

Clients & Friends Memo

DOJ Brings First Criminal “No-Poach” and “Wage-Fixing” Prosecutions New Focus on Labor Market Prosecutions

January 14, 2021

What happened?

The Department of Justice’s Antitrust Division (“DOJ”) [announced](#) that, on January 5, 2021, a federal grand jury returned a two-count [indictment](#) charging Surgical Care Affiliates LLC and its related entity (together, “SCA”), which own and operate outpatient medical care centers across the country, for agreeing with competitors not to solicit senior-level employees. This follows on the heels of DOJ’s [announcement](#) last month that a federal grand jury returned a two-count [indictment](#) charging Neeraj Jindal (“Jindal”), the former owner of a therapist staffing company, for participating in a conspiracy to fix prices by lowering the rates paid to physical therapists and physical therapist assistants. These indictments mark the first times that DOJ has challenged alleged no-poaching and wage-fixing agreements as criminal violations of federal antitrust law.

Why does this matter?

In 2016, DOJ and the Federal Trade Commission jointly issued antitrust guidance for human resource professionals and others involved in hiring and compensation decisions (“[HR Guidance](#)”). The HR Guidance announced a significant change in policy: instead of treating naked no-poach or wage-fixing agreements only as civil offenses, such agreements also could be investigated as criminal violations of the Sherman Act. The guidance stated that no-poaching and wage-fixing agreements among employers, whether entered into directly or through a third-party intermediary, are *per se* illegal under the antitrust laws if they are separate from or not reasonably necessary to a larger legitimate collaboration. Depending on the facts of the case, DOJ could bring criminal charges against the individuals and/or the company, and both DOJ and FTC also could bring civil enforcement actions. A violation of the Sherman Act carries a statutory maximum penalty of 10 years in prison and a \$1 million fine for individuals. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims if either amount is greater than \$1 million.

In its announcement of the guidance, DOJ [explained](#) that naked no-poaching or wage-fixing agreements “eliminate competition in the same irredeemable way as agreements to fix the prices of goods or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.” The HR Guidance also instructs HR professionals to avoid sharing sensitive information with competitors about the terms and conditions of employment, as doing so could serve as evidence of an implicit illegal agreement.

Despite the HR Guidance’s warning that, “[g]oing forward, the Justice Department intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers,” and DOJ’s [continued affirmation](#) of such intent in the years since, no criminal cases materialized . . . until now. First, in December 2020, DOJ charged Neeraj Jindal, the former owner of a therapist staffing company, with a conspiracy to fix prices by sharing non-public pay rates for physical therapists and physical therapist assistants and then agreeing to lower those rates. The Jindal indictment was “an important step in rooting out and deterring employer collusion that cheats American workers – especially healthcare workers – of free market opportunities and compensation,” said Assistant Attorney General Makan Delrahim. Then, in January 2021, DOJ alleged that SCA, which owns and operates outpatient medical care centers across the country, illegally agreed with two other companies not to solicit senior-level employees. These charges “demonstrate the Antitrust Division’s continued commitment to criminally prosecute collusion in America’s labor markets,” said Assistant Attorney General Delrahim.

The SCA no-poach indictment and the Jindal wage-fixing indictment each are the first prosecutions of their kind, and more likely are on the horizon. In a [January 2018 speech](#) regarding wage-fixing and no-poach cases, Assistant Attorney General Delrahim remarked that he was “shocked about how many of these there are, but they’re real.” The focus on collusion in labor markets likely will only increase with the change in administrations, as the Biden administration has [stated its intention](#) to “[e]liminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers.”

Key Takeaways

DOJ’s recent SCA and Jindal indictments highlight the potential criminal antitrust risks for no-poach or wage-fixing agreements among competitors. The cases also demonstrate DOJ’s ongoing commitment to prosecute anticompetitive conduct affecting U.S. labor markets and are a strong reminder to companies, executives and human resources professionals that no-poach and wage-fixing agreements could lead to federal criminal prosecution, significant fines and even jail time.

Companies should review the antitrust agencies’ HR Guidance and minimize their antitrust risk by ensuring their antitrust compliance programs are current, comprehensive and effective. Strong

compliance programs also will position companies to benefit from DOJ's recent policy of [crediting effective compliance programs](#) if a violation occurs.

Employee training should encompass the antitrust risks associated with hiring practices, compensation-related issues and communications with others involved in hiring and recruiting employees. Companies also should review their employee-related agreements to remove or update any provisions that may implicate illegal no-poach or wage-fixing agreements.

How can Cadwalader help?

Cadwalader's antitrust team, located in key jurisdictions in the United States (New York, Washington, D.C., Charlotte) and London, is composed of specialists that offer 'end-to-end' advice on compliance, investigations and related litigation. Our practitioners are experienced in counseling on compliance and other antitrust issues and are available to assist with reviewing or designing effective corporate compliance programs.

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If you have any questions, please feel free to contact either of the following Cadwalader attorneys.

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