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DOJ Evolves Its Strategy of Increased Criminalization of Employment Restrictions Under Antitrust Laws

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The Biden administration's Department of Justice (DOJ) Antitrust Division recently secured its first criminal conviction for a labor-side violation of Section 1 of the Sherman Act after VDA OC LLC (VDA) entered a guilty plea. The conviction follows a pair of highly publicized losses the DOJ suffered earlier this year in its first two criminal trials involving no-poach and wage-fixing accusations. While VDA's guilty plea shows the DOJ's commitment to criminally prosecuting labor-side Section 1 claims, questions still remain about the DOJ's ability to convince juries — and the public — that businesses should not communicate with each other about employee pay or the solicitation of other businesses' employees.

U.S.A. v. Ryan Hee and VDA OC LLC, formerly Advantage On Call LLC

On March 30, 2021, the DOJ filed an indictment against Ryan Hee and VDA OC LLC, formerly known as Advantage on Call LLC, alleging that the defendants had violated 15 U.S.C. § 1 conspiracy in restraint of trade.[1]

VDA is a contract health care staffing service that operates in multiple states and provides health care personnel, including nurses, to the entities with which it contracts.[2] For many years, including the years relevant to the prosecution, Mr. Hee served as the regional manager of VDA's Las Vegas office.[3] Per the indictment, VDA, at the direction of Mr. Hee, entered into a conspiracy with an unnamed competitor to refrain from recruiting or hiring each other's nurses and not to compete with respect to the wages paid to nurses.[4] The DOJ alleged that emails between VDA and the unnamed competitor prove that a no-poach agreement and an agreement to set the nurses wages at the same rate was entered into and thus restrained trade.[5]

Motions to Dismiss

In September 2021, VDA filed a motion to dismiss the indictment that was joined by Mr. Hee.[6] In the motion to dismiss, the defendants relied heavily on the Northern District of Illinois ruling in *Deslandes v. McDonald's USA LLC*[7] and the Southern District of Illinois ruling in *Conrad v. Jimmy John's Franchise LLC*,[8] each of which ruled that the no-poach agreements at issue were subject to rule of reason analysis, not *per se* treatment.[9] The defendants also argued that since both VDA and the unnamed company had contracts with the Clark County School District in Nevada (CCSD), the alleged no-poach agreement "must be considered ancillary to their shared role for CCSD" and therefore subject to the rule of reason.[10]

The DOJ opposed the motion to dismiss, arguing the alleged no-poach agreement was a classic example of a horizontal restraint of trade, long held to violate Section 1.[11] It further argued there was no reason to create an

exception to the *per se* rule for no-poach agreements and that the defendant's ancillary-restraint defense was meritless.[12]

To date, the court has not ruled on the motion to dismiss. During a status conference on May 12, 2022, Judge Richard F. Boulware II informed the parties: "I'm not inclined, based upon my review of the law to grant the motion to dismiss. However, I'm going to defer ruling on it only because this is an evolving area and it's possible that the Ninth Circuit may come down with something more specific."[13] The ruling referenced is still pending.

VDA Pleads Guilty

On September 1, 2022, while its motion to dismiss was still pending, VDA filed a notice of intent to change the plea.[14] However, at the change of plea hearing on September 8, there was a dispute between the prosecution and VDA's counsel as to the elements that needed to be pled for the entry of the guilty plea.[15] On October 27, the parties appeared to have come to an agreement on the proper elements for the plea, and VDA plead guilty to conspiracy to violate Section 1 of Sherman Act.[16] The court accepted the parties' sentencing recommendation and ordered VDA to pay a $62,000 fine and $72,000 in restitution.[17]

Notably, while VDA's guilty plea ended the prosecution against it, Mr. Hee did not enter a guilty plea and remains a defendant in the case. In fact, Mr. Hee may face an even tougher battle going forward because in pleading guilty, VDA admitted that "during the relevant time period, [it], through one of its employees, participated in a conspiracy…" .[18] However, both Mr. Hee's motion to dismiss and motion to suppress remain pending and may result in the dismissal of the indictment against him.[19]

Conclusion

Businesses should expect the DOJ to feel emboldened in their enforcement actions as a result of this guilty plea. Despite the DOJ's difficulty securing criminal convictions, the guilty plea by VDA is a strong example for why clients should be careful when seeking to limit the movement of their employees in an agreement with competitors or discussing their employees' pay with competitors. *U.S. v. Hee* shows the DOJ's appetite for bringing criminal charges for Sherman Act claims involving employees.

Having said that, the ability for the DOJ to secure a conviction without a guilty plea is still far from certain. The DOJ has yet to show it can overcome the hurdles it faced in earlier cases and demonstrate the enforcement agencies' ability to secure criminal antitrust convictions for indictments involving employee pay and mobility. Unlike communications involving the price of a product or services offered to consumers that are commonly seen as "high risk," communications among employers regarding their employees may not strike the public at large or the judiciary as either patently illegal — at least not worthy of jail time — or having an anticompetitive effect.

We will have to wait and see if the prosecution against Mr. Hee goes to trial, and if so, if the DOJ will overcome this hurdle.

Related Cases Worth Watching

Along with following the prosecution against Mr. Hee, businesses should pay close attention to the appeal of the

district court's denial of class certification and judgment on the pleadings in *Deslandes v. McDonald's USA LLC*, which is pending in the Seventh Circuit.[20] Plaintiffs in *Deslandes*, former employees of McDonald's franchisees, alleged that a no-poach provision in McDonald's franchise agreements was *per se* illegal under the antitrust laws and injured them by suppressing wages and limiting their employment opportunities. We reported on the district court's dismissal of the *per se* antitrust claims in our client alert earlier this year. Recently, the DOJ and FTC,[21] as well as a coalition of 20 states and the District of Columbia[22], filed amicus briefs, urging for the reversal of the district court's ruling. Both amicus briefs argued that the district court erred by not properly applying the ancillary-restraints doctrine and by not applying *per se* treatment to the employee-allocation agreement.

Some have expressed concern that private litigants can have mixed incentives for filing a lawsuit (including harm to their competitor) and that the extensive burdens inherent in antitrust class actions can have an *in terrorem* effect. Thus, the success of the enforcement agencies' attempts to expand use of the antitrust laws through private civil litigation will depend largely on overcoming the judiciary's historic reluctance to apply the antitrust laws to potentially legitimate business activity.

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[1] *United States of America, v. Ryan Hee and VDA OC LLC, formerly Advantage on Call LLC*, ECF. 1, 2:21-cr-00098-RFB-BNW (D. Nev. March 30, 2021).

[2] *Id.* at ¶2.

[3] *Id.* at ¶3.

[4] *Id.* at ¶¶12-14.

[5] *Id.* at ¶14.

[6] ECF. 37, 39, 2:21-cr-00098-RFB-BNW (D. Nev. Sept. 3, 2021). Mr. Hee, along with joining VDA's motion dismiss, filed his own motion to dismiss or in the alternative to suppress, alleging prosecutorial misconduct. ECF. 38, 2:21-cr-00098-RFB-BNW (D. Nev. Sept. 3, 2021).

[7] 2021 WL 3187668, No. 17-cv-4857, (N.D. Ill. July 28, 2021).

[8] ECF 240, No. 18-cv-00133 (S.D. Ill. July 23, 2021).

[9] ECF. 37, 2:21-cr-00098-RFB-BNW, at 9-11 (D. Nev. Sept. 3, 2021).

[10] *Id.* at 12-14. The defendants also argued that the application of the *per se* was unconstitutional for various reasons. *Id.* at 18-22.

[11] ECF. 47, 2:21-cr-00098-RFB-BNW, at 5-9 (D. Nev. Oct. 1, 2021).

[12] *Id.* at 9-2. The DOJ also disputed the Defendants' constitutional arguments. *Id.* at 22-30.

[13] ECF. 90, 2:21-cr-00098-RFB-BNW, at 4:4-8. (D. Nev. May 12, 2022).

[14] ECF. 96, 2:21-cr-00098-RFB-BNW (D. Nev. Sept. 1, 2022).

[15] ECF. 98, 2:21-cr-00098-RFB-BNW (D. Nev. Sept. 9, 2022).

[16] ECF. 108 2:21-cr-00098-RFB-BNW (D. Nev. Oct. 27, 2022).

[17] *Id.*

[18] ECF. 106 2:21-cr-00098-RFB-BNW (D. Nev. Oct. 27, 2022).

[19] An evidentiary hearing as to Mr. Hee's motion to dismiss or in the alternative to suppress is scheduled for January 20, 2023.

[20] *Leinani Deslandes and Stephanie Turner v. McDonald's USA LLC*, Nos. 22-2333 and 22-2334, U.S. Court of Appeals for the Seventh Circuit.

[21] *Leinani Deslandes and Stephanie Turner v. McDonald's USA LLC*, Brief for the United State of America and the Federal Trade Commission as Amici Curiae In Support of Neither Party, ECF. 50 Nos. 22-2333 and 22-2334, U.S. Court of Appeals for the Seventh Circuit (Nov. 18, 2022).

[22] *Leinani Deslandes and Stephanie Turner v. McDonald's USA LLC*, Brief of Amici Curiae Illinois, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, and Washington in Support of Plaintiff-Appellants and Reversal, ECF. 47 Nos. 22-2333 and 22-2334, U.S. Court of Appeals for the Seventh Circuit (Nov. 18, 2022).

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