Reinhart

Department of Justice Secures First Criminal Indictments Against Companies for No-Poach and Wage-Fixing Agreements

Near the end of 2020, the U.S. Department of Justice (DOJ) announced its first criminal indictments for anti-competitive practices taken by companies with respect to the labor market. The first was for "wage-fixing" and the second, for entering into a "no-poaching" agreement. According to the indictments, both practices by employers constituted federal crimes in violation of U.S. antitrust law. Employers should heed this warning and steer clear of such agreements with competitors.

As a reminder, in October 2016, the DOJ issued guidance to human resources professionals warning that it may criminally prosecute employers that reach agreements not to solicit competing employers' employees (i.e., "no-poaching agreements") or that collude to artificially set wages payable to employees (i.e., "wage-fixing agreements"). Since then, the DOJ has repeatedly warned that it views these types of agreements (whether written or unwritten) among competitors as anti-competitive and collusive, *per se* illegal, and subject to criminal prosecution, but it had not yet brought criminal charges.

That changed in December 2020, when the DOJ announced that a federal grand jury had indicted the former owner of a physical therapy staffing company who had allegedly conspired with competitors to keep wages suppressed for therapists in the labor market. If convicted, the former owner faces up to 10 years in prison and up to a $1 million fine.

Then, in January 2021, the DOJ announced another federal grand jury indictment, this time because of a no-poaching agreement. According to the indictment, affiliated entities of UnitedHealth Group conspired with other health care companies to not poach senior-level executives from one another. If convicted, the defendants face a maximum penalty under the Sherman Act of up to $100 million.

In other situations, where the parties to a non-solicitation agreement are not necessarily competitors in the labor market, the DOJ does not generally view such agreements as illegal and subject to criminal prosecution. However, even in other such contexts like corporate transactions and franchise agreements, non-

POSTED:

Mar 2, 2021

RELATED PRACTICES:

Corporate Law
https://www.reinhartlaw.com/practices/corporate-law

Health Care
https://www.reinhartlaw.com/practices/health-care

Labor and Employment
https://www.reinhartlaw.com/practices/labor-and-employment

RELATED PEOPLE:

Michael J. Gentry
https://www.reinhartlaw.com/people/michael-j-gentry

Matthew DeLange
https://www.reinhartlaw.com/people/matthew-delange

solicitation terms have come under closer scrutiny by the DOJ and state authorities in recent years and should be reviewed in order to assess compliance with antitrust law and trade regulations.

Likewise, during the presidential campaign, then-candidate Biden publicly expressed that the United States should "get rid of non-compete clauses and no-poaching agreements that do nothing but suppress wages." However, to date, neither President Biden nor the DOJ has indicated that non-compete agreements *with employees* violate antitrust law. But companies should expect increased enforcement by the DOJ, including more criminal indictments, for "no-poaching" and "wage-fixing" agreements between competing companies.

Although the DOJ secured these indictments during the waning days of the Trump administration, employers should not expect the DOJ to change course under the new administration. If employers do not have one already, they should consider implementing an antitrust compliance program to prevent and detect potentially criminal anti-competitive practices by their employees or managers. The DOJ will consider the adequacy and effectiveness of an employer's program in deciding whether to bring criminal charges.

If you are unsure whether an employment-related or non-solicitation agreement risks scrutiny under antitrust law or other trade regulation laws, or if your company has any questions about employment or restrictive covenant agreements, please contact Michael Gentry, Matthew DeLange or your Reinhart attorney.