

Employer and Former CEO Indicted in No-Poaching Case

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According to the U.S. Department of Justice (DOJ), on July 15, 2021, DaVita Inc. and its former chief executive officer were accused in an indictment of two counts of violating the Sherman Act, an antitrust law, by conspiring with two competitors to not solicit or hire each other's key employees. One of the other companies allegedly part of the arrangement was charged in federal court earlier this year.

The indictment claims the competitors involved had no-poaching agreements under which they would "steer clear" of one another's senior-level employees and not follow through with inquiries from employees of the other companies who reached out about job opportunities.

Regardless of the ultimate outcome of this case, it is important for human resource professionals and others involved in hiring and compensation decisions to know that agreements between employers to limit or fix the terms of employment for potential hires can result in criminal liability. According to an October 2016 publication by the DOJ and Federal Trade Commission titled "Antitrust Guidance for Human Resource Professionals":

An individual likely is breaking the antitrust laws if he or she:

- agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements), or
- agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called "no poaching" agreements).

It makes no difference whether the companies do not compete to provide the same products or services; if they compete to hire and retain employees, then these kinds of agreements are likely illegal under federal antitrust laws.

Criminal exposure can extend to executives, HR professionals, and others who propose, make, and/or implement such agreements. In cases like the

DaVita case, a company can face a maximum criminal fine of \$100 million (and, if the volume of impacted commerce is great enough, the fine can be significantly higher than that). Individuals face a maximum penalty of 10 years in prison and a \$1 million fine for engaging in an illegal agreement.

Note that traditional non-compete and other restrictive covenants that have a legitimate business purpose and are narrowly tailored remain legal under the laws of many states.

Nexsen Pruet's employment and antitrust attorneys are available to advise employers on how antitrust law may intersect with employment law, including when communicating with other businesses about employees. If you have any questions about this or related matters, please contact us.