequences for employers and any individual directly or indirectly involved in an illegal agreement. Such consequences include:

- Criminal prosecution under felony charges for both the corporation and culpable individuals (i.e., internal management, human resources personnel, or third parties). Corporations found guilty of criminal violations of the antitrust laws face significant fines (up to US$100 million), while individuals may be subject to imprisonment (up to 10 years) and significant fines (up to US$1 million).
- Civil enforcement actions by the agencies that can result in broad-ranging injunctions governing future conduct.
- Private, civil actions by employees or third parties injured by the violation. Such lawsuits can be extremely costly to defend, both in terms of monetary costs and business disruption, including lost time of officers and employees, and can result in treble damages (three times the losses suffered by the complaining party) and payment of the plaintiff's attorneys' fees.

PRACTICAL GUIDANCE

All companies that compete for employees—including nonprofits, universities, and other entities that typically view themselves as having little exposure to violations of antitrust law—should take note of DOJ's current focus and approach to analyzing agreements among competitors in the labor market. It was under the Obama administration that the DOJ first announced its policy to begin criminally prosecuting anticompetitive agreements in the labor market, and we fully expect this policy to continue under the Biden administration. Given the aforementioned serious consequences and costs—including those of investigations of potential violations—of antitrust violations, all companies should consider the following practical guidance to mitigate their antitrust risk and potential exposure to DOJ scrutiny:

1. If engaging in agreements or communications with competitors regarding wages, salaries, benefits, terms of employment, or recruitment strategies, make sure that such agreements or communications serve a legitimate purpose. If you believe such an agreement serves a legitimate business purpose (such as, e.g., a joint venture, a franchise relationship, or a noncompete clause ancillary to an employment agreement), antitrust counsel should be consulted to ensure the defensibility of the agreement.
2. Proactively review any agreements with other employers that are currently in place related to employment issues to ensure legality. Be aware that even “routine” agreements, such as a settlement resolving a restrictive covenant dispute with another employer, may implicate antitrust laws. If any agreements raise concern, consulting antitrust counsel immediately may assist in limiting a company's exposure.
3. If sharing competitively sensitive information regarding wages, salaries, benefits, terms of employment, or recruitment strategies with competitors, ensure that such exchanges serve a legitimate purpose and include appropriate safeguards around such exchanges. In certain circumstances, for example, when companies are evaluating a merger, acquisition, or joint venture proposal, the sharing of limited competitively sensitive information may be lawful provided it is reasonably necessary to evaluate the proposed transaction and appropriate precautions are taken. Antitrust counsel should be consulted before exchanging this type of information, however, to ensure defensibility.
4. Review the company's compliance programs to ensure that proper policies and procedures are in place and that management and human resource professionals are appropriately trained to avoid inappropriate discussions or agreements with other companies seeking to hire the same employees. Traditionally, antitrust issues have not been the concern of hiring and recruiting managers; however, due to the current DOJ guidance, employers in competitive labor markets could be well served to consider implementing training to ensure familiarity with the relevant antitrust regulations applicable to the recruiting, hiring, and compensation of employees.

As evidenced above, in certain circumstances, competing employers might have legitimate purposes for sharing competitively sensitive information or entering into employment-related agreements. If you believe that you might fall within this category, first document the legitimate business justification for your policy or practice and then seek the opinion and guidance of antitrust counsel.

CONCLUSION

The legal landscape for restrictions on employee hiring and mobility continues to change, in some cases dramatically. DOJ views the use of naked wage-fixing and no-poach agreements as per se illegal, and it may

initiate criminal charges against companies or individuals who engage in such practices. Beyond that, companies face growing uncertainty regarding the boundaries of practices and contractual provisions that, for many, may be routine. We advise companies to take a fresh look at their employment practices and contractual forms to ensure they are knowingly aligning their business practices and risks.

K&L Gates antitrust practice members defend individuals and companies in a wide variety of criminal cases and civil litigation in the United States—including against allegations of anticompetitive conduct in labor markets—and also provide corporate counseling and training on how to remain compliant with U.S. antitrust laws.

FOOTNOTES

[1] Lauren Norris Donahue, Brian J. Smith & Gina A. Johnson, Assistant Attorney General Announces that DOJ Antitrust Division Is Building Criminal Cases Against Companies for Anti-Poaching Agreements, K&L GATES HUB (Jan. 31, 2018).

[2] Indictment, United States v. Jindal, Case No. 20-cr-358 (E.D. Tex. Dec. 9, 2020).

[3] Press Release, Dep't of Just. Antitrust Div., Former Owner of Health Care Staffing Company Indicted for Wage Fixing (Dec. 10, 2020).

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

[5] Press Release, U.S. Dep't of Just. Antitrust Div., Health Care Company Indicted for Labor Market Collusion (Jan. 7, 2021).

[6] U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 20, 2016).

[7] It should be noted that this application of the antitrust laws applies to agreements between separate economic entities—in this case, separate companies who are competing with each other to hire employees. It does not apply to what are commonly known as “noncompete agreements” between an employer and the employees it hires. Those noncompete agreements are subject to various state laws, and the conditions under which they may be found to be illegal or at least unenforceable are very different than how federal antitrust law assesses agreements between competing employers.

[8] U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 20, 2016).

[9] *Id*.

KEY CONTACTS

MICHAEL E. MARTINEZ
PARTNER

CHICAGO
+1.312.807.4404
MICHAEL.MARTINEZ@KLGATES.COM

LAUREN NORRIS DONAHUE
PARTNER

CHICAGO
+1.312.807.4218
LAUREN.DONAHUE@KLGATES.COM

DAVID C. RYBICKI
PARTNER

WASHINGTON DC
+1.202.778.9370
DAVID.RYBICKI@KLGATES.COM

BRIAN J. SMITH
PARTNER

CHICAGO
+1.312.807.4202
BRIAN.J.SMITH@KLGATES.COM