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No-Poaching, No Longer: Federal Agencies Target No-Poach Agreements in the Healthcare Industry

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Since at least the onset of the COVID-19 pandemic in early 2020, healthcare employers nationwide have endured serious talent acquisition and retention challenges, forcing employers to consider different strategies to maintain a stable workforce. While many healthcare employers have implemented various incentives to combat these desperate staffing times, some employers, unfortunately, have engaged in illegal practices of forming "no-poach" agreements, which have attracted the attention of federal agencies more recently. These agreements, which suppress competition among healthcare entities and restrict employee mobility, have also sparked legislative concern, resulting in President Biden's Executive Order to Promote Competition in the American Economy, specifically within the healthcare industry.[1]

As a result of this legislative push to prevent collusive behavior by healthcare employers, the Department of Justice and the Department of Labor entered into a Memorandum of Understanding on March 10, 2022, in an effort to penalize employers who stunt competition in the labor market, among other things.[2] With the increased attention focused on these illegal arrangements, healthcare employers must carefully consider ways to recruit and retain employees while avoiding at all costs the intentional or unintentional engagement in "no-poach" agreements, which may open the door to both civil and criminal liability.

Q. What Are "No-Poach" Agreements?

A. "No-Poach" agreements, sometimes referred to as "no-hire" or "no-solicitation" agreements are arrangements between employers where each agrees not to recruit the other's employees. Additionally, no-poach agreements often include wage-fixing arrangements where companies agree not to compete on specific terms such as compensation. These agreements are often formed to force employee retention by making comparable work in the same market unattainable for individuals seeking

employment with a different entity. While some employers have no-poach agreements with competitors not to hire each other's employees, other employers have engaged in more subtle agreements, whereby the companies agree to "fix" wages in order to reduce the desire to gain employment elsewhere.

Q. How Are No-Poach Agreements formed?

A. No-poach agreements are contracts which can be created formally through use of some written contractual instrument, informally, through the conduct or practice of the companies' representatives, or verbally. For example, employers who verbally agree not to hire employees of a competing business or to keep salaries at a specific wage, have formed an illegal no-poach agreement. Likewise, employers who share competitive wage information may also be engaging in a no-poach or wage-fixing agreement, although no explicit oral or written contract was formed. Importantly, employers need not intend to form an illegal no-poach arrangement. Any casual conversation, text message, or even informal meeting between company representatives outside of a business setting, can form the basis of a no-poach agreement if anti-competitive practices are discussed.

Q. How Are No-Poach Agreements Assessed in the Civil Context?

A. From the civil perspective, no-poach litigation can be brought by the Department of Justice ("DOJ"), Federal Trade Commission ("FTC"), or private parties affected by the arrangement. In many cases, these civil claims are initiated by groups of employees in a class-action suit against the companies engaged in alleged no-poach agreements. Class action litigation is often brought strategically for the purpose of demonstrating economic injury and inflating damage awards.[3]

For many civil cases filed against employers, courts have assessed whether these arrangements constitute a *per se* violation of the Sherman Antitrust Act, the legal framework which prohibits monopolization and restraints on trade, such as no-poach agreements. Under a *per se* standard, plaintiffs must only prove that the anticompetitive conduct occurred. However, many courts have refrained from using the *per se* standard, and have implemented the "rule of reason test," a less rigid approach requiring plaintiffs to show the anticompetitive effects in the relevant market and the market power of the defendants, among other factors.

Although most courts have opted to use a more balanced approach in assessing these civil no-poach cases, when found liable, employers can be subject to a litany of penalties including large damage awards, attorneys' fees, and in some cases, injunctive relief.

Q. What Are the Criminal Consequences of Engaging in No-Poach Agreements?

A. In 2016, the DOJ and FTC, the federal agencies primarily responsible for handling antitrust violations, increased their focus on no-poach agreements within the labor market and jointly issued antitrust guidance where the DOJ announced its plans to criminally prosecute employers involved in these arrangements.[4] In 2018, the United States Deputy Assistant Attorney General affirmed the DOJ's prosecutorial approach to stopping these agreements and stated that the agency would begin pursuing criminal charges for agreements entered into prior to the DOJ's 2016 announcement of its intent to prosecute collusive employers.[5]

Despite a four-year delay, the DOJ brought its first criminal no-poach case in 2020 and has since continued to bring federal charges against employers under the Sherman Antitrust Act, which imposes criminal penalties of up to $100 million for a corporation, $1 million for individuals, and up to ten (10) years of imprisonment.[6]

Some recent examples of DOJ indictments against healthcare companies include:

(1) *United States v. Surgical Care Affiliates, LLC et. al.*, Case No. 3:21-CR-00011 (N.D. Tex. Jan. 05, 2021).[7] On January 5, 2021, the DOJ indicted Surgical Care Affiliates, a company which operates outpatient medical care centers, for allegedly entering into and engaging in conspiracies not to solicit senior-level employees. According to the indictment, the conspirators also allegedly instructed recruiters not to solicit senior-level employees by requiring applicants to notify their current employer of their plans to seek employment elsewhere. The parties allegedly carried out their conspiracy through several meetings, telephone conversations, and email communications.

(2) *United States v. Faysal Kalayaf Manahe, et. al.*, Case No. 2:22-cr-00013-JAW (D. Me. Jan 27, 2022).[8] On January 27, 2022, the DOJ indicted four owners of home healthcare companies for entering into a conspiracy to suppress and eliminate competition for the services of personal support specialists ("PSS") by agreeing to not hire each other's employees and fix wages. According to the indictment, from April 2020 to May 2020, the conspirators allegedly participated in conversations and communications regarding rate increases and used an encrypted message app to communicate and schedule secret in-person and virtual meetings to discuss ways to fix hourly rates.

While the DOJ has been diligent in its efforts to prosecute employers engaging in these agreements, more recently, the agency has been met with opposition in its first criminal trials against healthcare companies indicted in the last two years.

In *United States v. Neeraj Jindal,* the DOJ indicted former owner of a physical therapist staffing company for allegedly entering into and engaging in a conspiracy to suppress competition by agreeing to fix wages and lower pay rates for physical therapists and physical therapist assistants. Case No. 4-20-CR-358 (E.D. Tex. Dec. 09, 2020).[9] According to the indictment, Defendant and his co-conspirators solicited and received public rates for physical therapists and assistants in order to reduce wages in the Dallas-Fort Worth area. Over a six-month period, the parties communicated about rate decreases and agreed to pay staff at their decreased agreed-upon rate. Evidence of such collusion included numerous text message conversations between competing therapist staffing companies where the Defendant solicited and suggested all companies pay rates lower than current market value.

However, on April 14, 2022, following an eight-day trial, a jury found two of the defendants not guilty of violating the Sherman Antitrust Act and one defendant guilty of obstructing the FTC's 2017 investigation into the alleged wage-fixing arrangements.[10] While the DOJ fell short of a victory in confirming any antitrust violations, a DOJ official announced it would continue its efforts in targeting employers engaging in these practices and stated, "In no way should the verdict today be taken as a referendum on the Antitrust Division's commitment to prosecuting labor market collusion, or on our ability to prove these crimes at trial."

The DOJ received a similar result in the case, *United States v. DaVita Inc., et. al,* in which it indicted DaVita Inc., a company which owns and operates outpatient medical care facilities, and its CEO, Kent Thiry, for allegedly engaging in a conspiracy with Surgical Care Affiliates to "allocate the market" by not soliciting each other's senior-level employees. Case No. 1:21-cr-00229-RBJ (D. Colo. Jul. 14, 2021).[11] According to the indictment, from as early as February 2012 to as late as July 2017, DaVita participated in several meetings, conversations, and communications with co-conspirators to discuss the solicitation of senior-level employees.

However, on April 15, 2022, a day following its loss in the *Jindal* case, a jury found DaVita and CEO, Kent Thiry, not guilty of engaging in any anti-competitive agreements. Despite the jury's decision, the DOJ confirmed it would continue enforcing antitrust laws within labor markets.[12]

Again, although the DOJ has suffered losses in these recent criminal trials, the DOJ announced it remains committed to working to expose employers that exploit the labor market through anti-competitive practices.

Q. What are Ways Employers Can Avoid Entering into No-Poach Arrangements?

A. Employers must be particularly careful not to inadvertently enter into a no-poach agreement. To avoid such arrangements, employers should: (1) refrain from entering into any agreements with other employers regarding hiring and compensation and; (2) refrain from sharing sensitive competitive information. While it may seem obvious, employers must avoid any conversations or conduct that could unintentionally form a no-poach arrangement. The DOJ has clarified that whether the agreement is "informal, or formal, written or unwritten, spoken or unspoken" any practice or conduct between two employers regarding refusal to hire employees or placing limitations on wages, could lead to a potential antitrust violation. Additionally, employers must also be careful when sharing sensitive competitive information, as the exchange of such information could be used as evidence of an illegal no-poach arrangement.

In sum, no-poaching litigation will continue to be a focus of the DOJ and other federal agencies as the Biden Administration works to reduce anti-competitive schemes in the labor market. Although many healthcare employers are still facing recruitment and retention struggles as well as other residual effects of the COVID-19 pandemic, employers must beware of purposely or inadvertently participating in any no-poach arrangements. Implementing antitrust compliance measures and policies can help employers reduce the likelihood of engaging in these agreements and ultimately avoid exposure to civil or criminal penalties.

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[1] FACT SHEET: Executive Order on Promoting Competition in the American Economy | The White House

[2] download (justice.gov)

[3] ANALYSIS: 'No-Poach' Cases Still Grappling With Big Questions (bloomberglaw.com)

[4] Antitrust Guidance for Human Resources Professionals (justice.gov)

[5] Principal Deputy Assistant Attorney General Andrew C. Finch Delivers Remarks at the Heritage Foundation | OPA | Department of Justice

[6] The Antitrust Laws | Federal Trade Commission (ftc.gov)

[7] Superseding Indictment: U.S. v. Surgical Care Affiliates, LLC and SCAI Holdings, LLC (justice.gov)

[8]Indictment: U.S. v. Faysal Kalayaf Manahe et al. (justice.gov)

[9] Indictment: U.S. v. Neeraj Jindal (justice.gov)

[10] DOJ's First Criminal Wage-Fixing Case Ends Mostly in Defeat (3) (bloomberglaw.com)

[11] DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry: Davita Thiry Indictment.pdf (justice.gov)

[12] DaVita, Ex-CEO Found Not Guilty in DOJ's No-Poaching Case (2) (bloomberglaw.com)