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2021 Criminal Antitrust Update

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The First Criminal Wage-Fixing and No-Poach Prosecutions

In 2016, the Department of Justice's Antitrust Division and the Federal Trade Commission issued guidance alerting human resource professionals that an "agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws."[1] The DOJ stated its position clearly: "the DOJ intends to proceed *criminally* against naked wage-fixing or no-poaching agreements" because these agreements "eliminate competition" and create the same type of harm as other hardcore cartel conduct.[2] This was a significant change because, in the past, the DOJ had resolved allegations of wage-fixing and no-poach agreements through civil enforcement actions.[3] During COVID-19, the two agencies reaffirmed their commitment to criminally prosecute these types of agreements, and warned that they will hold those accountable who use the pandemic "to prey on American workers by subverting competition in labor markets."[4] Recently, the Division announced its first two indictments for wage-fixing and no-poach agreements.

Wage-Fixing

On December 10, 2020, the Antitrust Division announced the indictment of Neeraj Jindal, the former owner of a therapist staffing company (which contracts with physical therapists), making him the first individual criminally charged with wage-fixing.[5] The indictment alleges that from around March 2017 to around August 2017, Jindal and the owner of a competing therapist-staffing agency agreed to reduce pay to

[1] 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, at 1.

[2] *See id.* at 4 (emphasis added).

[3] *See, e.g.*, Department of Justice, Office of Public Affairs, "Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees," (Apr. 3, 2018), available at https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[4] *See* Federal Trade Commission, "Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets," (April 2020), available at https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf

[5] *See* 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.

physical therapists.[6] Later, Jindal allegedly solicited other competitors via text message to "join the collective effort to lower rates."[7] Then-Assistant Attorney General Makan Delrahim stated that the charges were "an important step in rooting out and deterring employer collusion that cheats American workers — especially health care workers — of free market opportunities and compensation."[8]

No-Poach

On January 7, 2021, the Division announced its first grand jury indictment for a no-poach agreement.[9] The first company that was indicted is Surgical Care Affiliates LLC ("SCA"), which owns and operates outpatient medical care centers.[10] The DOJ alleged that SCA engaged in "two separate bilateral conspiracies with other health care companies to suppress competition between them for the services of senior-level employees."[11] Both counts of the indictment allege that SCA violated § 1 of the Sherman Act by agreeing with other companies not to recruit their senior-level employees, monitoring compliance with the alleged agreement, and instituting policies that required senior-level employees to inform SCA if they were seeking employment opportunities at other companies.[12] Neither of the two conspirator-companies were named, but the Division listed extensive email communications in the indictment.[13] In the first alleged conspiracy with "Company A," one Company A recruiter stated that "although the candidate 'look[ed] great' she 'can't poach her.'"[14] There were also similar communications between SCA and "Company B" in the indictment. In one email, an SCA employee wrote, "I thought there was a gentlemen's agreement between us and [Company B] re: poaching talent."[15] An SCA executive replied, "There is."[16]

Conclusion

Both indictments represent material developments for criminal antitrust enforcement in the HR space. Under the Biden administration, similar efforts to investigate agreements that suppress wages and competition in labor markets will certainly continue. President Biden has previously expressed his support for these types of policies in December 2019, tweeting, "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]

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[6] *See United States v. Neeraj Jindal*, No. 4:20-cr-358-ALM-KPJ (E.D. Tex. Dec. 9, 2020), available at https://www.justice.gov/opa/press-release/file/1344191/download, at 3-4.

[7] *See id.* at 5.

[8] *See supra* note 5.

[9] *See* 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.

[10] *See id.*

[11] *See id.*

[12] *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, 3-4, 8-9.

[13] *See generally id.*

[14] *See id.* at 5.

[15] *See id.* at 9.

[16] *See id.*

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

The Rise of Deferred Prosecution Agreements

In July 2019, the DOJ announced a new policy permitting the resolution of antitrust criminal prosecutions in certain circumstances through deferred prosecution agreements ("DPAs") instead of plea agreements.[18] Recognizing that the Antitrust Division's approach towards corporate compliance programs has not changed since the early 1990s, then-Assistant Attorney General Makan Delrahim explained that the Division should change its policies to maximize deterrence and detection.[19] An "admission of guilt, a criminal penalty, and cooperation in the ongoing investigation" are required to resolve criminal charges using this route.[20] Though when changing its policy the Division emphasized the importance of one factor in particular when entering into such agreements—the "adequacy and effectiveness of the corporation's compliance program"[21]—the Division has since entered into seven DPAs, spanning three investigations, each with varying rationales.

Collateral Consequences to Consumers

The first investigation to yield a DPA involved an investigation into price-fixing, bid-rigging, and customer-allocation in the generic drug industry.[22] Five of six companies that were under investigation entered into DPAs: Heritage Pharmaceuticals,[23] Rising Pharmaceuticals, Inc.,[24] Sandoz Inc.,[25] Apotex Corporation,[26] and Taro Pharmaceuticals.[27] Four executives from the generic drug industry have also been charged for their roles in the alleged conspiracy.[28] Under federal law, a criminal conviction of a healthcare company may result in the company's exclusion from federal healthcare programs for five years.[29] With this in mind, the Antitrust Division justified its use of DPAs in the generic space by observing that removal of the

[18] *See* Department of Justice, Office of Public Affairs, "Assistant Attorney General Makan DelrahimDelivers Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement," (July 11, 2019), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

[19] *See id.*

[20] *See* Department of Justice, Antitrust Division, "Generic Drugs," (June 23, 2020), available at https://www.justice.gov/atr/division-operations/antitrust-division-update-2020/generic-drugs.

[21] *See supra* note 1.

[22] *See supra* note 3.

[23] *See* Department of Justice, Office of Public Affairs, "Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations," (May 31, 2019), available at https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false.

[24] *See* Department of Justice, Office of Public Affairs, "Second Pharmaceutical Company Admits to Price Fixing, Resolves Related False Claims Act Violations," (Dec. 3, 2019), available at https://www.justice.gov/opa/pr/second-pharmaceutical-company-admits-price-fixing-resolves-related-false-claims-act.

[25] *See* Department of Justice, Office of Public Affairs, "Major Generic Pharmaceutical Company Admits to Antitrust Crimes," (Mar. 2, 2020), available at https://www.justice.gov/opa/pr/major-generic-pharmaceutical-company-admits-antitrust-crimes.

[26] *See* Department of Justice, Office of Public Affairs, "Generic Pharmaceutical Company Admits to Fixing Price of Widely Used Cholesterol Medication," (May 7, 2020), available at https://www.justice.gov/opa/pr/generic-pharmaceutical-company-admits-fixing-price-widely-used-cholesterol-medication.

[27] *See* Department of Justice, Office of Public Affairs, "Sixth Pharmaceutical Company Charged In Ongoing Criminal Antitrust Investigation," (July 23, 2020), available at https://www.justice.gov/opa/pr/sixth-pharmaceutical-company-charged-ongoing-criminal-antitrust-investigation.

[28] *See id.*

[29] *See* Social Security Act, 42 U.S.C. § 1320a–7 (2011).

investigation targets from the market would reduce competition, to the detriment of drug purchasers.[30] In addition, the Antitrust Division emphasized the companies' ongoing cooperation in the investigation.[31]

In the second investigation to yield a DPA, Florida Cancer Specialists & Research Institute LLC, a Florida oncology group, agreed to pay $100 million and admitted to conspiring to allocate chemotherapy and radiation treatment.[32] The Division released a "Q&A" to explain its rationale for the DPA.[33] In it, the Division took a similar position it did with the generic drug manufacturers, explaining that it "took into account the significant collateral consequences that likely would result from a criminal conviction," especially for patients, and considered the potential future exclusion from federal healthcare programs.[34]

A Different Approach with Argos

Recently, the Antitrust Division entered into a DPA with Argos USA LLC, a Georgia-based company that produces and sells ready-mix concrete, for participating in a conspiracy to fix prices, rig bids, and allocate markets for sales of ready-mix concrete.[35] Among other considerations, the Antitrust Division's rationale for the DPA focused on the following: (1) "the illegal conduct was limited to a small number of employees who joined the Company through an asset acquisition of another company in October 2011, after the conspiracy had already begun"; (2) the two employees primarily responsible were previously charged; (3) the company began cooperating with the Department of Justice in August 2020; and (4) the company agreed to enhance its antitrust compliance program.[36]

Different from the DPAs that stemmed from the two previous investigations, the Antitrust Division did not appear to consider the collateral consequences to consumers in its decision to agree to a DPA. In addition, it was not apparent that Argos' corporate compliance program reflected all the attributes of a "good program" that the DOJ had previously identified.[37] This is notable, given that the Division's initial drive to allow the use of DPAs to resolve criminal antitrust charges was to encourage robust corporate compliance.[38]

Conclusion

The rise of DPAs to resolve charges of criminal antitrust violations is a major change in the Antitrust Division's practices. Based on the DPAs entered into so far, it is clear that the potential consequences of

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[30] *See, e.g.*, *United States v. Apotex Corp.*, No. 20-cr-169 (E.D. Pa. May 7, 2020), available at https://www.justice.gov/opa/press-release/file/1274706/download.

[31] *See id.*

[32] *See* Department of Justice, Office of Public Affairs, "Leading Cancer Treatment Center Admits to Antitrust Crime and Agrees to Pay $100 Million Criminal Penalty," (Apr. 30, 2020), available at https://www.justice.gov/opa/pr/leading-cancer-treatment-center-admits-antitrust-crime-and-agrees-pay-100-million-criminal.

[33] *See* Department of Justice, "Florida Cancer Specialists & Research Institute, LLC, Deferred Prosecution Agreement – Q&A," available at https://www.justice.gov/opa/press-release/file/1272556/download.

[34] *See id.*

[35] *See* Department of Justice, Office of Public Affairs, "Ready-Mix Concrete Company Admits to Fixing Prices and Rigging Bids in Violation of Antitrust Laws," (Jan. 4, 2021), available at https://www.justice.gov/opa/pr/ready-mix-concrete-company-admits-fixing-prices-and-rigging-bids-violation-antitrust-laws#:~:text=The%20Antitrust%20Division%20also%20announced,the%20Antitrust%20Division's%20ongoing%20criminal

[36] *United States v. Argos USA LLC*, No. 4:21-CR-002-RSB-CLR (S.D. Ga. Jan. 1, 2021), available at https://www.justice.gov/opa/press-release/file/1350481/download.

[37] *See id.* at 33-35.

[38] *See supra* note 1.

a criminal conviction to consumers is important. The DPA that the Division entered into with Argos, however, calls this general trend into question, so it remains to be seen when DPAs might be available to resolve criminal antitrust investigations in the future.

Criminal Antitrust Whistleblower Protections Enacted

After years of attempts to pass protections for private-sector employees who report criminal antitrust violations, on December 23, 2020, the Criminal Antitrust Anti-Retaliation Act of 2019 ("the Act") became law.[39] The Act amends the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 by adding civil protections for whistleblowers.[40] This Act will likely reinforce the recent initiatives by the Department of Justice's Antitrust Division that focus on early detection of antitrust violations and corporate compliance, such as the Antitrust Division's new policy that it will consider companies' compliance programs at the charging stage in criminal antitrust investigations.[41]

The Scope of the Whistleblower Protections

The Act protects a broadly defined group of "covered individuals" from discharge, demotion, suspension, threats, harassment, or discrimination by an employer (*i.e.*, "a person, or any officer, employee, contractor, subcontractor, or agent of such person").[42] A covered individual is an "employee, contractor, subcontractor, or agent of an employer."[43]

The Act sets out various requirements that must be met before a covered individual may qualify for whistleblower protections. For example, a covered individual cannot have "planned or initiated" the violation of the criminal antitrust law or have "planned and initiated an obstruction or attempted obstruction of an investigation by the Department of Justice of a violation of the antitrust laws."[44] In addition, the individual must either:

- provide information or cause someone to provide information to the "federal government" (*i.e.*, a federal regulatory body, federal law enforcement agency, or a member or committee of Congress), "a person with supervisory authority over the covered individual," "or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct;"[45] or
- testify, participate in, or otherwise assist the federal government's investigation or proceeding that is about to be filed.[46]

Protections are limited to individuals who report what is or what they reasonably believe to be a violation of: (1) criminal antitrust laws, or (2) "another criminal law committed in conjunction with a potential

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[39] *See* Department of Justice, Office of Public Affairs, "Justice Department Applauds Passage of the Criminal Antitrust Anti-Retaliation Act," (Dec. 24, 2020), available at https://www.justice.gov/opa/pr/justice-department-applauds-passage-criminal-antitrust-anti-retaliation-act.

[40] *See* Criminal Antitrust Anti-Retaliation Act of 2019, 15 U.S.C. § 7a–3 (2020), available at https://www.congress.gov/116/plaws/publ257/PLAW-116publ257.pdf.

[41] *See* Department of Justice, Office of Public Affairs, "Antitrust Division Announces New Policy to Incentivize Corporate Compliance," (July 11, 2019), available at https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

[42] *See* §§ 7a–3(a)(1), (a)(3)(C).

[43] *See* § 7a–3(a)(3)(B).

[44] *See* § 7a–3(a)(2).

[45] *See* §§ 7a–3(a)(1)(A), (a)(3)(D).

[46] *See* § 7a–3(a)(1)(B).

violation of the antitrust laws or in conjunction with an investigation by the Department of Justice of a potential violation of the antitrust laws."[47] And the Act defines "antitrust laws" as Sections 1 and 3 of the Sherman Act, which prohibit contracts, combinations or conspiracies in restraint of trade or commerce.[48]

A covered individual who is discharged or discriminated against for reporting a violation may seek relief by filing a complaint with the Secretary of Labor.[49] If the Secretary of Labor does not issue a final decision within 180 days, and the delay was not based on the claimant's bad faith, the Act creates a federal private right of action.[50] A covered individual may seek "all relief necessary to make the covered individual whole," including reinstatement to the same employment status the employee would have had "but for" the discrimination, "back pay, with interest," and special damages, including "litigation costs, expert fees, and reasonable attorney's fees."[51]

Conclusion

The Act will likely add to the Antitrust Division's efforts to encourage early detection and corporate compliance with antitrust laws by creating an avenue for employees to report a company's violations without fear of retaliation. However, this change is significant because it may impact a corporation's ability to take part in other Antitrust Division efforts aimed at early detection, such as the corporate leniency policy.[52] Under the leniency policy, a corporation may become ineligible to participate in the program, if, for example, an employee reports the violation before the corporation.[53]

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If you have questions concerning the contents of this issue, or would like more information about Weil's Antitrust/Competition practice group, please speak to your regular contact at Weil or to the contacts listed below:

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[47] *See* § 7a–3(a).

[48] *See* §§ 7a–3(a)(3)(A), (a)(4).

[49] *See* § 7a–3(b)(1).

[50] *See id.*

[51] *See* § 7a–3(c).

[52] Department of Justice, Antitrust Division, "Corporate Leniency Policy," (updated July 19, 2015), available at https://www.justice.gov/atr/corporate-leniency-policy.

[53] *See id.*