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Management Alert

Healthcare Employers Beware: DOJ Announces Criminal Investigation of Healthcare Human Resources Practices in the Midst of the Ongoing Nursing Shortage

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Seyfarth Synopsis: *At the recent American Bar Association's Antitrust in Healthcare conference, the Department of Justice ("DOJ") reportedly advised that it has open criminal investigations into agreements among healthcare providers not to hire each other's employees. This announcement comes at a time when the healthcare industry is experiencing an acute nursing shortage. It was a similar nursing shortage that some claim created economic conditions that led to an alleged unlawful exchange of nurse wage information in the early and mid-2000s. In 2006, nurses filed class actions in five different cities alleging that hospitals agreed to suppress nurse wages and exchange nurse wage information in violation of federal antitrust laws. Two of those cases resulted in settlements of tens of millions of dollars, and one is still being litigated. Thus, it is imperative that healthcare employers examine their recruiting and compensation practices and ensure that these practices do not raise concerns under federal antitrust laws.*

Background

In October 2016, the Federal Trade Commission ("FTC") and DOJ jointly issued their Antitrust Guidance for Human Resource Professionals (the "Joint Guidance"). (Available at https://www.justice.gov/atr/file/903511/download). The Joint Guidance principally addresses three potential human resources practices that could lead to antitrust violations: (1) agreements by employers not to compete for each other's employees ("no-poach" agreements); (2) agreements by employers to fix or suppress wages paid to their employees; and (3) agreements by employers to exchange information regarding the wages and benefits they pay to their employees. The Joint Guidance also stated that DOJ may treat wage fixing and so-called "naked" no-poach agreements as criminal violations of the antitrust laws.

Naked no-poach agreements are those that are not part of, or are not reasonably necessary to further the legitimate interests of, a larger business transaction. No-poach agreements that are part of a larger, legitimate transaction (e.g., in connection with the sale of a business) are referred to as ancillary, and they are typically found to be lawful if they are reasonable in scope and duration.

No-Poach Agreements

In January of this year, the new Assistant Attorney General for the Antitrust Division, Makan Delrahim, remarked that he was "shocked" at the number of ongoing investigations at DOJ of alleged no-poach agreements. Delrahim also remarked that if naked no-poach agreements were undertaken or continued after the issuance of the Joint Guidance, then DOJ may exercise its prosecutorial discretion to treat them as criminal. When DOJ engages in a criminal enforcement action, it typically insists on jail time.

Naked no-poach agreements can also have devastating civil class action consequences. DOJ's investigation and subsequent civil enforcement actions brought against seven Silicon Valley tech companies in 2009 led to a highly publicized consolidated class action against the defendants entitled *In Re High-Tech Employee Antitrust Litigation*, No. 11-CV-02509 ("*High-Tech*"). After years of litigation, a class of over 62,000 employees was eventually certified. The plaintiffs' expert in that case argued that damages to the class amounted to $3 billion, which would automatically be tripled under the antitrust laws to $9 billion. The case eventually settled for $435 million.

On April 3, 2018, DOJ announced the first of what appears to be a wave of no-poach enforcement actions against employers -- in this instance, against two employers in the railway equipment industry and a number of their subsidiaries. Since that announcement, nine separate class actions have been brought against the defendants seeking treble damages for alleged antitrust violations.

Wage Information Exchange Agreements

In 2006, in the midst of a nursing shortage, nearly identical class actions were filed by nurses against hospital defendants in Chicago, Detroit, Albany, Memphis and San Antonio. Among the claims asserted in each of those cases was an agreement to unlawfully exchange nurse wage information in violation of federal antitrust laws. Class certification was denied in the Chicago and Memphis cases but was granted in Detroit and Albany. The Detroit and Albany cases settled for approximately $90 million and $14 million respectively. The San Antonio case is ongoing, and no class certification decision has yet been reached in that case.

Implications for Healthcare Employers

Naked no-poach, wage-fixing and improper wage information sharing agreements can have devastating consequences for healthcare employers. Not only is there the risk of jail time and millions or billions of dollars in potential class action damages, but the litigation itself is time-consuming, burdensome and costly. As noted above, the San Antonio case has been going on for more than 12 years.

Based on our experience in defending these types of cases, many healthcare employers, including top executives and HR personnel, are simply unaware that these types of agreements can impose antitrust risk. Moreover, the current nursing shortage creates huge pressure for healthcare employers to recruit, retain and properly compensate nurse employees. Thus, if they have not already done so, healthcare employers should immediately consider:

1. Conducting an internal investigation to determine whether the company is engaging in the informal gathering of wage, salary or benefit information, through direct contact with other employers; or whether it has entered into any no-poach agreements. The investigation should be conducted or closely supervised by counsel with steps taken to preserve the attorney-client privilege. Also, if it is discovered that the company has engaged in any "naked" wage-fixing or no-poaching agreements on or after October 25, 2016, then criminal counsel should be consulted as DOJ may treat such conduct as criminal.

2. Implementing an antitrust compliance program that ensures that all management and human resources personnel are aware that they cannot: (1) engage in a naked wage, salary or benefits-fixing agreement with any other unrelated

employer; (2) engage in the gathering or exchange of wage, salary or benefits information without full compliance with the Joint Guidance; or (3) enter into any no-poach agreement without prior approval of counsel. Such individuals should, on an annual basis, be required to acknowledge in writing that they are aware of these prohibitions. Also, anyone hired or transferred into any of these positions should be made aware of these prohibitions at the time they are hired or transferred. These employees should also be advised that the DOJ is likely to treat naked wage/salary/benefit-fixing and no-poaching agreements as criminal and employees could be sentenced to prison for engaging in such conduct.

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