

PUBLICATION

DOJ Cracks Down on Alleged Wage Fixing and No Poach Agreements

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On January 28, 2022, the U.S. Department of Justice (DOJ) announced its indictment of four owners or managers of home health care agencies for allegedly violating federal antitrust laws by conspiring to fix the rates paid to workers and agreeing to eliminate competition for each other's employees through so-called "no poach" agreements.

- This indictment joins a growing list of criminal antitrust enforcement actions that began under the Trump administration targeting employment practices in health care, agriculture, government contracting and other industries.
- It again highlights the importance of engaging experienced antitrust counsel to navigate a tight labor market and rising wage rates. In particular, any discussions with competitors about these issues should be reviewed by experienced counsel.

In this [latest case](#), the DOJ and the U.S. Attorney in Maine allege that beginning in spring 2020, the four named individuals and their home health care companies, along with several unnamed co-conspirators, committed criminal violations of Section 1 of the Sherman Act by agreeing to suppress the wages and limit the opportunity for Personal Support Specialist (PSS) workers to change jobs and potentially earn a higher wage. PSS workers provide in-home personal care services to ill, injured, mentally or physically disabled, elderly or otherwise fragile individuals. In Maine, the home health care agencies submit reimbursement for services to MaineCare, a jointly funded state and federal Medicaid program. The difference between the reimbursed rate and the hourly rate paid to workers is the company's margin. In April 2020, in response to the COVID-19 pandemic, MaineCare announced it would increase the hourly reimbursement rate by almost \$6.

The indictment identifies specific communications and activities, including excerpts of encrypted text messages, in which the defendants allegedly agreed on the wage rates that each would offer PSS workers. The indictment alleges that by capping hourly rates between \$15-\$17 per hour, depending on certification level, the agencies were able to increase profits by retaining the increased wage-rate reimbursement that MaineCare intended for PSS workers. The DOJ also alleges that the defendants agreed to not recruit or "poach" workers from each other. Further, the indictment asserts that the participating companies pressured other competitors to retract advertised wage rates that were higher than those set by the conspirators.

As we discussed in an August [client alert](#), state and criminal prosecution of wage-fixing and so called "no poach" agreements reflects a recent, increased focus by state and federal antitrust enforcers on these activities. Unvetted efforts between competitors to address rising wages in the face of limited supply can lead to potentially time consuming and expensive investigations that could result in:

- Criminal prosecution:
 - Potential jail time of up to ten years for individuals and conduct oversight penalties for companies; plus

- Criminal monetary penalties of \$1 million for an individual and/or \$10 million for a company for each offense, or twice the gain derived from the crime or twice the loss suffered by victims if either amount is greater than the statutory maximum fine; and
- Private litigation in which successful plaintiffs are entitled to treble damages and attorneys' fees.

Of particular concern is the DOJ's practice of charging individual executives for criminal antitrust violations in addition to, or sometimes in lieu of, charging the company. This complicates the response to any investigation, as the interests of these leaders may not always be aligned with the entity's interests.

In light of the DOJ's focus on wages and no poach agreements, clients should consider taking the following steps:

1. Review hiring policies and practices, both formal and informal;
2. Review communications with competitors, including participation in benchmarking activities, regarding industry wages and hiring practices; and
3. Ensure that personnel with hiring authority receive regular antitrust compliance training.

If you have any questions on this topic, please contact one of the authors or one of Baker Donelson's [antitrust and government enforcement experts](#) who can assist employers with identifying any problematic issues, creating antitrust protocols, and providing compliance training. Our Firm attorneys have extensive experience representing clients on these issues before federal and state agencies and in court. With several former government prosecutors on its team, Baker Donelson can leverage first-hand agency experience to achieve successful outcomes for clients.