Article – AHLA Annual Meeting

The healthcare industry is one of the largest sectors in the U.S. economy, employing over 18 million workers. Healthcare workers—including treatment providers, caretakers, and those in operations and management—are especially in high demand due to nationwide staffing shortages and high turnover rates, which were only exacerbated by pandemic burnout. These challenges have sparked concern among industry leaders and elected officials over patient safety and the delivery of quality services.

As a result, hospitals and other healthcare facilities are hotly competing for workers and have been pressured to increase salaries and offer various incentives to attract and retain staff. It may be tempting as an employer to restrict employee movement or consider ways to curb the market rate. But recent enforcement actions by the DOJ's Antitrust Division cracking down on this type of activity should serve as a warning to employers to resist this temptation.

In October 2016, the DOJ and FTC jointly announced in their "Antitrust Guidance to HR Professionals" that they would begin criminally prosecuting companies that entered into wage-fixing or no-poach agreements, stating that "[t]hese types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers[.]" While the DOJ previously pursued this conduct civilly, it would now view it as "per se" unlawful under the Sherman Act, meaning that the conduct is presumed anticompetitive and lacking a business justification. This was a significant development because, as a matter of institutional policy, the Antitrust Division only criminally prosecutes conduct that it deems "per se" unlawful.

Beginning in 2020, the DOJ began to criminally indict a number of companies, several of which were uncoincidentally in the healthcare industry.

Four cases are worth reviewing:

- *U.S. v. Surgical Care Affiliates* (Northern District of Texas, Case No. 3:21-cr-00011) – This case is the first no-poach case brought by the DOJ. SCA is an ambulatory surgical care company that owns and operates outpatient medical care facilities across the United States. The two-count indictment alleges that SCA and two co-conspirators (known to be DaVita and USPI) agreed not to solicit each other's senior-level employees and thus engaged in a conspiracy in restraint of trade to allocate employees. A jury trial is currently set for January 2023, and a motion to dismiss the indictment is currently pending before the court, in which the defendants challenge the DOJ's characterization of no-poach conduct as "per se."

- *U.S. v. DaVita, et al.* (District of Colorado, Case No. 1:21-cr-00229) – This case was borne out of the SCA case in Texas and involved a three-count indictment, similarly alleging that DaVita entered into agreements with three other companies (including SCA) not to solicit one another's employees. Each of the three other companies, though in healthcare broadly, provide different patient services: while DaVita is a dialysis provider, SCA provides ambulatory surgical

care, Hazel Health partners with K-12 schools to provide students TeleHealth services, and Radiology Partner oversees a network of radiology practices. In April 2022, a Denver jury acquitted DaVita and its former CEO of all three charges. This was the first criminal trial over alleged agreements to restrict employee movement between companies. The judge denied the defendants' motion to dismiss the indictment, challenging the classification of this conduct as "per se" illegal. The judge also instructed that the DOJ had to prove at trial that the defendants entered into the agreement with the purpose of allocating the market for employees and intended to end meaningful competition in the market.

- *U.S. v. Jindal, et al.* (Eastern District of Texas, Case No. 4:20-cr-358) – This case was the first criminal trial involving wage-fixing allegations. The indictment was brought against the former owner and clinical director of a physical therapist staffing company named Integrity Home Therapy that contracted with home health agencies in the Dallas Fort-Worth area. The DOJ alleged that the defendants reached out to the owners of several competing staffing businesses to discuss collectively lowering wages for physical therapists and assistants. Although the defendants were acquitted by a Texas jury of the antitrust charges, one of them was convicted of obstructing the FTC's investigation by making false and misleading statements. As in the *DaVita* case, the judge rejected the defendants' motion to dismiss the indictment that argued agreements to fix wages are not "per se" Sherman Act violations.

- *U.S. v. Hee, et al.* (District of Nevada, Case No. 2:21-cr-00098) – This case involves allegations of both wage-fixing and no-poach agreements. The defendants in this case are a healthcare staffing company called Advantage On Call (later changed to VDA OC LLC) and its regional manager. The DOJ alleges that the defendants entered into an agreement with its competitors to refrain from recruiting and hiring each other's nurses and refrain from raising their wages. The judge denied the defendants' motion to dismiss, and a jury trial is currently set for April 2023.

Despite the acquittals in *DaVita* and *Jindal*, the DOJ has publicly indicated that it will continue to pursue these types of cases especially given the courts' favorable rulings in the motion to dismiss decisions. It should therefore not be encouraging to anyone in the healthcare sector that these cases resulted in acquittals. The truth is that, in both cases, the companies and individuals went through an enormous expenditure of time, resources, stress, and risk to achieve these results. In other words, it's not a cost-free exercise even if there's a trial win.

And where a case results in a conviction, a company runs the grave risk that it gets excluded from participation in a state's Medicaid program. That's because, even though the federal government generally will not exclude a company from Medicare participation unless a fraud-base offense related to reimbursement or delivery of services occurs, a state is entitled to make its own exemption rules, which could be extended to companies convicted of any crime, including under the Sherman Act.

The other risk of a criminal investigation is that, even if a company or individual ultimately wins the case, they are at risk of committing other crimes throughout the lifecycle of the case. Such was the case in *Jindal*, where the defendant was convicted on obstruction charges for concealing and misrepresenting information during the FTC's investigation.

Given these recent developments, companies should be on the lookout for red flags and warning signs regarding their hiring practices and efforts to retain employees. This is particularly true if there is ever a suggestion to communicate with another company regarding terms of employment (such as salary and benefits) or recruitment strategies generally. It does not matter if the other company does not directly compete for patient services; the key is whether the companies compete for employees. To avoid ambiguity, companies should develop detailed rules for how to communicate with other employers regarding these topics.