



News & Types: Client Advisories

Employers at Risk of Criminal and Civil Liability for "Wage-Fixing" and "No Poach" Agreements

1/4/2022

By: Steven L. Katz

Practices: Commercial, Competition & Trade, Employment, Labor & Benefits, Litigation

Executive Summary

On November 30, 2021, a federal court in Texas refused to dismiss the U.S. Department of Justice's ("DOJ") very first criminal case concerning an alleged wage-fixing agreement, rejecting the defendants' argument that there is no legal precedent to support the criminal prosecution of such activity. In that case, the DOJ accused a former owner of a physical therapist staffing company and an ex-director of the company, of violating the federal antitrust laws through a scheme to fix the wages paid to physical therapists in the Dallas-Ft. Worth area. Defendants argued in their motion to dismiss that the DOJ's charges violated their constitutional rights because the defendants did not have "fair warning" that the alleged wage-fixing activity could be considered illegal. The court issued an order and opinion denying the motion, finding that the alleged scheme, if proven, would constitute price-fixing, which has long been illegal under the antitrust laws. The defendants are now facing trial, scheduled to commence in April 2022.

As previously reported and as the Texas federal case demonstrates, the DOJ is making good on its warnings to pursue criminal antitrust charges against employers who enter into "wage-fixing" and "no poach" arrangements. Essentially, "wage-fixing" involves agreements made with competitors to fix salary or other terms of compensation, while "no poaching" agreements involve refusing to solicit or hire another company's employees. As set forth in the "Antitrust Guidance For Human Resource Professionals" published in October 2016 by the DOJ and the U.S. Federal Trade Commission ("FTC"), companies generally are prohibited from entering agreements with competitors concerning employee hiring, compensation or other terms or conditions of employment. On July 9, 2021, President Biden issued an Executive Order that called upon the DOJ and FTC to "enforce the antitrust laws vigorously" including with respect to the employment markets. Criminal antitrust violations carry the potential for corporate fines of \$100 million or more and fines and jail time for individual defendants.

In addition to the wage-fixing case described above, in early 2021, the DOJ brought its first two criminal cases alleging that competitors pursued illegal non-solicitation pacts seeking to suppress competition in the healthcare industry by agreeing not to solicit or hire each other's employees. The DOJ also brought in 2021 a second criminal wage-fixing case. Defendants in those cases also have argued that there is insufficient

precedent to allow such charges to proceed on a criminal basis. The recent ruling denying defendants' motion to dismiss in the Texas wage-fixing case may suggest that courts are inclined to allow such charges to proceed to trial.

In 2021, a putative class action lawsuit also was filed in federal court in Chicago seeking to impose civil liability against the defendants related to the criminal no-poach allegation. Recent civil cases in this area have resulted in hundreds of millions of dollars in settlements.

With the DOJ's increased focus in this area in mind, employers should remain very careful in their dealings with competitors concerning hiring and compensation practices given the clear criminal and civil risks involved. While not all non-solicitation arrangements are illegal, if you have doubts about whether communications or agreements with competitors have legal implications or if you just have questions about these recent court decisions and cases you should promptly contact legal counsel to make sure you and your company stay within the law.