



First criminal no-poach action brought against health care company

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After several years of stating it had undertaken multiple active criminal investigations into employee allocation and other labor market agreements, on January 7, 2021, the U.S. Department of Justice's Antitrust Division (DOJ) brought its first indictment against a health care company, alleging that it had illegally conspired with its competitors to not solicit each other's employees.

According to the DOJ, "[t]he charges demonstrate the Antitrust Division's continued commitment to criminally prosecute collusion in America's labor markets." Assistant Attorney General Makan Delrahim said, "[A] freely competitive employment market is essential to the health of our economy and the mobility of American workers. Along with our law enforcement partners, the division will ensure that companies who illegally deprive employees of competitive opportunities are not immune from our antitrust laws."

In the indictment, DOJ alleges that a Birmingham, Alabama, and Deerfield, Illinois, company, Surgical Care Affiliates, LLC and its successor SCAI Holdings, LLC (collectively, SCA), engaged in a "Conspiracy in Restraint of Trade to Allocate Employees," in violation of the Sherman Act, 15 U.S.C. § 1, by entering into two separate bilateral conspiracies with other health care companies to suppress competition between them for the services of senior-level employees.

In the first count, SCA is alleged to have entered into an agreement, between 2010 through 2017, with a Dallas-based company to not solicit each other's senior-level employees. As evidence of the agreement, the indictment cites an email in which the Dallas-based company's CEO said, "I had a conversation w [SCA's CEO] re people, and we reached agreement that we would not approach each other's proactively," and another email from SCA's CEO stating, "[W]e 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." *Indictment* at ¶ 11.

In the second count, the indictment alleges that from 2012 through 2017, SCA conspired with a Denver-based company to allocate senior-level employees through a non-solicitation agreement. *Indictment* at ¶ 19. According to the indictment, in 2016, an employee of SCA said, "I thought there was a gentlemen's agreement between us and [Company B] re poaching talent."

The CEOs of the involved companies, who are alleged to have made and enforced the unlawful agreements, were not named in the indictment.

In response to the indictment, an SCA spokesperson said, “The position taken by the government in this matter represents a novel application of the antitrust laws as they relate to employee recruitment [...],” and vowed that the company would vigorously defend against the allegations.

This indictment comes on the heels of the Antitrust [Division’s first-ever wage-fixing indictment against horizontal competitors](#), filed last month in the Eastern District of Texas [against a health care staffing company](#). It is also the first no-poaching case to come in the wake of the [October 2016 Joint DOJ and FTC Antitrust Guidance to Human Resources Professionals](#), which had explicitly stated that DOJ would not hesitate to investigate labor market collusion as criminal violations of the antitrust laws. And, not surprisingly, plaintiffs’ law firms have already filed the first civil follow-on antitrust class-action suit on behalf of affected employees (*See Roe v. Surgical Care Affiliates, LLC, et al.*, N.D. Ill. 21-cv-305, Complaint, Jan. 19, 2021).

A violation of the Sherman Act carries a maximum penalty of a \$100 million fine for corporations. 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. Successful civil plaintiffs are entitled to treble damages.

Given the increased enforcement attention focused on labor markets, companies are advised to be vigilant about avoiding any conduct or implementing company policies that constrain labor market competition, whether through no-poach or non-solicitation agreements, wage-fixing, or agreements regarding benefits offered to employees.

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