GODFREY & KAHN S.C.

January 2021

DOJ brings first criminal antitrust charges for wage-fixing and no-poach agreement between employers

Allison W. Reimann
608.284.2625
areimann@gklaw.com

Brian C. Spahn
414.287.9314
bspahn@gklaw.com

Nina G. Beck
414.287.9633
nbeck@gklaw.com

Paul J. Covaleski
608.284.2619
pcovaleski@gklaw.com

Over four years after warning human resource professionals that agreements between competitors to fix wages or restrict solicitation of each other's employees (known as "no-poach" agreements) could result in criminal prosecution under antitrust laws, the U.S. Department of Justice Antitrust Division (DOJ) recently issued its first indictment for a no-poach agreement. This indictment comes on the heels of the DOJ's first indictment for wage-fixing, obtained in December.

The DOJ's 2016 Guidance for Human Resources Professionals delivered a stern reminder of the antitrust risks associated with anti-competitive agreements affecting labor markets, specifically wage-fixing and no-poach agreements between competitors that are not reasonably necessary to a broader legitimate collaboration (so-called "naked" agreements to restrain competition). The DOJ warned that it intended to proceed criminally against employers that entered into agreements of this type, explaining that "[t]hese types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct." The agency, however, recognized that non-solicitation and other agreements impacting employees may be appropriate when necessary to a larger collaboration between employers, such as a joint venture for shared facilities.

The Guidance arose from a series of antitrust cases against Silicon Valley tech giants. In 2010, the DOJ sued Adobe, Apple, Google, Intel and Pixar over alleged agreements not to "cold call" each other's highly skilled employees. This, according to the DOJ, unlawfully restrained competition in the labor market. The parties entered into a settlement with the DOJ in 2011 that enjoined them from entering into agreements not to solicit, cold call, recruit or otherwise compete for employees absent specified legitimate justifications. That same year, employees of these and other companies brought a class action lawsuit on behalf of more than 64,000 employees, alleging that the companies had conspired to depress wages by refraining from poaching one another's highly skilled employees, resulting in civil settlements in the tens to hundreds of millions of dollars.

Despite the strong warning to employers in 2016, years passed without the DOJ bringing criminal charges based on wage-fixing or no-poach agreements. That changed on Dec. 9, 2020, when the DOJ initiated its first wage-fixing prosecution and then again on Jan. 5, 2021, when it obtained its first indictment based on a no-poach agreement.

The December wage-fixing indictment was obtained against the president of a therapist staffing company, which contracted with individual physical therapists to provide in-home physical therapy (PT) services to home health agencies. The defendant allegedly conspired with other, unidentified PT staffing companies to obtain non-public rates paid to PTs. The conspiring companies allegedly

used that information to enter into agreements to decrease the contracted rates they paid to PTs, and "implemented rate decreases in accordance with the agreement reached." The indictment cites a number of text messages in which the defendant invited other therapist staffing companies to "collectively" lower therapists' wages.

The January indictment alleges that outpatient medical facility Surgical Care Affiliates and its successor Scai (collectively, SCA) entered into "gentlemen's agreements" with at least two different companies not to poach each other's senior-level employees. The indictment cites numerous emails between human resource representatives and executives of SCA and the other two companies (identified only as Company A and Company B) specifically acknowledging the agreement and discussing several candidates who should not be approached or recruited because of the agreement.

That indictment alleges that the no-poach agreement was effectuated and enforced in several ways. SCA contacted recruiting agencies and instructed them not to solicit or contact senior-level employees of Companies A and B. SCA and the other companies also "monitored compliance ... by requiring senior-level employees ... who applied to the other company to notify their current employer that they were seeking other employment in order for their applications to be considered." Finally, the companies agreed to, and did, alert each other when one of their employees applied for or inquired about employment at the other.

The conduct alleged in the recent indictments involve flagrant agreements to fix wages and not solicit competitors' employees. In both cases, the DOJ obtained communications acknowledging the agreement and illustrating that the conspirators were abiding by it. Hence, the indictments confirm federal antitrust enforcers' willingness, in the right case, to pursue criminal charges for anti-competitive agreements impacting labor markets.

While it remains to be seen whether these indictments are outliers — the result of particularly egregious conduct — employers should take seriously both the criminal and civil consequences of agreements that limit competition for employees, fix wages or otherwise unreasonably restrain competition in labor markets. Companies also should consult with antitrust and employment counsel before reaching agreements with competitors that may impact wages, benefits, hiring, retention or working conditions of employees.