King & Spalding
Client Alert

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No Poach Investigations

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Agreements between companies not to solicit or to hire each other's employees ("no poach agreements") have been in antitrust enforcers' crosshairs for several years now. In 2016, the DOJ and the FTC released their joint *Antitrust Guidance for Human Resource Professionals*, alerting employers, among other potential anticompetitive violations, that regulators would be on the lookout for no poach agreements between companies seeking to hire from the same pool of potential employees.

Reasonable employee non-solicitation clauses are of course common and accepted in M&A transactions. In such instances, enforcers would consider such restrictive covenants as "ancillary" to a legitimate agreement and not necessarily anticompetitive. However, naked no poach agreements are horizontal agreements to restrict competition in the labor market and could be categorized as *per se* illegal violations of Section 1 of the Sharman Act. Indeed, in the 2016 Guidance, the DOJ announced that no poach agreements may be prosecuted criminally.

This forecast has now come to pass. After filing a number of statements of interest in private no poach lawsuits and warning that criminal penalties may be forthcoming, the DOJ brought its first criminal no poach prosecution in January 2021 in the Northern District of Texas, alleging an agreement between two outpatient medical care facility operators not to solicit each other's senior level employees. This indictment follows DOJ's first criminal wage-fixing prosecution, also filed in the Northern District of Texas, against individuals and companies supplying physical therapist staffing services.

The DOJ criminal prosecutions are part of a heightened scrutiny of anticompetitive conduct in labor markets from the DOJ, FTC and state attorneys general. In January 2020, the FTC brought an administrative

complaint against police camera suppliers for an overly broad non-solicitation agreement in an M&A transaction. State enforcers, led by Washington Attorney General Bob Ferguson individually and cooperatively have investigated and brought lawsuits seeking to stop enforcement of no poach clauses, particularly in franchise agreements.

Private lawsuits seeking damages have inevitably followed this enforcement activity. For example, a former senior level employee of SCA, one of the defendants in the DOJ no poach criminal indictment, filed a class action lawsuit against SCA and other named and unnamed defendants alleging a Section 1 conspiracy not to solicit competitors' employees, thereby causing antitrust injury to impacted employees.

King & Spalding has extensive experience representing clients in no-poach investigations. With several former government enforcers, King & Spalding is able to use its first-hand agency experience to achieve successful outcomes for its clients including representing a leading accounting firm and a healthcare provider in criminal no-poach investigations. In addition, King & Spalding is currently representing Evangelical Community Hospital in class action litigation brought by former employers alleging a no-poach agreement with its competitor Geisinger Health.

Client should beware that under the Biden administration, we anticipate an increase in the number of no-poach investigations and an increase in the number of these cases being pursued criminally. As with any government investigation, there is also certain to be an uptick in follow-on litigation.