Court Allows First-Ever Criminal Indictment of an Employer for Wage-fixing to Proceed to Trial

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Butzel has issued numerous Client Alerts in recent years highlighting the antitrust risks when employers enter into wage-fixing or no-poach agreements covering the employees for which they compete. (As a reminder, employers may compete for types of employees (e.g., electrical engineers), even if they do not compete in the output market).

Most recently, at the beginning of this year, we advised that for the first time the Department of Justice brought criminal charges against the managers of competing employers who (allegedly) entered into a wage-fixing agreement. On November 29, the federal court handling the case denied a motion to dismiss the indictment, meaning that the case will proceed to trial.

The defendants raised two principal arguments in favor of dismissal. First, they argued that the conduct of which they were accused was not a *per se* violation of § 1 of the Sherman Act and thus was not subject to criminal prosecution. (With some simplification, a *per se* antitrust violation is one which can never be justified and is thus always unlawful.) Their second, related, argument was that the indictment denied them due process because the standards for defining a *per se* violation are so vague that they were not given fair notice that they were engaging in a criminal antitrust violation.

In rejecting the first argument, the court began by reviewing largely settled law that only a narrow group of agreements — price fixing, market allocation, and bid rigging — are *per se* violations. It then held that the alleged conduct was a form of price-fixing because "[t]he antitrust laws fully apply to the labor markets, and price-fixing agreements among buyers . . . are prohibited by the Sherman Act. . . . At bottom, the alleged agreement between Defendants and co-conspirators had the purpose and effect of fixing . . . the price of labor." In rejecting the

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second argument, the court largely relied on a century of case law which, the court concluded, made it sufficiently clear that wage-fixing was *per se* illegal.

To be clear, as with any motion to dismiss, the court did not decide that defendants were guilty, but only that if everything the government alleged was true, it could be a criminal violation of the antitrust laws. If convicted, the defendants are potentially subject to a fine of $1 million and 10 years in prison.

For employers, the takeaways are simple. First, **don't do it**. Wage fixing agreements have been the subject of great and increasing focus by Department of Justice. (This is true under both Democratic and Republican administrations. Indeed, the indictment here was issued by the Trump administration). Second, 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 and considers the existence of such a program as an important migrating factor if your organization does have an antitrust problem. We emphasize "effective," because a "compliance policy" that sits on a shelf without training, monitoring, enforcement and senior management backing is of little help.

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