Businesses Beware: The Government Turns Up the Antitrust Heat on Agreements to Not Compete for Employees

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In two recent cases, the Antitrust Division of the U.S. Department of Justice (DOJ) has for the first time brought criminal antitrust charges against businesses for entering into agreements to not vigorously compete for employees. Both cases were brought against healthcare entities. This is a major change and a reminder that employers should pay increased attention to the antitrust implications of employment and compensation practices and the adequacy of their compliance programs.

Businesses compete with rivals for customers, but also for employees. Presumably, all businesses understand that the antitrust laws prohibit them from agreeing with rival sellers not to aggressively compete for customers. The same is true for rival employers: it usually violates the antitrust law to agree with a competing employer to fix wages, or to not hire (poach) each other's employees, or to otherwise restrict uninhibited competition for employees. Wage-fixing and "no-poach" agreements with other businesses are usually unlawful because they are likely to reduce compensation below competitive levels, just as an agreement to not compete for customers is likely to raise prices above competitive levels. This is not new law; indeed, it has been the subject of previous Butzel Long Client Alerts in 2016 and 2020.

Those earlier Alerts focused on *civil* lawsuits brought by the Antitrust Division of the Department of Justice (DOJ) and private plaintiffs challenging such agreements, lawsuits that sometimes resulted in recoveries in the hundreds of millions of dollars for the employees. As expensive as those lawsuits were for the defendant businesses, they were civil lawsuits -- only money was at stake. But the DOJ's 2016 "Antitrust Guidance for Human Resource Professionals," warned that:

> Going forward, ***the DOJ intends to proceed criminally*** against naked wage-fixing or no-poaching agreements.

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> 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. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other's employees. And if that investigation uncovers a naked [1] wage-fixing or no-poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.

The DOJ has now acted on that warning, for the first time bringing two separate criminal antitrust cases, one in December 2020 and one in January 2021. The first involved an agreement on wages; the second, a "no-poach" agreement. Each case involves the health care industry and may signal a government focus on rooting out anti-competitive hiring practices in that industry.

THE RECENT INDICTMENTS

US v. Surgical Care Affiliates (SCA)

SCA was indicted for "Conspiracy in Restraint of Trade to Allocate Employees." SCA, a subsidiary of UnitedHealth Group, owns and operates more than 230 ambulatory surgery centers. According to the indictment, SCA agreed with two unidentified competing employers ("Company A" and "Company B") and others to not recruit each other's "senior-level employees" unless the employee notified the current employer, and that employer gave permission. As is often the case in criminal antitrust conspiracies, the participants are alleged to have repeatedly documented their agreement in emails. To give but a few examples, the indictment references an email from an employee of Company A stating "I had a conversation w [the CEO of SCA] re people and we reached agreement that we would not approach each other's proactively." Similarly, SCA told a recruiter not to recruit employees of Company A or B.

As with all criminal antitrust cases against a business, SCA is subject to up to a $100 million fine.

US v. Jindal

According to the indictment, Defendant Jindal was the proprietor of an unnamed therapist staffing company (Company A) providing physical therapists to home health agencies in need of physical therapists. At Jindal's direction, Company A agreed with a competing staffing company (Company B) to lower pay rates for physical therapists. As in SCA, the conspiracy was documented, this time in texts, complete with "thumbs up" emojis to confirm agreement to the conspiracy. Company A also tried to recruit other staffing agencies into the conspiracy, texting "I am reaching out to my counterparts about lowering pay rates . . . What are your thoughts if collectively do it together." Jindal was indicted for conspiring to fix prices, as well as for obstructing the investigation.

As with all criminal antitrust cases against a conspiring individual, Jindal is subject to up to ten years in prison and a $1 million fine.

Although criminal exposure is certainly the highest concern of these defendants, the likelihood of follow on class action litigation is also a great concern, especially for a large business like SCA. Indeed, on January 19th, the first class-action lawsuit was filed against SCA and related entities. More are likely to follow.

"HORIZONTAL AGREEMENTS"

The types of agreements in question in the DOJ actions are agreements between competitors, or, in antitrust lingo, "horizontal agreements." Note that horizontal agreements are different from "vertical" agreements between an employer and employee. Vertical agreements present important, though different, antitrust risks that are beyond the scope of this alert.

Note also that, in employment markets, "competitors" are those who employ similar types of employees, *regardless of whether the employers compete for customers.* For example, aerospace companies and automotive companies are likely competitors for certain types of engineers, even though they do not compete for customers.

Horizontal agreements that directly restrict competition on salary, benefits, or other terms of employment are highly likely to violate the antitrust laws. So too are no-poach, non-solicitation, or similar "I'll stay away from yours if you stay away from mine" agreements.

Unless they fit within an exception, horizontal agreements are "per se," or automatically, unlawful, meaning that they cannot be justified. One exception, common in certain industries, permits multi-employer bargaining agreements, which are exempt from the antitrust laws in certain circumstances. By definition, such bargaining involves agreements between competitors to provide the same compensation, and thus is in tension with the goals of the antitrust laws, but the law recognizes a federal policy judgment to prioritize collective bargaining over competition.

Second, and of more general applicability, there is an "ancillary agreement" exception to the general prohibition on horizontal agreements. In broad terms, an ancillary agreement is a horizontal agreement that makes a pro-competitive primary business agreement possible. More specifically, an ancillary agreement is generally lawful if: (1) the primary agreement is pro-competitive; (2) the ancillary agreement is reasonably necessary to the primary agreement; (3) there is not a substantially less restrictive alternative; and (4) any anti-competitive harm does not outweigh the pro-competitive benefits. For example, if one company agrees to purchase a business unit of another, then an agreement prohibiting the seller from hiring back key employees of the buyer for a reasonable period of time might be a lawful ancillary agreement.

Assessing whether an agreement fits within the ancillary agreement exception is among the most difficult in antitrust law. In light of the severe consequences of entering into a *per se* unlawful agreement, it is strongly urged that experienced antitrust counsel be consulted before entering into

such an agreement.

RISK MANAGEMENT

The prudent employer can take a variety of steps to manage the antitrust risks in hiring and compensation:

- Given the DOJ's clear intent in pursuing both civil and criminal actions and the risk of follow-on civil litigation, your organization should have an effective antitrust compliance program that recognizes that hiring and compensation practices are a primary area of antitrust risk. The DOJ has long touted the virtues of an effective compliance program to provide guidance to organizations, and considers the existence of such a program as an important migrating factor if your organization does have an antitrust problem. The DOJ's most recent pronouncement in its *Evaluation of Corporate Compliance Programs*, which was most recently updated in June of 2020, and which was the subject of a Client Alert in 2020.
- An effective compliance program, whether for antitrust or other compliance areas, requires much more than placing a boilerplate written policy in a compliance manual. Experienced counsel should be consulted both as to the content of the policy and its implementations and enforcement.
- Effectively train the people on the front lines of hiring and compensation decision making to identify and avoid the antitrust risks.
- Do not enter into agreements with competitors concerning compensation, recruiting, or hiring without the advice of experienced antitrust counsel.

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