Criminal Enforcement of Hiring Conduct: No-Poach and Wage Fixing Indictments

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Since December 2020, the U.S. Department of Justice, Antitrust Division (DOJ) has demonstrated its commitment to criminal enforcement against anticompetitive conduct in the labor market by indicting four cases. There have been reports of additional criminal investigations of hiring practices.[1]

Although all four cases arise from investigations initiated during the Trump Administration (and two were indicted prior to the end of the Trump Administration), there is no reason to believe that enforcement against labor market collusion will take a step back during the Biden Administration. Indeed, the impetus for those prosecutions began during the Obama Administration and can be expected to be carried forward vigorously in the new Administration.

2016 DOJ/FTC Guidance

Prior to 2016, the DOJ had not pursued as criminal antitrust violations conduct involving competitor agreements not to solicit or hire employees. In enforcement actions brought in the early part of the Obama Administration, the DOJ had pursued civil remedies against companies found to have reached agreements not to solicit employees from one another. *See, e.g.,* Complaint, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629-RBW (D.D.C. Sept. 24, 2010). It is notable, however, that the DOJ alleged that such agreements were a *per se* violation of the Sherman Act, but the *per se* categorization had not been adjudicated given that consent resolutions were reached by the parties. *Id*. at ¶ 35.

In October 2016, the DOJ and the U.S. Federal Trade Commission (FTC) jointly issued Antitrust Guidance for Human Resource Professionals ("2016 Guidance") to alert human resource personnel of the possibility of antitrust violations if reaching agreements with competing firms regarding solicitation, hiring or compensation terms for employees.[2] In particular, the 2016 Guidance gave notice that any such agreements, if naked (that is, "separate from or not reasonably necessary to a

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[1] See, e.g., Michael Acton, *Aveanna Healthcare Drew US DOJ Grand Jury Antitrust Subpoena over Hiring Policies, Company Discloses*, MLEX (Apr. 27, 2021, 1:43 GMT), https://content.mlex.com/#/content/1288312; Khushita Vasant, *Taboola, Others in Digital Advertising Industry Targeted in US Criminal Antitrust Probe for Hiring Practices, Company Discloses*, MLEX (May 1, 2021, 00:20 GMT), https://content.mlex.com/#/content/1289711.

[2] At the time, author was the Deputy Assistant Attorney General for Criminal Enforcement and participated in the formulation of the 2016 Guidance.

larger legitimate collaboration"), would be treated as *per se* illegal and subject to criminal prosecution.

The 2016 Guidance focused on two categories of agreements:

- Agreements between competing employers about employee salaries, benefits, or other terms of compensation ("wage-fixing"); and

- Agreements between competing employers to refuse to solicit or hire from each other ("no poaching").

The 2016 Guidance declared that wage-fixing and no-poaching 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." U.S. DEP'T OF JUST. ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016).

The 2016 Guidance gave further notice that such agreements are potentially subject to criminal prosecution even if reached between companies that would not ordinarily be considered horizontal competitors for purposes of a Section 1 criminal prosecution. "From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services." *Id*. at 2.

Accordingly, any two companies, whether or not in the same line of business or industry, that are soliciting (or could solicit) the same employees are considered to be competitors for purposes of labor-related anticompetitive agreements. Companies in entirely different industries or lines of business may plausibly compete for employees with the same skillset, whether managerial, financial, or technical, and be subject to prosecution for reaching agreements to restrain or eliminate their competition for those employees.

Post-2016 Guidance Enforcement

Shortly after the 2016 Guidance was issued, the Trump Administration assumed leadership of the DOJ and the extent to which the Guidance would be implemented, if at all, was unclear. As it turned out, the Trump Administration embraced the 2016 Guidance and prioritized enforcement against anticompetitive labor-related agreements.[3]

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[3] *See, e.g.*, Matthew Perlman, *Delrahim Says Criminal No-Poach Cases are In The Works*, LAW360 (Jan. 19, 2018, 5:19 p.m.), https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works; Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Remarks at the Public Workshop on Competition in Labor Markets (Sept. 23, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition.

Although many investigations are likely to have remained confidential, civil resolutions of no-poach agreements during the early stages of the Trump Administration demonstrated the DOJ's willingness to take enforcement action. *See, e.g.*, *United States v. Knorr-Bremse AG and Westinghouse Air Brake Techs. Co*., No. 1:18-cv-00747-CKK (D.D.C. Apr. 3, 2018).[4]

It was only at the end of the Trump Administration that the first criminal cases were filed, however. This delay in bringing criminal charges likely reflects not only the length of time needed to complete a criminal investigation but also the desire to base the foundational prosecutions on wage-fixing and no-poaching agreements that either were reached after the 2016 Guidance was issued or, if initiated prior to the 2016 Guidance, continued for a significant time thereafter.

In the first labor-related criminal antitrust prosecution, indicted in December 2020, the DOJ alleged "a conspiracy to suppress competition by agreeing to fix prices by lowering the pay rates to [physical therapists] and [physical therapist assistants]" between March and August 2017. Indictment at ¶ 11, *United States v. Jindal*, No. 4:20-cr-00358-ALM-KPJ (E.D. Tex. Dec. 9, 2020). [5] Among the evidence cited in the indictment are incriminating written communications:

- *"Yes, I agree [to lower pay rates]."*
- *"[I]f we're all on the same page…[the] industry may stay stable."*
- *"I am reaching out to my counterparts about lowering…rates…what are your thoughts if we all collectively do it together?...I think we all collectively should move together."*

The second indicted labor-related case involves allegations of no-poaching. The case, which was indicted in January 2021, alleges that two affiliated providers of outpatient medical care services engaged in two bilateral conspiracies to "suppress competition between them for the services of senior level employees by agreeing not to solicit each other's senior-level employees." Indictment at ¶ 9, *United States v. Surgical Care Affiliates, LLC and Scai Holdings, LLC*, No. 3:21-cr-0011-L (N.D. Tex. Jan. 5, 2021). Unlike the *Jindal* case, which alleges a cartel that formed after the issuance of the 2016 Guidance, the *Surgical Care Affiliates* indictment alleges conduct that began several

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[4] It is worth noting for purposes of counseling clients that several investigations of no-poach agreements appear to have been initiated by DOJ after detecting the conduct during the course of merger reviews rather than through more typical means of cartel detection, such as leniency, customer complaints, and whistleblowers. *Civil Investigations Uncover Evidence of Criminal Conduct*, U.S. Dep't of Just., Office of Public Affairs, Division Update Spring 2017, https://www.justice.gov/atr/division-operations/division-update-spring-2017/civil-investigations-uncover-evidence-criminal-conduct.

[5] The indictment also alleged one count of obstruction of proceedings (18 U.S.C. § 1505) and was superseded in April 2021 to add a second defendant, who was employed by defendant Jindal. See, e.g., *United States v. Jindal and Rodgers*, No. 4:20-cr-00358-ALM-KPJ (E.D. Tex. Apr. 15, 2021).

years before the 2016 Guidance was issued but continued into 2017. *Id*. at ¶ 11. The *Surgical Care Affiliates* indictment also features incriminating written communications:

- *"[W]e reached agreement that we would not approach each other's [senior executives] proactively."*
- *"[In light of] the verbal agreement with SCA to not poach their folks"*
- *"I explained I do not do proactive recruiting into your ranks."*
- *"[SCA cannot recruit from the other company] unless candidates have been given explicit permission by their employers that they can be considered for employment with us."*

The third labor-related prosecution brought after issuance of the 2016 Guidance was indicted in March 2021 and alleges both wage-fixing and a no-poach agreement by a healthcare staffing company and its former manager. Indictment, *United States v. Hee and VDA OC, LLC, formerly Advantage on Call, LLC*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Mar. 30, 2021). The defendants allegedly agreed with a competitor not to recruit or hire nurses staffed by their respective companies at Clark County (NV) School District facilities and to refrain from raising the wages of those nurses. *Id*. at ¶ 12. Again, the indictment features written communications suggesting the existence of the agreement:

- *"Per our conversation, we will not recruit any of your active [ ] nurses." "Agreed on our end as well. I am glad we can work together through this, and assure that we will not let the field employees run our businesses moving forward."*
- *"If anyone threatens us for more money, we will tell them to kick rocks!"*
- *"Advantage On-Call and us have a deal not to poach nurses."*

The fourth case to be prosecuted based on hiring practices was incited in July 2021. It charges an outpatient medical care provider and its former chief executive officer with reaching no-poach agreements with two other healthcare providers, including Surgical Care Affiliates. Indictment, *United States v. DaVita, Inc. and Kent Thiry*, No. 21-cr-00229-RBJ (D. Col. July 14, 2021). The indictment again provides a flavor of some of the communications evidencing the agreements:

- *"I thought there was a gentlemen's agreement between us and DaVita re: poaching talent." "There is. Do you mind if I share with [Individual 1], who has most recently addressed with Kent."*
- *"You also have my commitment we discussed that I'm going to make sure everyone on my team knows to steer clear of anyone at [DaVita] and that I'll come back to you and talk before ever get anywhere near a point that could contemplate someone else."*

Despite being the first prosecutions of anticompetitive employment agreements, the evidence cited in the indictments sounds like the type of highly incriminating documentary evidence on which the DOJ has traditionally built its strongest criminal prosecutions.

Looking Ahead

There is no reason to expect that an enforcement initiative started during the Obama Administration and carried forward enthusiastically by the Trump Administration will be any less a priority for the Biden Administration. These cases complement early pro-worker/pro-jobs messaging by the new Administration. For example, in 2019, then-candidate Biden tweeted, “It’s simple: companies should have to compete for workers just like they compete for customers. We should get rid of non-compete clauses and no-poaching agreements that do nothing but suppress wages.” @JoeBiden, Twitter (Dec. 23, 2019, 7:05 p.m.), https://twitter.com/joebiden/status/1209263668736745473?lang=en.

President Biden began to make good on that campaign promise with his July 9, 2021, Executive Order on Promoting Competition in the American Economy, which, among other things, encourages the FTC to “exercise [its] statutory rulemaking authority . . . to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” That order has a willing audience. For instance, FTC Commissioner Rebecca Slaughter has previously noted, “[W]hile antitrust enforcement and competition policy initiatives will not be a panacea for the struggles facing American workers, ensuring competitive labor markets is a key ingredient of the recipe for improving economic justice for workers.”[6] And the Biden Administration could potentially score big with workers through these prosecutions—it appears that there is widespread prevalence of such agreements across a range of industries, including by companies that would not otherwise be likely candidates for criminal Section 1 enforcement.

That is not to say that the prosecutions do not have their challenges. They do – significant ones. The criminality of wage-fixing and no-poach agreements are being hotly contested. Motions have been filed to dismiss each of the indictments, raising challenging due process and substantive antitrust arguments against criminal treatment of no-poach agreements. Several *amici* briefs, including by the U.S. Chamber of Commerce and the National Association of Criminal Defense Lawyers, have been filed in support of some of the motions to dismiss.[7]

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[6] Rebecca Slaughter, Fed. Trade Comm’n Acting Chair, New Decade, New Resolve to Protect and Promote Competitive Markets for Workers, Remarks Prepared for Delivery at FTC Workshop on Non-Compete Clauses in the Workplace (Jan. 9, 2020), https://www.ftc.gov/public-statements/2020/01/remarks-commissioner-rebecca-kelly-slaughter-ftc-workshop-non-compete.

[7] Foreshadowing where these issues eventually could be headed, the cases have attracted advocates more associated with the U.S. Supreme Court than U.S. district courts: former U.S. Solicitors General Paul Clement and Seth Waxman represent Surgical Care Affiliates and DaVita, respectively, and noted Supreme Court advocate Carter Phillips signed onto the National Association of Criminal Defense Lawyers *amicus* brief.

The defendants charged in each case have argued that no court has ever held that such agreements (wage-fixing and employee non-solicitation agreements) are *per se* illegal and that subjecting such agreements to that treatment for the first time in a criminal case violates the "fair notice" requirements of procedural due process.[8] Moreover, the defendants charged with no-poaching agreements assert that non-solicitation agreements are not always anticompetitive—a point tacitly acknowledged in the 2016 Guidance—making them appropriately subject to rule-of-reason analysis and not *per se* treatment.

In opposition briefing filed to date, the DOJ identifies several cases in which it argues that courts found customer non-solicitation agreements between companies *per se* unlawful and argues that naked agreements to allocate labor markets are "not fundamentally different" from market-allocation agreements courts have previously held *per se* illegal. *See, e.g.,* Brief for United States at 7-9, *Surgical Care Affiliates*, No. 3-21-cr-00011-L. Further, the DOJ contends that the "Sherman Act itself, and judicial decisions interpreting it, provided Defendants with fair notice" that no-poach agreements were subject to criminal prosecution. *Id.* at 22.

It may not be long before courts start weighing in on the issue. The *Jindal*, *Surgical Care Affiliates*, and *Hee* motions to dismiss are fully briefed but oral argument dates have not yet been set. The *DaVita* motion to dismiss will be fully briefed by early November and oral argument is currently scheduled in November 2021.

Conclusion

Regardless of the outcome of the motions to dismiss, district court rulings obviously will neither conclusively establish nor foreclose the criminality of wage-fixing and no-poaching agreements. It will take rulings from one or more appellate courts before the issue is well settled. Until then, it is safe to assume that the DOJ will open more investigations and likely pursue more prosecutions.

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[8] The fact that the *Surgical Care Affiliates* and *DaVita* indictments charge schemes that began several years before 2016 Guidance was issued likely also raises a separate set of due process considerations. See Indictment at ¶¶ 9, 17, *Surgical Care Affiliates*, No. 3-21-cr-00011-L.