WINSTON & STRAWN LLP

BLOG

DOJ's First Criminal Indictment for Wage-fixing Survives Dismissal Attempt

DECEMBER 10, 2021

The Eastern District of Texas denied Neeraj Jindal's and John Rodgers' motions to dismiss the Department of Justice's ("DOJ") first-ever criminal indictment for wage-fixing. The court found that wage-fixing agreements were a type of price-fixing and, as such, rejected defendants' arguments that there was a lack of precedent to criminally prosecute the alleged conduct as per se illegal.

Background

The DOJ filed an indictment against Jindal in December 2020 and a superseding indictment in April 2021 against both Jindal and Rodgers. The defendants were charged with violating antitrust laws through a wage-fixing scheme affecting physical therapists and therapist assistants in the Dallas-Fort Worth area. Jindal and Rodgers were also charged with conspiracy and with obstructing a Federal Trade Commission ("FTC") investigation into the allegations.

In May 2021, Jindal filed a motion seeking to dismiss the antitrust charges, which Rodgers joined. Jindal argued that there was a lack of precedent for bringing criminal charges for wage-fixing agreements. Further, Jindal took the position that the DOJ had failed to state a per se violation or a "naked restraint" on competition involving conduct that is inherently anticompetitive and dispenses with the need for case-by-case evaluation. The motion noted that only four types of Sherman Act violations have ever been considered per se illegal: price-fixing, bid-rigging, market allocation, and certain types of group boycotts.

The Decision

The court disagreed, however, and issued an order and opinion on November 29, 2021, denying the motion. Citing to Justice Kavanaugh's recent concurrence to the Supreme Court's June 2021 decision in *NCAA v. Alston* (see here for more information on the decision), the court concluded that "fixing the price of labor, or wage fixing, is a form of price-fixing" and thus the DOJ had properly alleged a naked price-fixing agreement. The court then held that given the long history of treating price-fixing agreements as per se unlawful, the defendants would also have had fair notice that their alleged conduct was illegal. Such a characterization is particularly important to the ongoing discourse regarding which level of analysis should apply to wage-fixing and no-poach allegations. (See here for our prior blog post on the Ninth Circuit's decision that the rule-of-reason analysis applies to ancillary no-poach agreements and here for our prior blog post on an amicus challenge to per se treatment of the DOJ's second criminal no-poach case). It remains to be seen whether other courts will adopt the same characterization of such

schemes, including in a pending motion to dismiss the DOJ's second criminal indictment in this area. It also remains to be seen whether the DOJ and courts will distinguish between wage-fixing and no-poach agreements with respect to the application of the per se standard.

Takeaways

While the case against Jindal is the first criminal case brought by the DOJ over an alleged agreement to restrain a labor market, it was long anticipated. The indictment comes after years of warnings from the DOJ and FTC that such wage-fixing and no-poach agreements could be considered criminal violations in certain circumstances. Such warnings became particularly prevalent in 2016 when the DOJ and FTC jointly issued the Antitrust Guidance for Human Resource Professionals and again at the outset of the COVID-19 pandemic when the agencies emphasized that they would "prosecute any criminal violations of the antitrust laws," including "between individuals or businesses to fix prices or wages." As evident even from the FTC-related charges in the indictment, the partnership between the DOJ and FTC is likely to continue with further developments, such as the FTC's recent announcement that it is expanding its criminal referral practice with the aim of deterring corporate crime. For more information on antitrust considerations in the labor market, see here for our blog post on the heightened focus of the DOJ on wage-fixing and no-poach agreements and here for our prior blog post on the FTC's focus on no-poach and non-compete provisions in evaluating mergers or acquisitions.

Going forward, labor markets are likely to remain a focus of enforcers. Indeed, President Biden's July 2021 Executive Order on competition further reinforced that labor market antitrust issues will remain a high priority for the foreseeable future (see our prior blog post and podcast on these issues).

4 Min Read

Authors

Eva Cole

Gabi Wolk

Related Locations

New York

Related Topics

Antitrust Intelligence | Department of Justice (DOJ) | Cartels | Employment Antitrust

Related Capabilities

Antitrust/Competition

Related Regions

North America

Related Professionals

Eva Cole

Gabi Wolk

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.