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DOJ Brings More Indictments in Labor Markets

By Carrie Mahan and Christopher Abbott

Under the Biden administration, the Department of Justice continues to make good on its promise to bring criminal antitrust enforcement actions in labor markets, and indications are that more prosecutions are on the way.

The latest action is a superseding indictment, returned on April 19, 2021, by a federal grand jury in Sherman, Texas.¹ The superseding indictment charges John Rodgers, a physical therapist and clinical director for a therapist staffing company owned by Neeraj Jindal, with wage fixing. The indictment adding Rodgers follows on the earlier indictment of Jindal.² The indictment alleges that Jindal and Rodgers entered into an agreement with a competing staffing agency to reduce pay to physical therapists.³ The indictment contains what appears to be direct evidence of the agreement in the form of communications between the competing companies. These communications include an exchange where Rodgers allegedly reaches out to the unnamed owner of a competing staffing agency, allegedly writing, “I think we’re going to lower PTA rates to \$45”, to which competing owner allegedly replies, “Yes I agree” and “I’ll do it with u.”⁴

The superseding indictment marks the third indictment this year connected to the Antitrust Division’s ongoing probe into anticompetitive activity in labor markets. A separate indictment was filed in the U.S. District Court for the District of Nevada in March.⁵ The indictment alleges that VDA OC, LLC, a contract healthcare staffing services company, along with Ryan Hee, its Las Vegas regional manager, conspired with an unnamed company and unnamed individuals not to recruit nurses from one another, and to fix nurses’ wages.⁶

In support of those allegations, the indictment cites what appears to be direct evidence of a no-poach agreement. The indictment alleges that in October, 2016, Mr. Hee emailed an unnamed individual at a competitor healthcare staffing company, saying, “Per our conversation, we will not recruit any of your active CCSD nurses.”⁷ The unnamed individual allegedly responds, “Agreed on our end as well. I am glad we can work together through this, and assure that we will not let the field employees run our business moving forward.”⁸ In March, 2017, the unnamed individual allegedly instructed a subordinate to refuse a nurse’s request for a pay increase, referring in an internal email to the “deal not to poach nurses.”⁹

And in January, an indictment was filed in the Northern District of Texas accusing Surgical Care Affiliates, an owner and operator of outpatient medical care centers, of conspiring with two unnamed health care companies to suppress competition for senior-level employees.¹⁰

The indictment alleges that Surgical Care Affiliates agreed with the competing companies not to recruit senior-level employees.¹¹ In support of these allegations, the indictment sets forth email communications allegedly discussing a “gentlemen’s agreement” regarding “poaching talent.”¹²

DOJ Guidance

These indictments result from an ongoing effort by the Antitrust Division to enforce violations of the antitrust laws by human resource professionals and others involved in hiring and compensation decisions. The Division signaled its intent to bring criminal prosecutions in this space in 2016, when it joined with the FTC to issue antitrust guidance for human resource professionals.¹³ That guidance stated clearly that “going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements,” because like traditional price-fixing or market-allocation agreements, they eliminate competition in an “irredeemable way.”¹⁴

The guidance advises that those involved in hiring and compensation decisions should avoid entering into so-called “naked” agreements regarding any terms of employment—not limited to just wage rates—with firms that compete to hire employees. Naked agreements are those separate from or not reasonably related to a legitimate collaboration. Agreements need not be formal or written down to be illegal. The guidance makes clear that “it does not matter whether the agreement is informal or formal, written or unwritten, spoken or unspoken.”¹⁵ In addition, HR decision-makers are advised not to enter into agreements not to solicit or hire another company’s employees (“no poach” agreements). Lastly, the guidance cautions against unnecessary exchange of sensitive information with competitors, such as information “about terms and conditions of employment,” because information exchange can be evidence of an illegal agreement, or give rise to civil liability if the information exchange itself has an anticompetitive effect.¹⁶

Key Takeaways

Labor market competition will continue to be an area of focus for the Antitrust Division under the Biden administration. Indeed, before being inaugurated, President Biden tweeted, “It’s simple: companies should have to compete for workers just like they compete for customers. We should get rid of non-compete clauses and no-poaching agreements that do nothing but suppress wages.”¹⁷

Now is the time—if they haven’t already—for companies to revisit their antitrust compliance policies to ensure they give appropriate focus and attention to issues related to human resources and hiring. A robust compliance program should include training tailored to issues facing human resources professionals. It should be made clear to those involved in hiring and compensation decisions that naked agreements with competitors about any terms of employment, including any type of benefit, are illegal and are being prosecuted criminally. But that alone is not enough. Human resources personnel must understand that even activity that doesn’t rise to the level of a “naked agreement” can nevertheless raise antitrust concerns. Such activity includes unnecessary exchange of current or future, competitively sensitive or company-specific information about employee compensation or terms of employment, and participation in meetings, such as trade association meetings, where any such information is discussed on a non-anonymized basis, and without appropriate guidance on the scope of such discussions.

¹ Department of Justice, Office of Public Affairs, “Second Individual Charged with Fixing Wages for Health Care Workers and Obstructing FTC Investigation,” (Apr. 19, 2021), available at <https://www.justice.gov/opa/pr/second-individual-charged-fixing-wages-health-care-workers-and-obstructing-ftc-investigation>.

² Department of Justice, Office of Public Affairs, “Former Owner of Health Care Staffing Company Indicted for Wage Fixing,” (Dec. 10, 2020), available at <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>.

³ See *United States v. Neeraj Jindal and John Rodgers*, No. 4:20-cr-358-ALM-KPJ (E.D. Tex. Dec. 9, 2020), available at <https://www.justice.gov/opa/press-release/file/1387866/download>.

⁴ *Id.* at 4.

⁵ Department of Justice, Office of Public Affairs, “Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses,” (Mar. 30, 2021), available at <https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses>.

⁶ *United States v. Ryan Hee and VDA OC, LLC, formerly ADVANTAGE ON CALL, LLC.*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Mar. 26, 2021), available at <https://www.justice.gov/opa/press-release/file/1381556/download>.

⁷ *Id.* at 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ Department of Justice, Office of Public Affairs, “Health Care Company Indicted for Labor Market Collusion,” (Jan. 7, 2021), available at <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>.

¹¹ See *United States v. Surgical Care Affiliates, LLC and Scai Holdings, LLC*, No. 3:21-cr-011-L (N.D. Tex. Jan. 5, 2021), available at <https://www.justice.gov/opa/press-release/file/1351266/download>.

¹² *Id.* at 9.

¹³ Department of Justice and Federal Trade Commission, “Antitrust Guidance for Human Resource Professionals,” (October 2016), available at <https://www.justice.gov/atr/file/903511/download>.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 4.

¹⁷ @JoeBiden, Twitter, (Dec. 23, 2019, 7:05 PM), <https://twitter.com/joebiden/status/1209263668736745473>.

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