

DOJ's 1st Wage-Fixing Indictment Is A Warning To Cos.

By **Tiffany Rider, James Moore and John O'Toole**

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On Dec. 10, the U.S. Department of Justice Antitrust Division announced in *U.S. v. Jindal* the criminal indictment of a former owner of a North Texas physical therapist staffing company for conspiring with competitors to suppress wages for physical therapists.

The indictment marks a significant turning point in the Antitrust Division's prosecutorial efforts against so-called wage-fixing and no-poach agreements, because it is the first public criminal enforcement action against such agreements.

The Antitrust Agencies' Guidance for Anti-Competitive Agreements in Labor Markets

In October 2016, the Antitrust Division and the Federal Trade Commission jointly released a policy guidance document on antitrust guidance for human resource professionals.[1] As the agencies explained in the guidance, the federal antitrust laws apply to competition to hire and retain employees, just as they do to more traditional forms of competition between companies, such as decisions about pricing and supply levels.

In particular, the agencies emphasized that two types of agreements are per se illegal and may give rise to criminal antitrust liability:[2]

- Wage-fixing agreements: Agreements to fix or otherwise not to compete on salary, wages or other forms of compensation; and
- No-poach agreements: Agreements to refrain from soliciting or hiring another company's employees.

While the policy guidance was released to much fanfare, prior to December, the Antitrust Division had not publicly initiated any criminal enforcement actions based on either wage-fixing or no-poach agreements. Most of the significant legal developments in this area continued to occur through civil litigation and consent judgments.[3]

The Antitrust Division also filed a number of amicus briefs in civil actions brought by private plaintiffs in



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an effort to influence the development of the law concerning these types of anti-competitive labor-market agreements.[4]

Over the past year or so, high-level officials at the Antitrust Division have made numerous public statements regarding the Antitrust Division's commitment to criminally prosecuting conspiracies in labor markets.

At a September 2019 Antitrust Division workshop on competition issues in labor markets, Assistant Attorney General Makan Delrahim affirmed that "criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division." [5] In January, Delrahim told the Wall Street Journal that the Antitrust Division expected to bring its first-ever criminal case at some point in 2020.[6]

Antitrust Division Secures First Criminal Wage-Fixing Indictment

On Dec. 9, a federal grand jury in the U.S. District Court for the Eastern District of Texas returned an indictment against Neeraj Jindal. Jindal, the former owner of a therapist-staffing company, is charged with conspiring with competitors to fix wages for physical therapists and physical therapist assistants in the Dallas-Fort Worth metropolitan area.

According to the two-count indictment, Jindal and his co-conspirators agreed to pay therapists lower hourly rates during the period from March 2017 to August 2017.[7]

The indictment alleges that, through text messages and other communications, Jindal and his co-conspirators exchanged nonpublic information about rates paid to physical therapists and physical therapist assistants in an effort to decrease the rates they would pay.[8] The indictment further alleges that Jindal and his co-conspirators ultimately paid lower rates to therapists as a result of the conspiracy.[9]

Jindal is also charged with obstructing a separate FTC investigation into whether the therapist-staffing companies' business practices violated the FTC Act, which prohibits deceptive and unfair business practices.

According to the indictment, Jindal made false and misleading statements to the FTC during the investigation. These false and misleading statements included: (1) telling the FTC that he made wage cuts to his therapists based on a collective agreement with his office team; (2) telling the FTC that he only contacted his competitors to see how they were reacting to upcoming regulatory changes; and (3) denying other instances of collusion and collective action with co-conspirators identified by the FTC.[10]

Jindal also allegedly provided the FTC with an incomplete list of his competitors in the Dallas area, omitting several of his co-conspirators from the list.[11]

Though this is the first case of its kind, the Antitrust Division has made clear that they will continue to make criminal enforcement in labor markets a key area of focus. In announcing the indictment, Delrahim stated: "Employers who conspire to fix the wages of workers or restrict their mobility by allocating labor markets will be prosecuted to the fullest extent of the law." [12]

Key Takeaways

After much anticipation, the Antitrust Division has finally secured its first indictment in an antitrust case affecting labor markets. We expect the Antitrust Division to continue to investigate this conduct and, where appropriate, seek criminal charges against the individuals and companies involved.

In addition to expecting increased criminal enforcement in labor markets, there are a few other key takeaways from this case.

Agency Coordination

The alleged conspiracy was first discovered by the FTC through a separate investigation. The FTC does not have jurisdiction over criminal antitrust enforcement, but given the nature of the conduct discovered, the FTC referred this matter to the Antitrust Division. This type of cooperation among the agencies is not uncommon.

This case serves as a critical reminder that information found in any kind of antitrust investigation — including merger investigations such as second requests — can be the initial tip to the Antitrust Division to initiate a criminal investigation. In fact, the Antitrust Division recently announced that it updated its civil investigative demand form to warn recipients that the information provided may be used in criminal proceedings.[13]

Focus on the Business of Labor

Notably, the Antitrust Division's first wage-fixing indictment involves a conspiracy among companies involved in the contracting for labor. Companies, such as staffing agencies, that engage in the business of labor should be particularly careful to comply with the antitrust laws and review the Antitrust Division's guidance for human resource professionals. This case indicates that labor markets are likely to continue to face increased scrutiny from the Antitrust Division.

Guidance to Human Resource Professionals

It is important for companies to alert their human resource departments, and not only their commercial businesses, of the importance of complying with the antitrust laws. Antitrust compliance programs should include information tailored to issues that are likely to come up for human resource professionals, including no-poach and wage-fixing agreements. Human resource professionals should also be sure not to share sensitive information regarding wages or employment terms with competitors.

Seeking Leniency

The Antitrust Division's leniency program remains a cornerstone of its criminal enforcement. Under the leniency program, individuals and corporations charged with criminal violations of the antitrust laws can seek immunity in exchange for providing the Antitrust Division with information.

It is important to keep this option in mind if evidence of a wage-fixing or no-poach agreement is discovered. It is also important to note that a robust antitrust compliance program can affect the Antitrust Division's charging and sentencing decisions.[14]

Additional Liability From False Statements

Due to the alleged conspiracy, Jindal was charged with violating the antitrust laws. But Jindal was also charged with obstructing the FTC's inquiry — charges that he likely would have avoided if he had not allegedly made numerous false statements to the FTC.

Importantly, Jindal also allegedly submitted incomplete lists of competitors to the FTC, which the Antitrust Division saw as further evidence of an effort to obstruct the FTC's investigation. Individuals and companies that are requested to produce information to the agencies should make sure to do their due diligence to submit accurate and complete information.

Antitrust Violations Affecting Federal Government

A key focus of the indictment was the fact that the conspiracy involved an industry funded by Medicare, a government program. Over the past year, the Antitrust Division has focused on prosecuting antitrust crimes that impact government agencies, most prominently through the creation of the interagency Procurement Collusion Strike Force. For companies that interface with government agencies regularly, it is especially important to be aware of the Antitrust Division's scrutiny.

Short-Term Conspiracy Still Criminal

The conduct alleged in the indictment happened over a period of only five months. Nevertheless, Jindal faces serious consequences, including potential jail time. It is important to maintain a robust antitrust compliance program and ensure that all staff are aware of the consequences of even a relatively short-term antitrust violation.

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[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>. In the years preceding the guidance, the Antitrust Division brought a number of high-profile civil lawsuits against Silicon Valley companies like eBay, Adobe, and Apple, in order to terminate existing no-poach agreements.

[2] *Id.* at 3.

[3] See Final Judgment, *United States v. Knorr-Bremse AG*, No. 1:18-cv-747 (D.D.C. July 11, 2018).

[4] See Statement of Interest at 19, *Seaman v. Duke Univ.*, No. 1:15-cv-462 (M.D.N.C. Sept. 25, 2019) (reaffirming that agreements ancillary to a separate legitimate business transaction are subject to the rule of reason); Statement of Interest at 11, *Stigar v. Dough Dough Inc.*, No. 2:18-cv-244 (E.D. Wash. Apr. 18, 2019) (arguing that the franchisor-franchisee relationship is a vertical one and should not be subject to criminal penalty).

[5] Makan Delrahim, Assistant Att'y Gen., Remarks at the Public Workshop on Competition in Labor Markets (Sept. 23, 2019). In November 2019, Deputy Assistant Attorney General for Criminal Enforcement Richard Powers also noted that the "Division has a number of active criminal investigations into naked no-poach and wage-fixing agreements" and that antitrust violations affecting labor markets remain "one of the Division's highest priorities and an area to which we are devoting substantial resources." See Richard Powers, Deputy Assistant Att'y Gen., Remarks at the 29th Annual Antitrust, UCL, and Privacy Section Golden State Institute (Nov. 14, 2019).

[6] Brent Kendall, U.S. Targets Drug Pricing, No-Poach Deals for Antitrust Action in 2020, Wall St. J. (Jan. 15, 2020), [wsj.com/articles/u-s-targets-drug-pricing-no-poach-deals-for-antitrust-action-in-2020-11579124098](https://www.wsj.com/articles/u-s-targets-drug-pricing-no-poach-deals-for-antitrust-action-in-2020-11579124098).

[7] Indictment at 2, U.S. v. Jindal, No. 4:20-cr-00358 (ALM) (E.D. Tex. 2020).

[8] Id. at 4.

[9] Id. at 4.

[10] Id. at 7-8.

[11] Id. at 8.

[12] Press Release, U.S. Dep't of Just., Former Owner of Health Care Staffing Company Indicted for Wage Fixing (Dec. 10, 2020).

[13] Press Release, U.S. Dep't of Just., Antitrust Division Announces Updates to Civil Investigative Demand Forms and Deposition Process (Sept. 10, 2020).

[14] U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), <https://www.justice.gov/atr/page/file/1182001/download>.