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As Federal Antitrust Prosecutions Rise, Potential Criminal Pitfalls Loom for Non Compete Clauses

The Biden administration seeks to position itself as one that will crack down on employers' attempts to limit their employees' mobility and pay through allegedly non-competitive measures.

By Laily Sheybani

On July 9, 2021, President Joe Biden issued his "Executive Order on Promoting Competition in the American Economy" (EO), establishing his administration as one that will prioritize the importance of competition in the workforce. *See*, **White House Exec. Order on Promoting Competition in the American Economy** (Jul. 9, 2021). The EO strikes the same chord as a recent Tweet from President Biden which states: "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." *See*, Joe Biden (@JoeBiden), **Twitter** (Dec. 23, 2019, 7:05 PM). Clearly, the Biden administration seeks to position itself as one that will crack down on employers' attempts to limit their employees' mobility and pay through allegedly non-competitive measures.

We have begun to see the fruits of this aggressive new approach. This year, the Department of Justice (DOJ) filed the first-ever criminal prosecutions of employers and individuals allegedly involved in inter-business agreements to avoid raising employees' pay. In January 2021, the DOJ's Antitrust Division brought charges in its first prosecution of an employer alleged to be engaging in a so-called "illegal no-poach agreement." *See*, Siri Bulusu, **Antitrust Regulators Eye Criminal Enforcement in No-Poach Deals,** Bloomberg Law (May 17, 2021, 6:30 AM). Less than one month earlier, the DOJ brought its first criminal charges against an employer alleged to be involved in "wage-fixing." These two cases come just over four years after the DOJ released **Antitrust Guidance for Human Resource Professionals.** See, U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016). That 2016 guidance cautioned employers to expect criminal prosecutions for restrictive covenants that did not protect a legitimate business interest. *Id.*

A New Kind of Prosecution

Generally speaking, what the government calls a "no-poach agreement" is an agreement between two or more companies not to compete for each other's employees. See, Alex Malyshev & Jeffrey S. Boxer, ***With DOJ's Focus on Wage Fixing and No Poach Agreements, Non-Compete***

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and Antitrust Laws Collide, Reuters (Aug. 23, 2021, 6:51 AM). Similarly, a "wage-fixing agreement" is an agreement between two or more companies to set employees' salaries at a certain level or within a certain range. *Id.* Until the two aforementioned cases, the DOJ (along with state attorneys general) enforced perceived illegality with respect to no-poach and wage-fixing arrangements via civil penalties. The *criminal* prosecution of that conduct represents a significant shift when compared to how these labor agreements were regulated in the past. See, Bulusu, supra note 3.

In the DOJ's first criminal no-poach case, a federal grand jury indicted Surgical Care Affiliates, Inc. (SCA), accusing SCA — one of the largest American providers of outpatient surgery — of conspiring with competitors in an agreement not to pursue each other's senior-level employees. *United States v. Surgical Care Affiliates, LLC et al.,* Case No. 3:21-cr-00011 (N.D. Tex. Jan. 5, 2021). The government argues that such an agreement is in violation of Section 1 of the Sherman Act, which broadly prohibits anticompetitive cooperation between companies. Under the Sherman Act, SCA faces a statutory maximum of 100 million dollars in fines — significantly, however, no individual SCA employees have been criminally charged yet. See, Press Release, U.S. Dep't of Justice, **Health Care Company Indicted for Labor Market Collusion** (Jan. 7, 2021).

In December 2020, a therapist staffing company's owner was indicted in the DOJ's first criminal case pursuing employer wage-fixing. *United States v. Neeraj Jindal,* Case No. 4:20-cr-358 (E.D. Tex. Dec. 9, 2020). In this case, the owner and owners of similar businesses are alleged to have corresponded about decreasing salaries for physical therapists and physical therapist assistants as a way to collectively decrease rates for these positions. Ultimately, the defendant and co-conspirators allegedly agreed to decrease rates, enabling them to pay their employees at noncompetitive rates. The defendant, Neeraj Jindal, faces up to 1 million dollars in fines and 10 years in prison if convicted. See, Press Release, U.S. Dep't of Justice, **Former Owner of Health Care Staffing Company Indicted for Wage Fixing** (Dec. 10, 2020).

In the months since these inaugural no-poach and wage-fixing cases, the DOJ has pursued similar prosecutions, signaling that there may be more indictments to come. In *United States v. Ryan Hee, et al.*, Case No. 2:21-cr-00098 (D. Nev. Mar. 30, 2021), VDA OC LLC, a health care staffing company, and its former manager, Ryan Hee, were both indicted in *United States v. Ryan Hee, et al.*, Case No. 2:21-cr-00098 (D. Nev. Mar. 30, 2021). See, Press Release, U.S. Dep't of Justice, Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses (Mar. 30 2021), https://bit.ly/3B3bW9M. The *Hee* indictment charges both VDA OC LLC and Hee with conspiring with a competitor to fix nurses' wages. *Id.*

Defendants Push Back

Over a century ago, the Supreme Court decided that the Sherman Act should be "construed in the light of reason; and, as so construed, it prohibits all contracts and combination which amount to an unreasonable or undue restraint of trade in the interstate commerce." *Standard Oil Co. vs. United States,* 221 U.S. 1 (1911). The Court's distinction between reasonable and unreasonable restraint gave rise to the "rule of reason," which advises courts to consider the totality of the circumstances when assessing whether the practice in question's procompetitive effects outweigh its anticompetitive harm. See, U.S. Dep't of Justice, **Archived Antitrust Resource Manual** (Nov. 2017). Certain practices, however — such as price-fixing and bid rigging — are not analyzed under the rule of reason; this is because they are considered "per se" unreasonable restraints of trade, meaning that they have "no legitimate justification and lack any redeeming competitive purpose and should, therefore, be considered unlawful without any further analysis of their reasonableness, economic justification, or other factors." Id.

The DOJ's 2016 Antitrust Guidance for Human Resource Professionals categorizes wage-fixing and no-poach agreements as per se illegal under antitrust laws. *See*, Antitrust Guidance for Human Resource Professionals, supra note 4. In a motion to dismiss its indictment, SCA argued that the DOJ's declaration via a guidance document of a new per se criminal offense — namely no-poach agreements — equates to a takeover of antitrust policy, something that should be in the hands of the courts and Congress. See, Memorandum in Support of Motion to Dismiss, *United States v. Surgical Care Affiliates, LLC et al.,* Case No. 3:21-cr-00011 (N.D. Tex. Mar. 26, 2021). In its amicus curiae brief, the U.S. Chamber of Commerce, a business federation with roughly 300,000 members, argues that SCA did not have notice that its alleged conduct would be considered per se illegal and that the lack of notice is a due process violation. The brief goes on to argue that the Sherman Act does not identify the types of conduct that it covers, and that it has historically been up to the courts to determine what constitutes a per se violation. *See*, Brief of *Amicus Curiae* Chamber of Commerce of the United States of America Supporting Defendants' Motion to Dismiss Indictment, *United States v. Surgical Care Affiliates, LLC et al.,* Case No. 3:21-cr-00011 (N.D. Tex. Apr. 07, 2021). In response, the DOJ rejected SCA's assertion that precedent is lacking, arguing that the Sherman Act itself provides the requisite notice. See, United States' Opposition to Defendants' Motion to Dismiss, *United States v. Surgical Care Affiliates, LLC et al.,* Case No. 3:21-cr-00011 (N.D. Apr. 30, 2021). The case is scheduled for trial in May 2022.

Jindal filed a similar motion to dismiss, also arguing that precedent is absent. Jindal's motion contends that courts have only ever found four types of Sherman Act violations to be per se illegal — price fixing, bid-rigging, market allocation, and certain group boycotts — and that wage-fixing is not one of them. See, Defendant Neeraj Jindal's Motion to Dismiss Count One of the First Superseding Indictment, *United States v. Neeraj Jindal,* Case No. 4:20-cr-358 (E.D. Tex. May 25, 2021). In its response, the DOJ argued that wage-fixing is a form of price-fixing, claiming that the Supreme Court has equated the two concepts, pointing to a recent concurring opinion in which Justice Brett Kavanaugh seems to adopt this position, saying, "Price-fixing labor is price-fixing labor." United States' Response in Opposition to Defendant Neeraj Jindal's Motion to Dismiss Count One of the First Superseding Indictment, *United States v. Neeraj Jindal,* Case No. 4:20-cr-358 (E.D. Tex. Jun. 22, 2021). Jindal's trial is set for April 2022.

Steps Companies and HR Professionals Can Take

Companies should consider strengthening their compliance programs to conform to the harder line that the DOJ has begun to take toward no-poach and wage-fixing agreements. Employers should reevaluate their hiring contracts to ensure that any non-compete covenants are narrowly tailored and justifiable, such as a covenant that bars an individual from sharing confidential information about a company after resignation.

Furthermore, companies should align their compliance protocols with the guidance offered in the DOJ's July 2019 "**Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations**." The 2019 guidance lists nine factors that prosecutors should consider when evaluating the effectiveness of an antitrust compliance program, including compliance training for employees, auditing techniques, and compliance incentives and discipline. More broadly, the guidance recommends that companies implement compliance programs before they are under investigation, and that these programs are regularly reviewed and revised if necessary. A company's fulfillment of DOJ compliance recommendations is a consideration during DOJ investigations and in DOJ's enforcement and charging decisions — something that should motivate employers and their counsel to implement robust antitrust compliance procedures if they are not already in place. Id.

While courts and juries may not see the actions of SCA, Jindal, and future such defendants as per se violations worthy of criminal prosecution, litigation will incur enormous reputational and financial costs for defendant employers even if they are ultimately victorious. Employers and their Human Resources departments will benefit from revisiting and potentially revamping their compliance practices to avoid criminal prosecution — a penalty that has long been available to the DOJ but has been dormant until very recently. As evidenced by President Biden's recent EO, the current administration has set its sights on curbing allegedly exploitative noncompetition practices in the workforce, so we are likely to see the DOJ criminally charge more companies under the Sherman Act in the coming years. This is especially likely if the DOJ is successful in its criminal pursuit of either Jindal or SCA, though the lack of clear precedent will certainly pose a challenge to the government's argument that no-poach and wage-fixing agreements are per se violative of the Sherman Act.

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