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A New Administration Brings Continued Scrutiny to No-Poach Agreements

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In 2019 we wrote about the intersection of non-compete and antitrust laws, which is most pronounced in the area of "wage-fixing" and "no-poach" agreements between competitors. In 2016, during the final months of the Obama administration, the U.S. Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) issued joint "Antitrust Guidance for Human Resources Professionals" asserting the illegality of, and potential penalties for, entering into such agreements to (1) fix the salary or other terms of compensation, whether at a specific level or within a range, for employees (wage fixing agreements); or (2) preclude companies from hiring or soliciting each other's employees (no poaching agreements).

Prior to the issuance of the Antitrust Guidance, the agencies limited themselves to civil enforcement actions, mostly in the healthcare, entertainment, and technology industries. While those enforcement actions did not result in criminal charges – and in fact no executives were even named – the DOJ was clear in its 2016 guidance that "[g]oing forward [it] intends to proceed criminally against naked wage fixing or no-poaching agreements" and "will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other's employees." *See* Antitrust Guidance at 4. The DOJ warned that it would "bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies." *Id.*

The first such prosecutions did not come until the final days of the Trump presidency. In December of 2020 the DOJ indicted Neeraj Jindal, the former owner of Integrity Home Therapy, a physical therapy staffing company, under Section 1 of the Sherman Act (15 U.S.C. § 1) for Price Fixing and Antitrust Conspiracy.[1] The DOJ alleged that the company entered into agreements with competitors to suppress competition by agreeing to fix prices by lowering the pay rate of physical therapists.

A month later the DOJ brought a second action, this time against Surgical Care Affiliates, an operator of outpatient surgical facilities, alleging that an agreement with competitors not to poach each other's senior executives violated the same provision of the Sherman Act, this time styled as a Conspiracy in Restraint of Trade to Allocate Employees.[2] This collusion is alleged to have occurred between 2010 and 2017. As part of the alleged conspiracy, the DOJ claimed that Surgical Care Affiliates and other companies not named in the indictment had refrained from reaching out to each other's senior employees – though it appears that employees could be interviewed if they previously had informed their supervisor they were looking for a new job, and then applied for a position on their own. According to the DOJ, this was *per se* unlawful. Surgical Care filed a motion to dismiss that was joined by the U.S. Chamber of Commerce as *amicus curiae*. The DOJ filed a superseding indictment earlier this month, maintaining the *per se* illegality theory of liability.

The Biden administration seems poised to ramp up the use of criminal indictments against companies that enter into naked no-poach agreements (i.e., agreements without legitimate, legal justifications). On July 14, 2021, the DOJ brought charges against Davita Inc., another healthcare company, and its CEO Kent Thiry for allegedly participating in the Surgical Care Affiliates conspiracy.[3] But this is just part of the administration's push, which was announced a few days prior in an Executive Order on Promoting Competition in the American Economy. The Executive Order signals a "Whole-of-Government Competition Policy" that will use various federal laws, including the Sherman Act, to promote competition and (where necessary) break up monopolies. The Executive Order directs the Attorney General and the Chair of the FTC to

consider revising the 2016 antitrust guidance to better protect workers from wage collusion. As explained in the Fact Sheet accompanying the Executive Order, the Executive Order encourages "the FTC and DOJ to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another" and further encourages the "FTC to ban or limit non-compete agreements."[4]

It remains to be seen how far such guidance, and prosecutions, will go – but employers should navigate these new waters carefully. It is now more important than ever that employers, especially those in highly concentrated markets with fewer competing businesses, have a clear understanding of the boundary between legitimate restrictive covenants and anti-competitive behavior.

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[1] *See U.S. v. Jindal*, 20-cr-00358-ALM-KPJ (E.D. Tex. 2020).

[2] *See U.S. v. Surgical Care Affiliates, LLC, et al.*, 21-cr-00011-L (N.D. Tex. 2021).

[3] *See U.S. v. Davita Inc. et al.*, 21-cr-00229-RBJ (Dist. Colo 2021).

[4] The Executive Order itself directs the FTC to consider using its rulemaking authority to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." The non-competition provisions of the Executive Order are summarized in another advisory.

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