

Axinn Antitrust Insight: Antitrust Division Obtains First Conviction for Labor-Market Collusion

October 27, 2022

PRACTICE AREAS

Antitrust

Axinn Update

On October 27, 2022, the Antitrust Division obtained its first plea and conviction for collusion among employers when healthcare staffing company VDA OC, LLC pled guilty to violating Section 1 of the Sherman Act for its role in a no-poach and wage-fixing conspiracy involving school nurses in Clark County, Nevada. Under the plea agreement, VDA admitted to agreeing with a competing employer not to recruit or hire each other's nurses assigned to the Clark County School District and that they would not raise those nurses' wages. This first plea and conviction follows acquittals on antitrust charges in the first two labor cases to go to trial. And while many of the Division's initial criminal cases for labor-market conspiracies have been against individuals who face the potential of jail time, the result of this corporate plea is a fine and restitution totaling \$134,000. Despite the relatively small fine, this success will likely encourage the Division to redouble its efforts to prosecute labor conspiracies criminally.

Background

More than six years ago – on October 20, 2016 – the Antitrust Division and the Federal Trade Commission issued guidance that “[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.” The Division defines wage fixing as “a form of price fixing for employee compensation” where employers agree “not to compete on employee salary, benefits, or other terms of compensation, either at specific levels or within a range.” No-poach agreements, in turn, are “market allocation agreements” between “employers—or their third-party agents or intermediaries, e.g., recruiters—not to solicit (including cold calling and recruiting), hire, or otherwise compete for each other's employees.”

In December 2020, the Division indicted its first case and has now criminally charged six cases involving labor markets. Two have gone to trial, resulting in acquittals on the antitrust charges but one defendant was

convicted for conspiring to obstruct an earlier Federal Trade Commission investigation. Three cases have withstood motions to dismiss, which the Antitrust Division argues “reaffirm[s] the core principle of our labor market prosecutions: that labor market collusion is a felony under the Sherman Act.” Even before VDA’s plea, the Division made clear that it will continue to prioritize “and prosecute collusion in labor markets that serves no other purpose than to cheat workers of competitive wages, benefits, and other terms of employment.”

U.S. v. VDA OC, LLC et al.

A Las Vegas grand jury indicted VDA OC, LLC and its former executive in March 2021 for an eight-month conspiracy that began on October 21, 2016 – one day after the Antitrust Division/Federal Trade Commission guidance was released – to allocate nurses between VDA and its competitor by not recruiting or hiring each other’s nurses and wage fixing by refraining from raising nurse wages.

On October 27, 2022, Judge Richard F. Boulware accepted VDA’s guilty plea. Under its terms, VDA will pay a \$62,000 fine and \$72,000 of restitution based on \$218,016 of affected commerce, calculated based on wages paid to VDA nurses during the conspiracy. \$72,000 in restitution is an estimate of lost wages that amounts to nearly one-third of the affected commerce.

Key Takeaways

The Antitrust Division will celebrate VDA’s conviction as a milestone in its effort to prosecute labor-market collusion and as further support for the legal premise that labor-market collusion is collusion. The Division’s first plea will only further its resolve and interest in wage fixing, no-poach and no-solicit agreements moving forward.

For VDA’s part, however, the company’s arguments before Judge Boulware include reasons it may have chosen to put this case behind it. In VDA’s Motion to Dismiss, for example, the company argued it “ceased operations in July 2017 and has been dissolved for more than two years.”

The next labor market trial up for the Division, scheduled to begin on January 9, 2023 in Texas, alleges a non-solicitation agreement. The Division also awaits the results of outstanding motions to dismiss in certain of its other ongoing labor cases.



Please contact any of Axinn's Antitrust partners to discuss any questions about the Antitrust Division's effort to criminally prosecute wage fixing, and no-poach and non-solicit agreements.

