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Antitrust/Labor & Employment ADVISORY ■

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# Government Begins Criminal Prosecutions for "Wage-Fixing" and "No-Poach" Agreements

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The Department of Justice's Antitrust Division (DOJ) recently made good on a 2016 promise to pursue and prosecute criminal actions against companies and individuals for "wage-fixing agreements" (agreements to limit or fix employee wages, salaries, benefits, or other employment terms) and "no-poach agreements" (agreements not to solicit or hire another company's employees). The two indictments—in December 2020 for wage-fixing and in January 2021 for no-poach agreements—are the first-ever criminal prosecutions for wage-related antitrust violations.

In October 2016, the DOJ and Federal Trade Commission (FTC) issued joint guidance affirming that wage-fixing and no-poach agreements may violate antitrust laws, and for the first time threatened to proceed criminally against violators. The guidance distinguished "naked" agreements—those that are "separate from or not reasonably necessary to a larger legitimate collaboration between the employers" and are considered by the agencies to be per se unlawful—from other agreements that may be part of a legitimate joint venture.

Since then, the DOJ has continued to bring civil actions related to wage-fixing and no-poach agreements. It has also continued to warn that criminal investigations and actions were forthcoming (although it promised that it would not pursue agreements that ended before the issuance of the October 2016 guidelines). Warnings mounted during the COVID-19 pandemic, with the DOJ and FTC issuing a joint statement in April 2020 affirming an intent to protect frontline workers and noting that the DOJ "may criminally prosecute companies and individuals who enter into naked wage-fixing and no-poach agreements."

Now, four years after its initial guidance, the DOJ has followed through on these warnings. On December 9, the DOJ obtained its first criminal indictment based on wage-fixing allegations against Neeraj Jindal in the Eastern District of Texas. The DOJ alleged that Jindal, the owner of a therapist staffing company, agreed with other companies to lower the pay rates for physical therapists (PTs) and physical therapist assistants (PTAs). The DOJ alleged that Jindal and his co-conspirators communicated about non-public rates paid to PTs and

PTAs, discussed and agreed to decrease rates, and subsequently implemented rate decreases. The indictment quotes a series of text messages that are alleged to evidence this conspiracy; for example, Jindal wrote to other staffing company owners that "I am reaching out to my counterparts about lowering PTA pay rates to $45" and "I think we all collectively should move together," with other companies responding that they would join.

Less than a month later, on January 5, the DOJ obtained a second indictment in the Northern District of Texas, alleging that Surgical Care Affiliates (SCA), an operator of outpatient medical care centers, verbally agreed with two competitors not to solicit each other's senior-level employees; instructed executives, employees, and recruiters not to solicit competitors' employees; required employment candidates to notify their current employer of their application before it would be considered; alerted competitors about instances of recruitment; and refrained from soliciting competitors' employees.

Following the Jindal indictment, DOJ Assistant Attorney General Makan Delrahim stated that the charges "are an important step in rooting out and deterring employer collusion that cheats American workers—especially health care workers—of free market opportunities and compensation." Following the SCA indictment, Delrahim stated that the "charges demonstrate the Antitrust Division's continued commitment to criminally prosecute collusion in America's labor markets."

The government has yet to get a conviction or guilty plea in these cases, and the defendants will have a chance to present their defense to these allegations, but all signs suggest that the Biden Administration will continue to aggressively pursue wage-fixing and no-poach agreements. The Biden campaign issued a plan that proposed an outright ban on all no-poach agreements. Employers, executives, and human resources professionals should keep in mind:

- Stand-alone agreements with competitors to fix employee compensation or terms or to refrain from hiring or soliciting one another's employees are unlawful and can subject businesses and individuals to criminal prosecution as well as civil actions.

- A wide range of employers may qualify as competitors in labor markets—including companies that provide different products or services.

- Employers and employees should avoid directly sharing information about employees' compensation and terms of employment with competitors. If it is necessary to exchange such information (for example, to assess a potential merger or acquisition), it is advisable to seek legal guidance.

- Certain procompetitive information exchanges and industry initiatives may be legal, but always consult counsel before proceeding.

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