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DOJ ANTITRUST SECURES FIRST CONVICTION FOR NO-POACH AND WAGE-FIXING CONDUCT

To Our Clients and Friends:

On October 27, 2022, VDA OC LLC ("VDA") pleaded guilty to engaging in a conspiracy with another healthcare staffing company to allocate employee nurses and fix their wages in violation of Section 1 of the Sherman Act.[1] The case marks the first successful criminal prosecution for a labor market antitrust violation, following two significant losses for the U.S. Department of Justice ("DOJ") earlier this year with acquittals in *United States v. DaVita, Inc.*, No. 1:21-cr-00229 (D. Colo.), and *United States v. Jindal*, No. 4:20-cr-00358 (E.D. Tex.).

VDA emphasized the "extremely limited nature of the [conspiratorial] agreement" in a statement.[2] According to the indictment, VDA entered into a nine-month agreement not to recruit nurses from a competitor in the Clark County School District in Nevada ("CCSD") or to raise school nurses' wages.[3] The agreement began in or around October 2016, when VDA's former Regional Manager Ryan Hee sent an email to the executive of an unnamed competitor saying, "[p]er our conversation, we will not recruit any of your active CCSD nurses" and "[i]f anyone threatens us for more money, we will tell them to kick rocks!"[4] The competitor's executive responded, "[a]greed on our end as well. I am glad we can work together through this, and assure that we will not let the field employees run our businesses moving forward."[5] The agreement allegedly ended in or around July 2017.[6]

VDA was sentenced to pay a criminal fine of $62,000 and restitution of $72,000 to the affected nurses.[7] Under the U.S. Sentencing Guidelines ("USSG"), antitrust fine ranges are calculated by first determining the "base fine," which is 20% of the "affected volume of commerce."[8] The DOJ has not previously addressed how to measure the affected volume of commerce in labor market cases, but this case confirms the prevailing assumption that the DOJ will seek to calculate the volume of commerce using the compensation paid to the defendant's affected employees for the duration of the alleged conduct. The volume of commerce attributed to VDA was $218,016 based on payroll records for the wages paid to affected nurses during the period of the conspiracy.[9] The resulting base fine was $43,603, which is adjusted for culpability under the USSG, yielding a recommended fine range between $52,324 to $104,647.[10]

The DOJ likely agreed to recommend a fine near the lower end of the USSG fine range because of the relatively high amount of restitution that VDA agreed to pay. The $72,000 restitution reflects nearly a third of the agreed-upon volume of commerce, which is much higher than the settlement rates in prior no-poach civil cases.[11] VDA's resolution is silent about how the DOJ identified the affected nurses or how the restitution payment will be distributed, although the methodology that the DOJ adopts will be of significant interest to parties in future cases.

VDA's willingness to pay such generous restitution, in exchange for a lower criminal fine, may reflect its own interest in a settlement skewed toward compensating alleged victims to reduce the risk of follow-on civil litigation. Indeed, the DOJ noted in its sentencing memorandum that VDA's restitution payment would potentially obviate the need for nurses to bring parallel civil suits to recover damages.[12] This is a promising pathway for the DOJ to incentivize companies to enter plea agreements that merits further consideration. Companies now face years of costly and burdensome civil litigation following many criminal antitrust investigations and must consider whether a resolution with the DOJ will prejudice its ability to defend those cases. If the DOJ is willing to negotiate reasonable restitution amounts in plea agreements and advocate in court that its agreed-upon restitution payments fully compensate the allegedly harmed employees, it may significantly reduce the risk of follow-on private litigation. This incentive may also extend to leniency recipients under the Antitrust Division's Corporate Leniency Policy, which was recently updated to require that "applicants must present concrete, reasonably achievable plans" for paying restitution to injured parties.[13]

The DOJ's case remains ongoing against VDA's former Regional Manager, Ryan Hee. Hee has pleaded not guilty and is currently scheduled for trial in April 2023.

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[1] Plea Agreement at ¶ 2-3, *United States v. VDA OC, LLC*, No. 2:21-cr-00098 (D. Nev. Oct. 27, 2022).

[2] *See* Dan Papscun, *DOJ Notches First No-Poach Win With Staffing Firm's Sentencing* (Oct. 27, 2022, 2:23 PM), Bloomberg News, https://news.bloomberglaw.com/in-house-counsel/doj-notches-first-no-poach-win-with-guilty-plea-sentencing?utm_source=rss&utm_medium=CCNW&utm_campaign=00000184-1a94-d054-af8e-5bb56feb0001.

[3] *See* Indictment at ¶ 12-14, *United States v. VDA OC, LLC*, No. 2:21-cr-00098 (D. Nev. March 26, 2021).

[4] *Id.* at ¶ 14.

[5] *Id.*

[6] *See id.* at ¶ 12.

[7] Plea Agreement at ¶ 10.

[8] USSG §§ 2R1.1(d), 8C2.4.

[9] Sentencing Memorandum at 4, *United States v. VDA OC, LLC*, No. 2:21-cr-00098 (D. Nev. Oct. 20, 2022). Interestingly, the DOJ did not consider the value of non-cash benefits or other forms of non-monetary compensation to the affected nurses in calculating VDA's base fine.

[10] *Id.* at 4-5.

[11] For example, a survey of eleven employee class action settlements from 2002 to 2020 shows that the parties settled for an amount between 1.4% to 5.3% of the total compensation at issue. *See* Exhibit E to Motion for Preliminary Approval of Proposed Class Settlement, *In re: Railway Industry Emp. No-Poach Antitrust Litig.*, No. 18-mc-798 (W.D. Pa. Feb. 24, 2020).

[12] Sentencing Memorandum at 6.

[13] *Frequency Asked Questions About the Antitrust Division's Leniency Program*, U.S. Dep't of Justice, Antitrust Division (Apr. 4, 2022), ¶¶ 34–35.

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