

AND THEN THERE WAS ONE: DOJ BRINGS FIRST CRIMINAL CHARGES IN CASE ALLEGING ANTICOMPETITIVE EMPLOYMENT PRACTICES

The U.S. Department of Justice Antitrust Division (the "Division") has made good on its promise to criminally prosecute anticompetitive employment practices. On December 9, 2020, the Division brought criminal charges against the former owner of a health care staffing company for allegedly conspiring to fix wages between March and August 2017.ⁱ The case represents the first criminal indictment of an individual or corporation for anticompetitive conduct relating to labor markets. But it does not come out of the blue; rather, the U.S. federal antitrust authorities have, in recent years, warned they would rigorously pursue cartel conduct in employment markets. This latest development underscores the need for antitrust compliance training for human resources departments.

Background: Applying the Antitrust Laws in the Employment Arena

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce." The Division has exclusive authority to prosecute criminal antitrust violations against both companies and individuals. Companies can face fines in excess of \$100 million for each offense, and individuals face fines up to \$1 million and ten years in federal prison per offense. Importantly, the Sherman Act applies to companies and businesses anywhere in the world whose conduct affects interstate commerce in the United States. The Division's policy has long been to prosecute criminally price-fixing, bid rigging, and market allocation agreements—so-called *per se* violations—because such conduct unambiguously harms competition. But, prior to October 2016, the Division did not have a policy of criminally prosecuting anticompetitive agreements between horizontal competitors in labor markets, including no-poach and wage fixing agreements.

Then, in October 2016, the Division and the Federal Trade Commission ("FTC") published their Guidance for Human Resources Professionals, which announced that the Division would seek criminal charges against individuals and corporations that enter into naked no-poach (agreements to not hire each other's employees) and wage fixing agreements.ⁱⁱ The Guidance states that these agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers.

In a 2018 civil settlement ending its investigation into no-poach agreements in the railway industry, the Division emphasized that it would have pursued criminal charges had the conduct continued after its 2016 guidance.ⁱⁱⁱ Then, in its July 2019 Antitrust Compliance Guidance, the Division underscored the need for antitrust training tailored for human resources. Most recently, in April 2020, the Division and the FTC jointly announced that they intend to target any anticompetitive behavior during the COVID-19 pandemic, including against employers who suppress competition for labor.^{iv}

United States v. Neeraj Jindal: The Conspiracy

The present case likely arises from the Division's ongoing investigation into anticompetitive employment practices in the in-home healthcare industry. The defendant, Neeraj Jindal, is the former owner of a therapist staffing company based in Texas.

The indictment, which the United States Attorney for the Eastern District of Texas joined, charges Jindal with a criminal Section 1 violation in the form of wage-fixing. It accuses Jindal of coordinating a conspiracy among competing staffing agencies of physical therapists in the Dallas area to lower pay rates for employees. The Division alleges that, in March 2017, Jindal instructed an employee to text the owner of a competing business to ask if it had considered lowering pay rates for physical therapists and physical therapist assistants.^v After agreeing with the first competitor to lower pay rates, Jindal attempted to arrange, via text messages, an agreement amongst the owners of four additional competing companies. Jindal then directed his employee to alert the other members of the scheme that they would all lower pay rates on a particular day. According to the indictment, the wage fixing conspiracy continued until August 2017—a total of only five months.

The indictment also charges Jindal with obstructing FTC proceedings under 18 U.S.C. § 1505. According to the indictment, the FTC originally began investigating the alleged price-fixing scheme shortly after it began in March 2017. The FTC settled its civil investigation into Jindal and the wage-fixing conspiracy in October 2019.^{vi} The settlement did not include any penalties against the conspirators, but it did require them to regularly provide the FTC with compliance reports and to refrain from engaging in similar conduct in the future. In the indictment, the Division alleges that Defendant Jindal "made false and misleading statements and withheld and concealed information during the [FTC] investigation."^{vii}

Takeaways

This first criminal case in the employment arena is a stark reminder of the need for antitrust compliance training for HR professionals and executives involved in hiring. It remains to be seen whether the Division will criminally charge any of the companies involved in the alleged wage fixing conspiracy. More broadly, however,

the indictment makes clear that the Division is serious about targeting anticompetitive behavior in employment markets.

Further, while the conspirators here appear to have participated in similar markets for local staffing of physical therapists, antitrust risk in labor markets applies much more broadly: defendants need not compete in the horizontal market for their output (i.e., the goods or services they sell). Rather, criminal liability can attach when the businesses at issue compete for inputs in the form of labor. This concept is important to explain to HR professionals.

Finally, the indictment is noteworthy as the latest example of the Division's use of electronic messages to build its case. Like other price fixing indictments issued this year, such as in the poultry cases, the Division cites text messages to help establish a conspiracy. In the present remote work environment—where more workplace communication is accomplished electronically—antitrust compliance should remain vigilant in monitoring potential cartel activity. The case also is a stark reminder of the need for antitrust compliance training for HR professionals and executives involved in hiring.

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- ⁱ U.S. Dept. Justice Antitrust Division, *Former Owner of Health Care Staffing Company Indicted for Wage Fixing – Antitrust Division Remains Committed to Prosecuting Collusion in Labor Markets* (Dec. 10, 2020), <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>.
- ⁱⁱ U.S. Dept. Justice Antitrust Division and Federal Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.
- ⁱⁱⁱ Press Release, U.S. Dept. Justice Antitrust Division, *Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees* (Apr. 3, 2018), <https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete>.
- ^{iv} Press Release, U.S. Dept. Justice Antitrust Division, *Justice Department and Federal Trade Commission Jointly Issue Statement on COVID-19 and Competition in U.S. Labor Markets* (Apr. 13, 2020), <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-jointly-issue-statement-covid-19-and>.
- ^v Indictment, *United States v. Neeraj Jindal*, Case No. 20-cr-358 (Dec. 9, 2020), <https://www.justice.gov/opa/press-release/file/1344191/download>.
- ^{vi} Decision & Order, *In the Matter of Your Therapy Source, LLC, et al.*, F.T.C. No. 171-0134, <https://www.ftc.gov/enforcement/cases-proceedings/171-0134/your-therapy-source-neeraj-jindal-sheri-yarbray>.
- ^{vii} *Id.* at 7.

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