

DOJ Continues to Prioritize No-Poach Cases

Publications

May 2023

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In recent years, the U.S. Department of Justice has tried three criminal no-poach cases to a jury, and in all three the defendants were acquitted. But expect the crackdown on the use of allegedly illegal no-poach agreements between employers to continue.

A “no-poach” is a tacit or express agreement between employers not to hire or solicit employees from one another. This type of agreement may be lawful under the “rule of reason” if it is reasonably necessary to promote a collaboration between employers. No-poach agreements that are either not ancillary to a larger collaborative agreement, so called ‘naked’ no poach agreements, or which are so broad they cannot be justified as reasonably necessary to enable business collaborations, have long been considered illegal and outside the rule of reason. However, enforcement against illegal no-poach agreements had until lately been limited to civil investigations and litigation. Recently, however, the DOJ has instead pursued *criminal* liability for both corporations and individual employees, representing a major shift and escalation in enforcement tactics. DOJ brought its first criminal indictment stemming from unlawful no-poach agreements in December 2020. Numerous others quickly followed.

Thus far, no jury has reached a guilty verdict on the antitrust charges. Most recently, in March 2023 a federal jury in Maine acquitted four executives of home healthcare agencies accused of entering no-poach and wage-fixing agreements. DOJ’s only successful prosecution for a criminal no-poach agreement stems from a pretrial agreement with healthcare staffing company VDA OC LLC, wherein the company paid a criminal fine and a former executive entered a pretrial diversion agreement to avoid a jail sentence.

Despite its relative lack of success prosecuting no-poach agreements at trial, employers should not assume criminal enforcement will wane, for several reasons:

- *First*, DOJ’s Antitrust Division updated its leniency policy in 2022 to include more stringent reporting and remediation requirements, reflecting the Biden administrations’ continued commitment to more stringent application of antitrust law.
- *Second*, agency leadership has explicitly reiterated their commitment to bringing criminal charges against parties to no-poach agreements, calling the failed prosecutions righteous and noting that

public support is on the agency's side.

- *Third*, even acquittals on antitrust charges leaves open the possibility of accompanying charges for obstruction of justice, perjury, or others, to increase the likelihood of a conviction.

Even with the DOJ's recent losses, naked no-poach agreements raise significant liability risk. DOJ investigations are burdensome, time consuming, and expensive. Companies should identify whether such agreements exist and confer with counsel on the appropriate course of action, which could include self-reporting violations under the DOJ's leniency program.

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