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Criminal Prosecutions Have Begun for No Poach Agreements and Wage Fixing Violations

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Practice Area: Health Law & Health Industry Labor, Employment and Immigration

In 2016, the Department of Justice (DOJ) and Federal Trade Commission (FTC) jointly issued anti-trust guidance treating no poach or wage fixing agreements as possible criminal violations of the Sherman Act. Two health care related entities have now become the first to face criminal prosecutions under the 2016 Guidance.

Sherman Act
Very broadly, the Sherman Act, which was passed in 1890, is one of the core federal antitrust laws. It prohibits "every contract, combination, or conspiracy in restraint of trade" and "any monopolization, attempted monopolization, or conspiracy or combination to monopolize". In practice, the Sherman Act doesn't prohibit every restraint of trade, only unreasonable restraints of trade.

The Sherman Act has both civil and criminal components. Individuals and businesses who violate the Sherman Act may face criminal prosecution, primarily in cases with intentional and clear violations. Under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, criminal penalties under the Sherman Act can be as high as $100 million for a corporation and $1 million for an individual, as well as up to 10 years in prison.

2016 Guidance
In October 2016 the DOJ's Antitrust Division, along with the FTC, released Antitrust Guidance for Human Resource Professionals. The guidance stated that agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal. Specifically, naked wage-fixing or no-poaching agreements are considered *per se* illegal under antitrust laws. Though companies were subject to civil actions for such agreements in the past, the guidance announced that going forward, the Department of Justice intended to proceed criminally against naked wage-fixing or no-poaching agreements.

December 2020 – Criminal Prosecution for Wage Fixing
The Department of Justice made good on its promise to proceed criminally when, in December 2020, it announced that a federal grand jury in the Eastern District of Texas had returned a two-count indictment charging the former owner of a therapist staffing company for participating in a conspiracy to fix prices by lowering the rates paid to physical therapists (PTs) and physical therapist assistants (PTAs) in Northern Texas, including the Dallas-Fort Worth metropolitan area.

The indictment, which does not identify the company, states that the former owner and his co-conspirators agreed to pay lower rates to certain PTs and PTAs in order to increase the company's margins. The company contracted with PTs and PTAs at set rates that the company paid them for providing in-home care visits. The company then billed home health agencies set prices for providing therapy services. The difference between the rates paid to the PTs and PTAs and the rates that were billed to the home health agencies comprised the company's margins. By agreeing with co-conspirators to fix prices by lowering the rates paid to PTs and PTAs, the company was able to increase its margins without having to compete on compensation paid to its PTs and PTAs.

As the indictment was against an individual, criminal penalties can be as high as $1 million under the Sherman Act as well as up to 10 years in prison.

January 2021 – Criminal Prosecution for No Poach Agreements
On January 5, 2021, a federal grand jury in the Northern District of Texas indicted Surgical Care Affiliates LLC and its related entity (collectively SCA) for entering into two separate conspiracies with other healthcare companies to suppress competition between them for senior-level employees. The indictment alleges that SCA and the unnamed competitors agreed not to solicit senior-level employees and then instructed staff to abide by the agreement. As evidence, the indictment references several communications regarding the alleged agreement, including an email from the CEO of the unnamed competitor to employees stating, "I had a conversation with [the CEO of SCA] re people and we reached an agreement that we would not approach each other's proactively." As a result of the charges, SCA faces a statutory maximum penalty under the Sherman Act of up to $100 million in fines. No individuals have been charged at this time.

Employers Must Exercise Caution
Employers can expect continued enforcement by the DOJ and FTC of no-poach agreements as well as other anticompetitive conduct in labor markets. What is important for employers to realize is that these cases do not require a formal, written agreement to be actionable. The "smoking gun" in each of the recent indictments was informal email correspondence between competitors. Employers should be cautious when discussing wages and hiring practices with competitors and avoid any agreement, no matter how informal, about what they will pay or who they will hire.

Finally, anyone who receives a civil investigative demand or grand jury subpoena from the DOJ should immediately seek counsel. The Antitrust Division's Leniency Program allows companies who "self-report" violations and "fully cooperate" with the investigation to avoid criminal prosecution. These steps should be taken only after consulting with counsel.
