**Stinson LLP for Association of Corporate Counsel**

# Employers Beware: Employment Practices in the Antitrust Crosshairs

By J. Nicci Warr

Traditionally, when most people think of antitrust, they think of price-fixing. Images of competitors meeting in smoke-filled rooms and collectively deciding what they will charge for their products comes to mind.[i] More recently, antitrust may bring to mind large technology companies—Google, Meta (the new name of Facebook), Apple, and Amazon—and discussions about whether these companies have obtained dominance over their relative markets that should be addressed through lawsuits or new legislation.[ii] What is less likely considered when people think about antitrust is employment. But events over the last several years and recent statements by the United States antitrust enforcers should cause all employers to take notice: The antitrust laws apply equally to the purchase of labor as they do to the selling of goods and services. Consequently, it would be advisable for employers to ensure that their hiring, recruitment, and non-compete/non-solicit policies and practices comply with the antitrust laws.

## US Antitrust Enforcers Turn Their Attention to Labor Markets

Although much of the focus on antitrust issues in the technology industry today centers around allegations of monopolization, in 2010, the Department of Justice (DOJ) was focused on a different issue—alleged agreements among some of the largest technology companies in the nation not to cold-call each other's employees. In September of that year, the DOJ filed a civil lawsuit and settlements with Adobe, Apple, Google, Intel, Intuit, and Pixar contending that the alleged agreements "restrained competition for affected employees without any procompetitive justification and distorted the competitive process."[iii] A few months later, the DOJ also announced civil charges and a settlement with Lucasfilm.[iv] Although the companies did not pay any fines or restitution as a part of the DOJ settlements, they later faced class action lawsuits, and ultimately payed a combined total of over $435 million to settle those cases.

In 2016, the DOJ and the Federal Trade Commission (FTC) released a new set of antitrust guidelines titled "Antitrust Guidance for Human Resource Professionals."[v] The DOJ and FTC made clear in the guidance that "[n]aked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws."[vi] In other words, "if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects."[vii] The regulators explained that "[t]hese types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hard-core cartel conduct."[viii] Consequently, the regulators announced that "[g]oing forward, the DOJ intends to proceed criminally against naked wagefixing or no-poaching agreements."[ix]

Over the next several years, the DOJ made good on its word. The first criminal indictment for alleged wage-fixing came in late 2020, when a federal grand jury returned criminal charges against two employees of a Texas health care staffing company for allegedly colluding to decrease the pay

for physical therapists and their assistants.[x] In 2021, the DOJ brought three more criminal antitrust cases, two alleging wage fixing and naked no-poach and non-solicit agreements among individuals and companies in the health care field.[xi]

The defendants in the cases all moved to dismiss the indictments, arguing that the types of conduct alleged do not fall within the categories of conduct that traditionally had been considered *per se* illegal under the antitrust laws and thus appropriate for criminal prosecution—*e.g.*, price fixing, market allocation, bid rigging.[xii] Two of the four courts overseeing the criminal actions have yet to rule on the defendants' motions. But both federal courts that have ruled have denied the motions.[xiii] The court in the Northern District of Texas held that "the scope of anticompetitive conduct that constitutes price fixing is broad—it covers agreements among buyers in the labor market.."[xiv] According to the court, "whether the Indictment refers to the 'pay rates' of the PTs and PTAs as 'prices' or 'wages' does not affect the outcome" because "the alleged agreement . . . had the purpose and effect of fixing the pay rates of the PTs and PTAs—the price of labor."[xv] The court in the District of Colorado took a similar approach to the alleged non-solicitation agreement at issue. The court noted that the indictment characterized the alleged agreement "not [to] solicit[] each other's senior-level employees across the United States" as a "horizontal market allocation agreement."[xvi] The court explained that while "[t]here are no cases finding that non-solicitation agreements are so pernicious, in and of themselves, that they should be classified as per se unreasonable," criminal treatment was appropriate here because the agreements at issue were alleged to be naked.[xvii]

Both cases went to trial in May 2022. The defendants in both cases were acquitted of the antitrust charges.[xviii] Despite the trial losses, the DOJ views the denials of the motions to dismiss as victories and has stated publicly that it intends to continue to focus heavily on labor markets, including bringing criminal charges based on employer conduct.[xix] In addition, the DOJ has stated it intends to scrutinize information sharing of employment terms among competitors to potentially bring civil claims, and the FTC has stated that it will review employment contracts and other actions that it believes may harm workers.[xx] The plaintiffs' bar has also taken notice, filing several employment-related antitrust class actions, with more sure to come.[xxi]

**What Should Employers Do to Protect Themselves?**

The number one, two, and three things employers can and should to do to minimize antitrust risk associated with employment is training, training, and more training. Many companies provide annual antitrust training for their executives and sales staff, but human resources personnel rarely receive any type of antitrust training. Human resources professionals, therefore, are often unaware of the ways that the antitrust laws apply to their work, which can result in risky behavior taking place due simply to lack of awareness. In addition, benchmarking is a common practice in the human resources world, which can create large antitrust risk, particularly for those not familiar with the safeguards that should be followed to minimize the risk of sharing information with competitors.

Given the heavy focus on labor markets, it would also be a good idea for employers to review their employment agreements, including any non-compete or non-solicit provisions in particular. Employers should consider whether there is a legitimate business justification for any restrictions on

employee mobility and whether those restrictions are properly tailored in scope and duration to be as narrow as possible to achieve the company's legitimate objectives.

Finally, any employer considering M&A activity should understand that the antitrust enforcers are likely to consider the effects of the M&A activity on the labor markets when analyzing whether the activity is compliant with the antitrust laws. And since labor markets may be both broader and narrower than a companies' product or service market, an employment-focused analysis may differ from the standard analysis companies may undertake to understand any pro- or anti-competitive effects resulting from the M&A activity. There should also be an analysis of any non-compete, non-solicit, or no-poach agreements associated with the M&A activity, and such agreements should not be reflexively entered without proper consideration of their necessity and scope.

While is it impossible to eliminate all antitrust risk associated with operating a business in the United States today, these actions can help employers minimize the risk that they will be the DOJ, FTC, or the plaintiffs' bar's next target.

Nicci Warr is a business litigation partner at Stinson LLP. She can be reached at nicci.warr@stinson.com.

---

[i] *See, e.g.*, Soderbergh, S. (Director). (2009). *The Informant!* [Film]. Warner Bros. The Informant! starred Matt Damon and made over $41 million worldwide, which must qualify as the highest-grossing film about antitrust in world history.

[ii] *See, e.g.*, Morrison, Sara. and Ghaffary, Shirin. "The case against Big Tech: Will Amazon, Apple, Meta, and Google survive the antitrust onslaught? And will Microsoft face it at all?" *Vox*, December 8, 2021, https://www.vox.com/recode/22822916/big-tech-antitrust-monopoly-regulation (accessed April 26, 2022); Kang, Cecilia. "Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust: A bipartisan group of House members introduced five bills targeting Amazon, Apple, Facebook and Google." *The New York Times*, June 29, 2021, https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html (accessed April 26, 2022).

[iii] United States Department of Justice. (September 24, 2010). *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements* [Press Release]. https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee (accessed April 26, 2022).

[iv] United States Department of Justice. (December 21, 2010). *Justice Department Requires Lucasfilm to Stop Entering into Anticompetitive Employee Solicitation Agreements* [Press Release]. https://www.justice.gov/opa/pr/justice-department-requires-lucasfilm-stop-entering-anticompetitive-employee-solicitation (accessed April 26, 2022).

[v] Department of Justice Antitrust Division and Federal Trade Commission. (October 2016) *Antitrust Guidance for Human Resource Professionals*, https://www.justice.gov/atr/file/903511/download (accessed April 26, 2022).

[vi] *Id*. at p. 3.

[vii] *Id*.

[viii] *Id*. at p. 4.

[ix] *Id*.

[x] *See United States v. Jindal, et al.*, No. 4:20-cr-00358 (E.D. Tex.).

[xi] *See United States v. Surgical Care Affiliates LLC et al.*, 3:21-cr-00011 (N.D. Tex); *United States v. Hee*, 2:21-cr-00098 (D. Nev.); and *United States v. DaVita Inc. et al.*, 1:21-CR-00229 (D. Col.).

[xii] *See* Defendant Jindal's Motion to Dismiss, *Jindal*, No. 4:20-cr-00358 (ECF 36); Motion to Dismiss, *Surgical Care Affiliates*, 3:21-cr-00011 (ECF 38); Defendant VDA OC's Motion to Dismiss, *Hee*, 2:21-cr-00098 (ECF 37); Defendants' Joint Motion to Dismiss, *DaVita Inc. et al.*, 1:21-CR-00229 (ECF 49).

[xiii] Order, *Jindal*, No. 4:20-cr-00358 (ECF 56); Order, *DaVita Inc. et al.*, 1:21-cr-00229 (ECF 132).

[xiv] Memorandum Opinion and Order, *Jindal*, No. 4:20-cr-00358 (ECF 56) at p. 11.

[xv] *Id*. at p. 11–12.

[xvi] Motion to Dismiss, *DaVita Inc.*, 1:21-cr-00229 (ECF 132) at p. 6.

[xvii] *Id*. at 14–15. The court also pointed to a Sixth Circuit opinion from the late 80's involving entities convicted of entering a customer non-solicitation agreement as precedent. *Id*. at 10 (citing *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367 (6th Cir. 1988)).

[xviii] *See* Verdict, *DaVita Inc.*, 1:21-cr-00229 (ECF 264); Verdict, *Jindal*, No. 4:20-cr-00358 (ECF 112). Defendant Jindal was convicted of obstructing the FTC's investigation.

[xix] Scarcella, Mike. "After DOJ antitrust losses in employment trials, defense lawyers urge 'rethink.'" *Reuters*, April 22, 2022, https://www.reuters.com/legal/litigation/after-doj-antitrust-losses-employment-trials-defense-lawyers-urge-rethink-2022-04-22/ (accessed April 26, 2022); Department of Justice. (April 8, 2022) *Assistant Attorney General Jonathan Kanter Virtually Participated in The Enforcers Roundtable at the ABA Spring Meeting* [Press Release]. https://www.justice.gov/opa/video/assistant-attorney-general-jonathan-kanter-virtually-participated-enforcers-roundtable-aba (accessed April 26, 2022).

[xx] Federal Trade Commission. (December 6, 2021). *Remarks of Chair Lina M. Khan at the Joint Workshop of the Federal Trade Commission and the Department of Justice*, https://www.ftc.gov/system/files/documents/public_statements/1598791/remarks_of_chair_lina_m_khan_at_the_joint_labor_workshop_final_139pm.pdf (accessed April

26, 2022); Executive Order No. 14036, Executive Order on Promoting Competition in the American Economy, 86 FR 36987 (2021).

[xxi] *See, e.g.*, *Jien et al. v. Perdue Farms, Inc. et al.*, No. 19-cv-02521 (D. Md.); *Balicoco v. Pratt & Whitney et al.*, No. 3:21-cv-01673 (D. Conn.).