

## Antitrust and Competition Law

# DOJ Announces Its First No-Poach Criminal Prosecution

By: [Lee K. Van Voorhis](#) and [Leigh J. Jahnig](#)

On January 7, 2021, the Department of Justice (DOJ) announced its first criminal prosecution against a company for agreeing with other companies not to poach each other's employees.<sup>[1]</sup> In October 2016, the DOJ announced a change in policy from treating naked no-poach agreements as civil offenses and its intention to instead investigate these "no-poach" agreements as criminal offenses.<sup>[2]</sup> DOJ has repeatedly reaffirmed its intention in the intervening years.<sup>[3]</sup> Thursday's indictment, however, is the first prosecution of its kind.

The indictment, filed in the Northern District of Texas (*United States v. Surgical Care Affiliates, LLC*, 3:21-cr-00011), names a company known as Surgical Care Affiliates (SCA), an operator of outpatient medical facilities. The DOJ charges SCA with criminal violations of Section 1 of the Sherman Act for creating separate agreements with two unnamed companies, one in Texas and one in Colorado, not to solicit each other's senior employees. The indictment outlines emails that describe the purported agreements, as well as efforts by SCA and the alleged co-conspirators to force compliance with the supposed agreements. For example, the indictment describes:

- How employees at the other companies discussed that they had reached a verbal agreement with SCA not to recruit each other's employees;
- How employees at the other companies instructed third-party recruiters not to solicit applications from SCA employees, and SCA similarly instructed recruiters that the other companies' employees were "off limits";
- How a senior executive at SCA instructed SCA human resources employees to interview senior employees of the other companies only if the employees had told their bosses that they planned to leave the other companies;
- How employees of the other companies discussed that they would interview an SCA employee only if the employee informed SCA's CEO of the interview;
- How senior executives of the other companies informed SCA's CEO that third-party recruiters were contacting the other companies' employees for an SCA position, and SCA's CEO correspondingly instructed other SCA executives to put one of the other companies on a "do not call" list for recruiters; and
- How senior executives at SCA similarly flagged when the other companies appeared to be recruiting SCA employees in violation of the agreement.

Section 1 of the Sherman Act prohibits certain agreements among competitors, some of which are considered "per se" illegal because they almost always harm competition. According to DOJ, no-poach and wage-fixing agreements can hinder competition in labor markets, much like the more well recognized Section 1 conspiracies such as price fixing hinder free competition for goods and services. The DOJ has announced that it will focus its enforcement efforts on "naked" no-poach or wage-fixing agreements, meaning agreements that are unrelated to legitimate business objectives. Importantly, parties to a potentially criminal no-poach or wage-fixing agreement need not be traditional competitors in the same markets for goods and services—it is enough to compete for the same talent in the job market. A violation of the Sherman Act carries a penalty of up to \$100 million for a corporation, which can be increased to twice the illegal gain or twice the money lost by the victims of the conspiracy, if either amount is more than \$100 million.

The DOJ's first no-poach criminal prosecution follows closely on the heels of its first wage-fixing prosecution in December 2020. The rapid succession of these indictments may signal more to come on

the DOJ's no-poach and wage-fixing front. Jenner & Block has successfully defended and guided clients through DOJ no-poach investigations, and conducted internal company investigations for possible violations. Please feel free to contact us if you have concerns or would like more information.

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[1] *Health Care Company Indicted for Labor Market Collusion*, U.S. Dep't of Justice (January 7, 2021), <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>.

[2] *Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation*, U.S. Dep't of Justice (Oct. 20, 2016), <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals>.

[3] *No More No-Poach: The Antitrust Division Continues To Investigate And Prosecute "No-Poach" And Wage-Fixing Agreements*, U.S. Dep't of Justice (Division Update Spring 2018), <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements>.



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## Contact Us



**Lee K. Van Voorhis**

[ivanvoorhis@jenner.com](mailto:ivanvoorhis@jenner.com) | [Download V-Card](#)



**Leigh J. Jahnig**

[ljahnig@jenner.com](mailto:ljahnig@jenner.com) | [Download V-Card](#)

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## Practice Leaders

### Richard L. Stone

Co-chair

[rstone@jenner.com](mailto:rstone@jenner.com)

[Download V-Card](#)

### Lee K. Van Voorhis

Co-chair

[ivanvoorhis@jenner.com](mailto:ivanvoorhis@jenner.com)

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