DOJ CONTINUES CRIMINAL LABOR ANTITRUST ENFORCEMENT DESPITE RECENT PROSECUTION SETBACKS

With yet another criminal wage-fixing indictment filed this week, the Antitrust Division of the Department of Justice ("DOJ") signaled its continued commitment to prosecuting anticompetitive conduct affecting the U.S. labor markets, including within the health care industry. On March 16, a federal grand jury returned an indictment that charges a health care staffing executive with conspiring to fix the wages of nurses, a per se violation of the Sherman Act. This indictment is only the most recent in a string of criminal antitrust cases brought by the DOJ against health care companies for wage-fixing and no-poach agreements. Though many of these cases, including a recent case against four operators of home health agencies, have ended in acquittals, the DOJ does not appear to be letting up in their push to protect workers through punishing certain types of labor agreements used frequently by health care companies.

BACKGROUND

In 2016, the DOJ and Federal Trade Commission ("FTC") published joint guidance for Human Resource professionals, advising them on the risks of anticompetitive agreements in labor markets. That guidance specifically states that naked wage-fixing and no-poach agreements are per se illegal and can lead to criminal charges, unlike agreements tied to a legitimate collaboration or joint venture between employers, which are generally accepted so long as the terms are reasonable. This guidance defines wage-fixing agreements as agreeing with individual(s) at another company about employee salaries or other terms of compensation and no-poach agreements as agreeing with individual(s) at another company to refuse to solicit or hire that other company's employees.

A few years later, in 2020, the DOJ brought their first criminal case for either of these two types of labor agreements, specifically, a criminal wage-fixing case that was followed in short succession by multiple no-poach cases. All of the DOJ's initial cases were brought against health care companies who had made agreements that limited the free flow of labor in the various specific markets. The first two criminal cases brought by the DOJ ended in acquittals, though both served as a warning sign to the health care industry and other sectors in the economy that entering into wage-fixing or no-poach style agreements was not without risk. Importantly, in both cases the judge denied the defendant's motions to dismiss, implicitly agreeing with the DOJ that no-poach and wage-fixing agreements could be *per se* violations of the antitrust laws (e.g., violations regardless of actual damages or harm to competition for labor).

Subsequently, the DOJ continued to file criminal charges against companies and their executives for wage-fixing and no-poach agreements, particularly in the health care space. In the DOJ's first successful prosecution in a criminal enforcement of a health care labor market antitrust violation, a health care staffing company pled guilty to conspiring with a competitor to allocate nurses and to fix their wages in *U.S. v. VDA OC, LLC*. In *VDA OC*, a health care staffing company admitted to entering into an agreement with a competitor where the two agreed not to recruit nurses from one another and not to raise nurse wages.

DOJ UNDETERRED BY ACQUITTALS, CONTINUES TO BRING CRIMINAL CHARGES

Despite its success in *VDA OC*, subsequent prosecutions have ended in acquittals, with another acquittal recently handed down on March 22. In *U.S. v. Manahe et al.*, a Maine federal jury acquitted four operators of home health agencies, finding they did not enter into an agreement to set wages for caretakers in the early stages of the pandemic. Though there was a written agreement between the parties that memorialized an agreement developed after several meetings between the operators, as well as evidence of messages between the parties that discussed setting wage levels, the jury determined the agreement was never signed and prosecutors failed to prove that any agreement was reached between the parties.

The loss in *Manahe* comes just days after the DOJ's latest indictment of a health care staffing executive charged with conspiring to fix the wages of nurses in Las Vegas and days before another criminal no-poach case is set to begin. On March 16, the DOJ announced in a press release that a federal grand jury in Las Vegas, Nevada returned an indictment against Eduardo Lopez, a home health agency executive. The indictment alleges the executive held positions at three separate home health agencies over the course of a three-year period, with responsibilities for recruitment, hiring and retention of nurses at each. He is accused of agreeing with other home health executives, during meetings and through other communications, of agreeing to fix the wages of nurses and thus reducing competition between the home

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health agencies for nursing services.

Additionally, a trial is currently ongoing in *U.S. v. Patel*, with the DOJ pursuing a criminal conviction for an alleged no-poach agreement between employers. *Patel* relates to an alleged agreement between aerospace engineering companies to refrain from hiring employees of the co-conspirators. The alleged conspiracy potentially affected thousands of workers in the aerospace engineering sector and represents the DOJ's next step in its criminal enforcement of the antitrust laws in labor markets.

PRACTICAL TAKEAWAYS

The DOJ appears to remain focused on protecting competition within labor markets despite the frequency of acquittals in their criminal wage-fixing cases. Given this focus, further investigations, indictments and trials seem likely. This is particularly true in the health care sector, where the DOJ has demonstrated a specific interest and focus in recent years. As a result, we expect additional criminal antitrust cases against health care companies for labor-related agreements are still to come. Companies are encouraged to:

- Conduct internal audits or investigations to evaluate risk and exposure from communications and agreements that may exist with a competitor—it is better to self-report into the DOJ's leniency program than become the subject of a DOJ investigation—and seek outside assistance if necessary.
- Update and review antitrust policies and compliance trainings and remain diligent with employee education.
- Educate employees regarding what communications are and are not permissible, including the potentially significant negative consequences for what may seem like an innocent exchange.
- Avoid agreeing, formally or informally, or discussing the terms of employee compensation or willingness to hire from competitors.

If you have any questions or would like additional information about this topic, please contact us as listed below:

- Nathan Chubb at (202) 780-2991 or nchubb@hallrender.com;
- Dana Stutzman at (317) 977-1425 or dstutzman@hallrender.com;
- Hannah Clarke at (317) 429-3615 or hclarke@hallrender.com; or
- Your primary Hall Render contact.

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