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Skadden Discusses First DOJ Criminal Challenges to Wage-Fixing and No-Poach Agreements

By Karen M. Lent, Tara Reinhart and Jessica R. Watters March 4, 2021

Comment

More than four years after the U.S. Department of Justice (DOJ) and U.S. Federal Trade Commission (FTC) jointly released the Antitrust Guidance for Human Resource Professionals in 2016 (Antitrust Guidance), the DOJ has brought its first criminal indictments for wage-fixing and no-poach agreements.

The 2016 Antitrust Guidance, released in the last few months of the Obama Administration, warned human resource professionals that agreements between competitors to set wages or to refrain from soliciting each other’s employees — so-called no-poach agreements — could result in criminal prosecution under U.S. antitrust laws. The guidance represented a considerable expansion of the agencies’ enforcement policy in labor markets, as the DOJ had previously only prosecuted such agreements civilly. The Antitrust Guidance advised that the agencies would treat such “naked” agreements, which are not reasonably necessary for a broader legitimate collaboration between the employers, as per se violations of Section 1 of the Sherman Act, which may result in criminal prosecution and fines for both the offending company and the individual parties involved. The DOJ explained that companies are considered horizontal competitors when they compete for labor, such as when they compete to hire employees, and therefore no-poach agreements “eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers.”¹ Nonetheless, the agencies recognized that legitimate joint ventures are not considered per se illegal, and therefore no-poach agreements that are ancillary to such ventures could themselves be procompetitive.

In the four years since the agencies issued the Antitrust Guidance, neither the DOJ nor the FTC had brought a criminal case. Instead, both the DOJ and the FTC have brought civil enforcement actions involving wage-fixing and no-poach agreements,² intervened in private enforcement actions,³ and initiated several criminal investigations into alleged wage-fixing and no-poaching agreements. In April 2020, the agencies issued a joint statement reaffirming the importance of competition for American workers. The statement warned employers, staffing companies, recruiters and others that, particularly in light of the COVID-19 pandemic, the antitrust agencies would be “on alert” for “agreements to suppress or eliminate competition with respect to compensation, benefits, hours worked, and other terms of employment, as well as the hiring, soliciting, recruiting, or retention of workers.”⁴ The agencies also reminded employers that enforcement officials are prepared to criminally prosecute naked wage-fixing and no-poach agreements. Less than a year later, the DOJ brought both its first wage-fixing indictment and its first “no-poach” indictment.

Wage-Fixing Agreements: *United States v. Neeraj Jindal*, Case No. 4:20-CR-358 (E.D. Tex. Dec. 09, 2020)

On December 9, 2020, the DOJ obtained an indictment in the U.S. District Court for the Eastern District of Texas in *United States v. Neeraj Jindal*, Case No. 4:20-CR-358 (E.D. Tex. Dec. 09, 2020). The indictment charges Neeraj Jindal, the former owner of a physical therapist staffing company, with allegedly violating Section 1 of the Sherman Act by conspiring with a competing physical therapist staffing company and others to fix wages for physical therapists and physical therapist assistants in the Dallas-Fort Worth metropolitan area.⁵ A year earlier, the FTC had filed a complaint against Neeraj Jindal, as owner of both Fit 4 Life Therapy, LLC, d/b/a Integrity Home Therapy (Integrity), and Your Therapy Source, LLC, a Texas-based LLC; and Sheri Yarbray, CEO of Your Therapy Source, for conspiring to lower wages to their contracted therapists and inviting four other competitors to collude on those rates.⁶ The DOJ indictment does not clearly indicate whether the charges against Neeraj Jindal also relate to his ownership of Fit 4 Life Therapy, LLC, but the indictment does include a count of obstruction of proceedings before the FTC.

In its December 9, 2020, indictment, the DOJ alleges that over a six-month period from March to August 2017, Jindal exchanged nonpublic information with his co-conspirators about the rates paid to physical therapists and physical therapist assistants. According to the indictment, Jindal and his co-conspirators, among other things, provided and received nonpublic rates paid to physical therapists and physical therapist assistants, communicated about

rate decreases, discussed and agreed to decrease rates paid to physical therapists and physical therapist assistants, implemented rate decreases in accordance with the agreement reached, and paid physical therapists and physical therapist assistants at collusive and noncompetitive rates. In support of these allegations, the DOJ has identified numerous text messages between Jindal and his co-conspirators concerning the alleged conspiracy.

No-Poach Agreements: *U.S. vs. Surgical Care Affiliates, LLC et al.*, Case No. 3:21-CR-00011 (N.D. Tex. Jan. 05, 2021)

One month later, on January 5, 2021, the DOJ filed a two-count criminal indictment in the U.S. District Court for the Northern District of Texas in *U.S. vs. Surgical Care Affiliates, LLC et al.*, Case No. 3:21-CR-00011.⁷ The indictment alleges that Surgical Care Affiliates (SCA), which owns and operates outpatient medical care centers across the country, entered into and engaged in two separate bilateral conspiracies with other health care companies not to solicit senior-level employees, thereby suppressing competition for the services of those employees. In the first count, the DOJ alleges that beginning at least as early as May 2010 and continuing to at least as late as October 2017, SCA and another Texas-based company conspired to suppress competition between them by agreeing not to solicit each other's senior-level employees. In the second count, the DOJ alleges that, beginning at least as early as February 2012 and continuing until at least as late as July 2017, SCA conspired with a Colorado-based company to allocate senior-level employees through a similar nonsolicitation agreement. The indictment also identifies the CEOs of all three companies and alleges that "various companies and individuals, not made defendants in this Court, participated as co-conspirators in the offenses charged."⁸

The DOJ also alleges various ways that SCA enforced its no-poach agreements, such as by instructing recruiters not to recruit senior-level employees from the Texas-based and Colorado-based companies, by requiring senior-level employee applicants to notify their bosses when they were seeking other employment, by monitoring compliance with the no-poach agreements, and by refraining from soliciting each other's senior-level employees. In support of its indictment, the DOJ has provided emails between SCA and the Texas-based company, and SCA and the Colorado-based company, acknowledging and admitting to the existence of the agreements.

Conclusion

The separate indictments of Mr. Jindal and Surgical Care Affiliates will be the first test of the DOJ's policy to criminally prosecute wage-fixing and no-poach agreements, but they are unlikely to be the last. We expect investigations of these practices to increase in the coming years, as the Biden administration has stated its intention to "[e]liminate noncompete clauses and no-poach agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers."⁹ The indictments serve as a timely reminder to employers that the DOJ and the FTC will not hesitate to challenge unlawful wage-fixing and no-poach agreements, and demonstrate the Antitrust Division's "continued commitment to criminally prosecute collusion in America's labor markets."¹⁰ Notably, neither indictment alleges illegal conduct that continued past August 2017 — less than a year after the agencies issued their Antitrust Guidance to human resources departments. The DOJ's pursuit of criminal charges for conduct that ended soon after the October 2016 guidance suggests a willingness to aggressively prosecute even short-lived no-poach agreements. While the outcome of these two indictments remains to be seen, employers should take seriously both the criminal and civil consequences of agreements that fix wages or otherwise limit competition in the labor market, and consult with employment and antitrust counsel before discussing such issues with competitors.

ENDNOTES

1 DOJ Press Release, "No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute 'No-Poach' and Wage-Fixing Agreements," April 10, 2018.

2 See, e.g., *United States vs. Knorr-Bremse AG and Westinghouse Air Brakes Technology*, Case No. 18-00747 (D.D.C. Apr. 03, 2018). In 2018, the DOJ initiated a well-publicized investigation into Knorr-Bremse AG and Westinghouse Air Brakes Technology for alleged "pervasive no-poach agreements that spanned multiple business units and jurisdictions." However, the DOJ used its discretion to treat the violations as civil violations because the companies formed and terminated the naked agreements before the 2016 guidance was issued. Ultimately, the parties settled and agreed to use rigorous notification and compliance measures to preclude their entry into these types of anticompetitive agreements in the future.

3 See e.g., Brief of Amicus Curiae United States of America In Support of Neither Party, *Arrington v. Burger King Worldwide, Inc.*, No. 20-13561 (11th Cir. Dec. 7, 2020) (Amicus Br.).

4 FTC Press Release, "Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets: Antitrust Enforcers Closely Monitoring Employer Coordination to Disadvantage Workers," April 2020.

5 See *United States v. Neeraj Jindal*, Case No. 4:20-CR-358 (E.D. Tex. Dec. 09, 2020).

6 See *In the Matter of Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray*, Docket No. C-4689 (Oct. 26, 2019).

7 See *U.S. vs. Surgical Care Affiliates, LLC et al.*, Case No. 3:21-CR-00011 (N.D. Tex. Jan. 05, 2021).

8 See *U.S. District Court for the Northern District of Texas in U.S. vs. Surgical Care Affiliates, LLC et al.*, Case No. 3:21-CR-00011 (N.D. Tex. Jan. 05, 2021).

9 President-elect Joe Biden, “The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions.”

10 DOJ Press Release, “Health Care Company Indicted for Labor Market Collusion,” Jan. 7, 2021.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “DOJ Brings First Criminal Challenges to Wage-Fixing and No-Poach Agreements,” dated February 18, 2021, and available [here](#).

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