

DOJ Seeks to Dismiss Its Last Pending No-Poach Criminal Action

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As we discussed earlier this year, the U.S. Department of Justice (“DOJ”) in recent years has brought numerous criminal prosecutions against companies accused of engaging in so-called “naked” no-poach agreements, *i.e.*, agreements among competing businesses to restrict hiring or compensation of employees, outside of any legitimate collaborative relationship. The DOJ’s efforts in this regard were spurred by the issuance in 2016 of Antitrust Guidance for Human Resources Professionals, which was a warning issued by the DOJ and the Federal Trade Commission (“FTC”) of potential criminal prosecution for such misconduct.

Since the DOJ began bringing these no-poach criminal prosecutions around 2020, it has been remarkably unsuccessful, losing four separate jury trials and suffering a pretrial dismissal of another set of no-poach charges against six aerospace and staffing company executives.

The latest addition to this poor track record came on November 13, 2023, when the DOJ filed a motion to dismiss the indictment it had filed in 2021 in the U.S. District Court for the Northern District of Texas against Surgical Care Affiliates, LLC and SCAI Holdings, LLC (operators of outpatient medical care facilities across the United States). The

indictment accused those companies of conspiring with one or more competitors to suppress competition between them for the services of senior-level employees by agreeing not to solicit each other's senior-level employees.

In its motion, the DOJ did not elaborate on its reasons for seeking dismissal of the indictment, only stating that dismissal “is not contrary to manifest public interest, and it will allow the conservation of this court’s time and resources,” and that defendants’ counsel “do not oppose this motion.” Reading between the lines, the DOJ seems to have decided it would have difficulty establishing the *per se* anti-competitive conduct that it would need to prove in order to win a conviction.

This action is the only pending criminal prosecution by the DOJ for alleged no-poaching violations. Time will tell, but the DOJ may have lost its appetite for bringing such actions, given the uphill challenges of winning convictions in them.

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