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PERSPECTIVE

Labor market criminal antitrust offenses in the crosshairs

By John “Jack” McLean and Patrick E. O’Shaughnessy

As quoted in a 2017 Daily Journal article the federal antitrust agencies were serious when they warned: “DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements [in the labor markets]. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.”

The U.S. Department of Justice followed through on its warning recently with two indictments in the health care industry for wage-fixing and no-poaching agreements.

Employers Were on Notice that Criminal Charges Would Commence

The federal antitrust officials’ 2016 warning was not the only time they sought to put employers on notice that they were in the crosshairs. The then-head of the DOJ’s Antitrust Division, Assistant Attorney General Makan Delrahim told an audience in September 2019 that “criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority

for the Antitrust Division.” Shortly thereafter, the then-head of criminal enforcement at the DOJ’s Antitrust Division, Deputy Assistant Attorney General Richard Powers, expanded on the theme and provided more detail, stating that the “Division has a number of active criminal investigations into naked no-poach and wage-fixing agreements” and such labor market violations are among our “highest priorities and an area to which we are devoting substantial resources.”

From a prosecutor’s perspective, those efforts paid off. Early in 2020, the Wall Street Journal reported federal prosecutors had developed solid cases and planned to bring their first later that year. After all the warnings, the criminal charges have begun.

The First Criminal Wage-Fixing Prosecution

The DOJ indicted Neeraj Jindal, the former owner of a physical therapist staffing company in the Dallas — Fort Worth area, on Dec. 9, 2020. It alleged that Jindal and his yet un-named conspiring competitors agreed to pay and paid lower rates to in-home physical therapists and assistants starting on St. Patrick’s Day in 2017 and continuing through August 2017. The type of conduct the DOJ alleged has al-

ways been a violation of the Sherman Act, but this is the first time DOJ has pursued it criminally.

The Federal Trade Commission learned of the alleged offense and opened a formal, but civil, investigation. Jindal’s response allegedly includes making false and misleading written statements to the FTC, and false and misleading testimony under oath during a formal hearing. The FTC referred the case to DOJ for criminal prosecution of both the antitrust crime and obstruction.

The First Criminal “No Poach” Prosecution

Next, on Jan. 5, 2021, the DOJ indicted Surgical Care Affiliates, a subsidiary of United Health Group, and its successor company, which operates outpatient medical care centers throughout the U.S. They alleged the defendants and their yet un-named conspiring competitors agreed not to “poach” — e.g., not solicit or not hire away — each other’s senior employees. The “no poach” agreement allegedly included compliance monitoring provisions, such as a reciprocal notice requirement and an agreement to not consider any job applicants working at a senior level for a competitor, unless the applicants first notified their

current employer that they were looking for another job. The “no poach” agreement allegedly began as early as May 2010 and lasted until as late as October 2017. Again, the type of conduct the DOJ alleged has always been a violation of the Sherman Act, and sometimes subject to civil prosecution such as in the 2010 U.S. v. Lucasfilm and Pixar case, but this is the first time DOJ has pursued it criminally.

Severe Consequences for Those Who Do

The Sherman Act provides for sentences of up to 10 years in prison and fines of up to \$1 million for individuals. The maximum statutory fine for a business is \$100 million. Under the U.S. Sentencing Guidelines, courts may significantly increase those fines when the harm caused or gain received through the conspiracy is greater than the statutory fines. (The obstruction charge at issue in the Jindal case involves a maximum of five years in prison and a \$250,000 fine.)

Further, those who have been harmed typically bring follow-on class action lawsuits for damages. Damages they establish at trial are automatically tripled by statute, and the defendant also must pay the plaintiffs’ reasonable attorneys’ fees in addition to

their own. For individuals, in particular, the consequences are very severe, including jail time, a fine and a felony record hampering future endeavors.

Leniency for Those Who Report and Cooperate

Those convicted of an antitrust crime often learn that the competitors they thought were working with them for their illicit profits actually were working with federal prosecutors to convict them. The antitrust laws and DOJ policies incentivize this frequent result. Critically, DOJ may grant a conditional reprieve from criminal punishment to the first conspirator — and only the first — to confess their conspiratorial conduct and agree to cooperate with the DOJ. In addition, the first to meet the requirements — and only the first — may be freed from triple damages in a civil lawsuit against them for their conduct. The difference between triple and single damages in antitrust cases is

typically a very large dollar amount.

Lessons Learned

More criminal wage-fixing and “no poach” prosecutions, and subsequent civil lawsuits, likely will follow. The DOJ’s tools to investigate these offenses are powerful, and its prosecutors spend years thoroughly developing cases like these before moving forward. Employers, particularly those in the health care industry, likely would benefit from developing or strengthening their antitrust compliance programs to address these and related antitrust risks. Compliance programs help prevent and mitigate violations. Also, if they are sufficient, such programs are a factor DOJ considers in making its sentencing recommendations. Management needs to understand the significant risks and consequences to their company and themselves of getting caught. Executives routinely go to jail for these offenses (at a rate of about two per

month over the last 10 years according to DOJ’s website). DOJ’s emphasis on criminal enforcement in labor markets is very unlikely to wane with a change in administrations; if anything, one would expect to see more cases like these.

Human resources professionals, and businesses, in general, but particularly health care industry employers, should

pay close attention to these issues in light of the DOJ’s recent enforcement actions. The consequences of this illicit labor-market conduct or any conduct that may trigger criminal antitrust enforcement can be mitigated or even eliminated with prompt and effective responses. It can make a big difference to act sooner rather than later. ■

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