Antitrust, Competition & Distribution Update

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DOJ Set to Obtain First Antitrust Conviction in "No-Poach" Case

On September 1, VDA OC, LLC filed a notice with the federal court in Nevada stating that it intended to enter a plea of guilty to a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. Specifically, VDA stated that it will admit that it "participated in a conspiracy with another contract healthcare staffing firm to suppress and eliminate competition for the services of nurses by agreeing to allocate nurses and to fix the wages of those nurses." Allocating nurses and fixing wages are viewed by the federal antitrust agencies as market allocation and price-fixing agreements, which are *per se* unlawful and may be prosecuted criminally.

The imminent conviction of VDA would be the first in a criminal "no-poach" case obtained by the Antitrust Division of the Department of Justice (DOJ), which first announced its intention to criminally prosecute no-poach cases in 2016 through Antitrust Guidance for Human Resources Professionals issued jointly with the Federal Trade Commission (FTC). DOJ's first criminal no-poach case was not brought until December 2020, four years after it issued its joint guidance with the FTC. Its no-poach prosecutions have not gone well, however, with its first two criminal no-poach trials resulting in full acquittals on the antitrust charges for each defendant. Despite the trial losses, DOJ insisted it would maintain its aggressive criminal enforcement, and the VDA guilty plea seems to be proof of that.

As the DOJ and FTC continue to aggressively push antitrust enforcement in labor markets, in-house counsel, HR departments and other employees should be aware of the criminal prohibition of no-poach agreements and consider seeking guidance from experienced antitrust counsel and training to maintain compliance with the antitrust laws.

FOR MORE INFORMATION

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