Law Alert

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Competitor "No Poach Agreements" Can Lead to Criminal Prosecutions, Fines and Jail Time

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by Michael A. Kurs and James T. Shearin

"No poach" agreements -- agreements between two or more competitors that neither will recruit or hire the other's employees – have long been held to violate the antitrust laws. The United States Justice Department and Federal Trade Commission issued guidance in 2016 making clear that such agreements are forbidden. But, some ignored the warning; they shouldn't anymore. Now is the time for you to consider telling your company president neighbor, the vice-president of human resources who lives down the street, your surgeon friend and anyone who might have reason to listen. Why now? The Justice Department has just announced the first criminal charges in an ongoing investigation into "employee allocation agreements," "non-solicitation" and "no poach" agreements.

According to an indictment filed on January 5, 2021 in the United States District Court for the Northern District of Texas, Dallas Division, Surgical Care Affiliates LLC (SCA) and its related entity conspired with other health care companies to "suppress competition . . . for senior level employees" in violation of the Sherman Act, a key component of our antitrust laws which also criminalizes other anti-competitive activity such as price fixing. The SCA indictment describes activity by "various companies and individuals" who participated as co-conspirators in the offense charged. Whether these "non-charged" individuals will escape prosecution, or the initiation of civil lawsuits, remains to be seen. At the center of the case against SCA is the allegation of two-way agreements not to solicit senior-level employees across the United States.

The Justice Department maintains that SCA, which owned and operated "outpatient medical care facilities" and its co-conspirators "participated in meetings, conversations and communications" to discuss no-poach agreements.

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The indictment quotes an email message: “I had a conversation with [Individual 1] re: people and we reached agreement that we would not approach each other’s proactively.” The indictment also recounts a “human resources executive” instructing a recruiter: “Please do not schedule a call with [candidate] . . . . We cannot reach out to SCA folks. Take any SCA folks off the list.” When a company identified in the indictment as “Company A” discussed whether to interview a candidate employed by SCA, one employee referred to a “verbal agreement with SCA not to poach their folks . . .”. A Company A human resources employee is said to have emailed a recruiting coordinator for Company A remarking that although a candidate “look[ed] great” she “can’t poach her.” The Justice Department asserts the no poach activities involving SCA and Company A began at least as early as May 2010 and continued to at least as late as October 2017.

A second count of the indictment maintains that SCA and a “Company B” also engaged in like illegal activities. For instance, the indictment tells of an SCA human resources executive emailing a recruiter that Company A and Company B are “off limits to SCA.” The no poaching agreement is explained this way: “. . . we can recruit junior people (below Director), but our agreement is that we would only speak with senior executives if they have told their boss already that they want to leave and are looking.” An SCA human resources executive’s email to a job candidate is quoted as specifying that SCA could not recruit from Company B “unless candidates have been given explicit permission by their employers that the can be considered for employment with us.”

A criminal violation of the Sherman Act may result in a $100 million fine for a corporation and the fine may be increased to twice the gain derived from the crime or twice the loss suffered by victims if either amount is greater than the statutory maximum. Civil antitrust no poaching law cases have their own big dollar consequences. A 2011 class action against seven of the world’s largest tech companies, including Apple, Google, and Intel, alleged a conspiracy to suppress employee pay through “no-poach” agreements. In 2015, that case reportedly resolved for settlements totaling $435 million.

As with all things antitrust, companies and individuals, whether large or small, for profit or non-profit, ought to consider the ounce of prevention - pound of cure approach. In an effort to avoid the severe consequences attendant to antitrust violations, business and other organizations should put effective compliance programs in place and regularly monitor their effectiveness. The Justice Department has a 2020 update to its guidance on antitrust compliance programs which provides that its prosecutors in matters involving corporations should consider a number of factors, including "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of the charging decision." The effectiveness of a company’s compliance program is a factor for prosecutors to consider in deciding whether and to what extent to bring criminal charges against a corporation.

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Compliance programs serve as a means to avoid price fixing, bid rigging, market allocation and other antitrust transgressions. The tools for successfully implementing compliance program abound. The 2016 Justice Department and Federal Trade Commission Guidance for Human Resources Professionals on antitrust laws that apply to competition among firms to hire employees covers some of that aspect of compliance.

For help with compliance and other antitrust issues, you may contact: Michael Kurs, James (Tim) Shearin or Jonathan Orleans at Pullman & Comley or our Compliance and Risk Management Services practice leaders, Collin Baron or Stephen Cowherd.