

Antitrust Director Signals Heightened Focus On Deterring No-Poach Agreements In Healthcare Industry

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As we have reported in previous articles, the Department of Justice's Antitrust Division has repeatedly reaffirmed its intent to criminally prosecute companies that restrict labor market competition through the use of unlawful no-poach and wage-fixing agreements. On May 17, 2018, a high-ranking Division official offered further guidance [by announcing](#) that the Division is taking a heightened look at unlawful no-poach agreements and other antitrust violations in the healthcare industry.

Antitrust Enforcement Policy In The Trump Era

On October 20, 2016, the DOJ and Federal Trade Commission released [Antitrust Guidance for Human Resource Professionals](#), stating that agreements between companies to either prevent hiring from their respective workforces, or set artificial limitations on employee wages, would be subject to criminal prosecution if such agreements are not reasonably tied to a larger, legitimate collaboration between the companies (see our [related article](#), dated November 9, 2016). Approximately fifteen months later, on January 19, 2018, Assistant Attorney General Makan Delrahim confirmed that such Guidance remained in effect under the Trump

Administration, and signaled that multiple enforcement actions were in the works (see our [related article](#), dated January 25, 2018).

The Division partially delivered on that promise when, on April 3, 2018, it filed a consent agreement with two rail equipment supplier for maintaining purported naked no-poach agreements over a period of several years (see our [related article](#), dated April 25, 2018). Although the nature of that enforcement action was civil rather than criminal, the Division explained that it exercised such lenience only because the defendants discontinued the unlawful arrangements before the Division published its Antitrust Guidance. Further, in a [Division update](#) dated April 11, 2018, which included a summary of the case, the Division offered the following warning:

Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy.

Antitrust Official Offers An Update On Anticipated Enforcement Measures

On May 17, 2018, in remarks delivered at the American Bar Association's Antitrust in Healthcare Conference, the Deputy Assistant Attorney General for the DOJ, Barry Nigro, reiterated the Division's intent to initiate criminal enforcement actions in the near future, including in connection with unlawful no-poach agreements. Mr. Nigro further announced that during the week of May 7, 2018, the Division welcomed a new Acting Deputy Assistant Attorney General for criminal enforcement. It is unclear from Mr. Nigro's remarks whether there is any relationship between this change in leadership and the lack of any criminal actions to date.

In addition to signaling its general intent to initiate criminal enforcement actions, Mr. Nigro stated that the Division was placing priority status on violations in the healthcare industry. As Mr. Nigro explained, "few, if any, segments of our economy merit higher priority when it comes to antitrust enforcement, and healthcare has long been an enforcement priority for the Antitrust Division and our friends at the Federal Trade Commission."

The bulk of Mr. Nigro's speech was focused on consumer-related antitrust violations, like price fixing, bid rigging, and customer allocation agreements, as well as mergers that likely would lead to increased costs and reduced quality of medical care. In fact, he made just one passing reference to violations affecting the labor market, stating that the Division is "investigating other potential criminal antitrust violations in this industry, including ... no-poach agreements restricting competition for employees." Therefore, one can only speculate as to when the Division will initiate criminal enforcement actions in connection with a no-poach and/or wage-fixing agreement, as well as which industry will be targeted first.

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