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Recent DOJ Action in the No-Poach Arena

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Since issuing its 2016 Antitrust Guidance affirming focus on enforcement of fair competition in labor-employment buy-side markets and warning of criminal remedies for those participating in illegal no-poach agreements, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have for the most part limited their participation to filing statements of interest in civil antitrust cases. That changed last week when the DOJ issued a criminal indictment against two health care companies, which allegedly entered into years-long agreements with competitors not to solicit each other's senior-level employees. This development comes on the heels of a federal grand jury returning an indictment against a former owner of a therapist staffing company for conspiring to fix wages paid to physical therapists and physical therapist assistants in December.

And civil litigators need also take heed: The DOJ recently filed an amicus brief in the Eleventh Circuit Court of Appeals on behalf of the United States to appeal an order dismissing a putative civil class action alleging Burger King conspired with its franchisees to restrain competition by inserting a no-poach provision in the franchise agreements. The DOJ disagreed with the district judges' finding that Burger King and its franchisees were incapable of conspiring with each other under the Supreme Court's decisions in *Copperweld* and *American Needle*.

Collectively, these developments reflect the DOJ and FTC's commitment to protect labor and employment markets from anticompetitive conduct. Read more about these developments below.

DOJ Issues First Public Criminal Indictment for Illegal No-Poach Agreements Since 2016 HR Guidance Warning

In their 2016 Antitrust Guidance for Human Resource Professionals (2016 HR Guidance), the DOJ and the FTC warned HR professionals that "[a]n agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement contains individual firm decision making with regard to wages, salaries, or benefits; term of employment; or even job opportunities." The 2016 HR Guidance further explained that companies are horizontal competitors when they compete for labor, such as when they compete to hire employees. In the guidance, the DOJ and FTC also advised that "naked" wage-fixing and no-poach agreements were per se illegal violations under the antitrust laws and warned that such agreements could result in criminal prosecutions. It took several years, but the DOJ has now filed the first public criminal indictment alleging violations of the antitrust laws flowing from a conspiracy between companies where they agreed not to poach each other's employees.

Specifically, on January 5, 2021, the DOJ filed a two-count criminal indictment in the U.S. District Court for the Northern District of Texas, *U.S. v. Surgical Care Affiliates LLC et al.*, Case No. 3:21-cr-00011, against defendants Surgical Care Affiliates LLC and its successor SCAI Holdings LLC. Collectively, the defendants did business as Surgical Care Affiliates (SCA). In the first count, the DOJ alleges that from as early as May 2010 to October 2017, SCA and a Texas-based company engaged in a conspiracy to suppress competition between them by agreeing not to solicit each other's senior-level employees. In the second count, the DOJ alleges that SCA had a similar agreement not to solicit each other's senior-level employees with a Colorado-based company between February 2012 and July 2017.

In support of its indictment, the DOJ sets forth alleged written email admissions as to the existence of the unlawful agreement between SCA and the Texas-based company and SCA and the Colorado-based company. Additionally, the indictment alleges several ways that SCA carried out its no-poach agreements with the Texas-based company and Colorado-based company by, inter alia, instructing recruiters not to solicit senior-level employees from each other's companies, requiring senior-level employees who applied to the other company to notify their boss that they were seeking other employment before their application would be considered, monitoring compliance with the no-poach agreement by keeping each other apprised of violations of the agreement, and refraining from soliciting each other's senior-level employees.

The outcome of the indictment is not yet known, and the DOJ's investigation continues. However, the case is notable because it is the first publicly filed criminal indictment concerning no-poach agreements. As such, the case is worth watching for future developments because its outcome will inform companies of the potential penalties that could result from entering into no-poach agreements.

DOJ Asks Eleventh Circuit to Clarify Single Entity Rule After Burger King Dismissal in Case Involving No-Poach Agreements

The DOJ has embroiled itself in yet another private civil antitrust litigation involving a franchise no-poach agreement. In the past two years, it has filed statements of interest in similar antitrust cases in federal district courts in North Carolina, Pennsylvania, and Washington. This time it filed an amicus brief in the Eleventh Circuit Court of Appeals seeking to ensure the appeals court employs the DOJ's view of the correct standards for analyzing the Sherman Act's Section 1 concerted action requirement in the appeal of a Miami, Florida federal judge's decision that Burger King and its franchisees are incapable of conspiring with each other. The district court judge found Burger King and its franchisees were a single entity given their mutual interest in promoting the Burger King brand. Under the single entity rule established by the Supreme Court's decisions in *Copperweld* and *American Needle*, legal entities that have a common unity of interest cannot be found capable of conspiring in violation of Section 1.

DOJ's intervention in this appeal is not surprising. Just last year it argued in a Washington federal court that a single entity relationship between a franchisor and its franchisees should not be presumed. Rather, the DOJ urged that a finding of a single entity relationship should be decided only after a court examines the facts of the particular case and that allegations of independent hiring decisions strongly suggest that a franchisor and franchisee are independent economic actors for purposes of challenges to no-poach agreements under Section 1 of the Sherman Act.

The DOJ took a similar position in the Eleventh Circuit. It rejected the district court's single entity analysis in which it found that Burger King was incapable of concerted action with its franchisees because "Burger King's relationship with its franchisees more closely resembles a corporation organized into divisions or de facto branches, or that of a parent-subsidiary [*i.e., Copperweld*], than the relationship between similarly-situated NFL teams [*i.e., American Needle*]." The DOJ disagrees insisting that Burger King and its franchisees are unlike the wholly-owned subsidiary in *Copperweld* and that the district court should have relied on the approach taken in *American Needle*.

The DOJ claims the district court improperly distinguished and misconstrued *American Needle*, and it treated the presence of the no-hire agreement in the franchise agreement as dispositive. The district court misconstrued *American Needle* as requiring a court to consider whether participants are capable of concerted action for all purposes as opposed to focusing on the challenged restraint. The DOJ contends that *American Needle* declined to consider whether the NFL as a whole operated as a single entity and instead focused on whether NFL teams were capable of concerted action with respect to licensing of NFL teams' intellectual property. The Court found that the teams' interests in licensing team trademarks were not necessarily aligned and subject to Section 1. The DOJ maintains that apart from the no-hire provision, there was nothing preventing Burger King and its franchisees from making their own employee hiring decisions, and under *American Needle*, such a finding means that Burger King and its franchisees are separately controlled, potential competitors not subject to the single entity rule.

The DOJ also rejected the notion that entities that sell common products or services or maintain uniform brands cannot conspire. The DOJ pointed out that the Supreme Court has decided Section 1 cases in the single-brand context involving manufacturers or franchisors conspiring with distributors and franchisees. Additionally, the DOJ argued that even assuming Burger King and its franchisees are a single entity, the franchise agreement would still be subject to Section 1 scrutiny because soon-to-be franchisees are independent actors and the franchise agreement is a formation agreement.

Because the district court's decision appears to have departed from the precedents in *American Needle* and *Copperweld*, the DOJ's position that it failed to apply proper standards is unsurprising. The DOJ's decision to involve itself in yet another private litigation is, however, notable and continues a trend of DOJ interest and involvement in no-poach/no-hire litigations. Whether the Biden administration will continue this trend or become less of an activist in private litigations will be worth watching as no-poach/no-hire litigation moves forward. In this case, the adoption of the DOJ's standards would likely lead to a finding that Burger King and its franchisees are not a single entity but separate economic actors capable of conspiring under the antitrust laws at least with respect to their hiring decisions.

Troutman Pepper's antitrust lawyers regularly advise clients on potential no-poach and wage-fixing issues, as well as litigation and enforcement actions related to alleged anticompetitive activity affecting labor markets. If you have any questions regarding these issues or the DOJ's recent activity in the space, we would be pleased to discuss them with you.

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