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Employers Should Be Wary of Serious Antitrust Risks of "No-Poach" Arrangements

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The U.S. Department of Justice (“DOJ”) is making good on its warnings to pursue criminal antitrust charges against employers entering into so-called “no-poach” arrangements with competitors, including arrangements not to hire or solicit each other’s employees or to fix wages. Criminal violations carry the potential for fines of \$100 million or more and jail time for individual defendants, and recent civil cases have resulted in hundreds of millions of dollars in settlements.

Scrutiny in this area started gaining attention in 2010 when the DOJ reached a settlement over use of no-poach agreements with a number of prominent high-tech companies, including Adobe, Apple, Google, Intel, Intuit and Pixar. The DOJ settlement required those companies to abolish their use of such agreements and sparked a series of private class action cases resulting in more than \$400 million in settlements. Since then, the DOJ and U.S. Federal Trade Commission issued 2016 guidance and multiple warnings against the use of no-hire and non-solicitation arrangements where there is no tie to some legitimate collaboration or transaction. These warnings were followed up in January 2021, when the DOJ brought its very first criminal no-poach case in federal court in Texas against Surgical Care Affiliates LLC (“Surgical Care”), an operator of outpatient surgical facilities, alleging that it illegally conspired with a competitor to not solicit each other’s senior level employees. This was quickly followed by an April 2021 federal grand jury indictment in Las Vegas, Nevada, charging a healthcare staffing company and one of its former managers with entering into an unlawful agreement with a competing staffing company to allocate nurses and fix wages.

In the DOJ’s recently filed action in Texas, it should be noted that the defendant, Surgical Care, joined by the U.S. Chamber of Commerce, has moved to dismiss the case arguing that there is insufficient precedent for the U.S. government to pursue non-solicitation pacts as being illegal under U.S. antitrust law. In May 2021, the DOJ responded that efforts to divvy up the labor market through non-solicitation or allocation schemes have long been considered unlawful. While the court’s ruling on the motion to dismiss in the Surgical Care case may impact the U.S. government’s efforts to prosecute no-poach arrangements, employers should remain very careful given the clear criminal and civil risks in this area. In particular, employers should not include no-hire or non-solicitation provisions in agreements with competitors without careful legal review, and should avoid all wage-fixing arrangements.

