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"Wage-Fixing" and "No Poach" Arrangements Remain Illegal, Despite Recent DOJ Trial Losses

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As previously reported, the U.S. Department of Justice ("DOJ") has made good on its warnings to pursue criminal antitrust charges against employers who enter into so-called "wage-fixing" and "no-poach" arrangements. Essentially, "wage-fixing" involves agreements with competitors to fix employee compensation, while "no-poaching" involves agreements with competitors not to solicit or hire each other's employees.

On April 14, 2022, a Texas jury acquitted two operators of a physical therapy staffing company on charges of wage-fixing in violation of the antitrust laws. The defendants argued, and seemingly convinced the jury, that there was no actual agreement with competitors to fix wages. Even so, one of the defendants was convicted of obstructing a federal investigation.

On April 15, 2022, a Colorado jury acquitted a kidney dialysis company and its former CEO on charges that they conspired with competitors in violation of the antitrust laws through non-solicitation arrangements to prevent their employees from being poached. In this case, the defendants successfully argued that there was insufficient evidence to prove the existence of any no-poach agreements.

While these verdicts clearly represent defeats for the DOJ in its efforts to criminally prosecute antitrust violations impacting the labor markets, it is notable that in each case the court denied the defendants' motion to dismiss the charges on the asserted basis that the antitrust laws do not support criminal violations for wage-fixing or no-poaching arrangements. Rather, in each case the court ruled that existing antitrust laws support the potential for criminal violations depending on the facts and allowed the charges to go to the jury.

As such, while the DOJ may look to refine its prosecution strategy in other cases moving forward, both of these cases support the DOJ's position that wage-fixing and no-poach arrangements are illegal under the antitrust laws and can give rise to criminal violations, including jail time and fines. This is in addition to the risk of civil liability for such conduct.

With this in mind, while not all non-solicitation arrangements are illegal, if you have doubts about whether arrangements or communications with competitors have legal implications or if you have questions about these recent court decisions, you should promptly contact legal counsel to make sure you and your company stay within the law.

