

Antitrust Enforcers Lodge First Criminal Indictment for Violation of No-Poach Agreement

The Department of Justice (DOJ) is carrying out its promise to prosecute illegal “no-poach” agreements between companies. Until last week, DOJ had brought only **civil** enforcement actions against companies that have allegedly entered into agreements not to hire or solicit talent from one another. That changed last week with an indictment charging Surgical Care Affiliates LLC (SCA) of colluding with two companies not to solicit each other’s senior-level employees. This prosecution signals that DOJ is moving to criminal prosecutions to regulate these problematic practices.

The SCA conspiracy allegedly consisted of participation in phone and email conversations between human resource (HR) professionals, instruction to executives not to solicit certain employees, and monitoring of employees to ensure adherence to the agreement. For example, the agreement allegedly required senior-level employees to notify their respective employers that they were seeking new employment for their application to be considered by the other companies participating in the arrangement.

DOJ warned companies about the severe consequences of these types of antitrust violations in guidance to HR professionals in 2016. DOJ explained that agreements to refuse to hire or solicit employees of a competitor are illegal regardless whether they are done by the parties directly or carried out by a third-party intermediary. The guidance put companies on notice of DOJ’s intention to move forward with criminal prosecution. Since issuing the guidance, though, DOJ has only filed statements of interest in private antitrust cases and a civil enforcement action. The indictment of SCA, therefore, represents a significant escalation in DOJ’s approach to regulating this conduct.

The indictment against SCA is likely just the beginning of DOJ’s employee-allocation criminal enforcement. To avoid criminal liability, companies should investigate their practices and ensure the following compliance measures have been implemented:

- Implement policies that expressly prohibit no-poach agreements. Incorporate guidelines on how to avoid such agreements and report violations, and inform third-party intermediaries involved in hiring, such as recruitment consultants, about your policies.
- Train management and HR professionals on those policies so that they are able to identify and decline invitations to collude. For example, a competitor’s seemingly innocuous offer to not recruit a prospective employee to avoid a bidding war could expose the individual and company to liability.
- Conduct an internal investigation, including interviews of senior managers, to ensure there are no existing violations or informal communications suggesting such agreements or understandings.
- Perform periodic reviews and audit company compliance to ensure policies are applied and promptly remediate policy violations.

The indictment of SCA reinforces DOJ’s commitment to prosecuting no-poach agreements. Failure to take protective action can result in severe criminal penalties for corporations and up to 10 years in prison for individuals. Understanding hiring protocols and undertaking compliance measures are critical for avoiding criminal liability. Experienced counsel can help to ensure the effectiveness of compliance efforts and prevent DOJ from knocking on your door.



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