



Antitrust Violations— Is Your Firm at Risk?

By John Polson, Esq.

Don't let criminal antitrust violations ruin your year. Here's a **six-step action plan** for staffing companies to help ensure compliance and **avoid criminal prosecution**.

When a Nevada health care staffing firm pled guilty to criminal antitrust allegations for workplace misdeeds this past October, it didn't just make history—it sent shockwaves through the entire staffing community, and rightfully so. It was the nation's first-ever successful criminal prosecution of a workplace-related antitrust matter, and the significant risks it lays bare should lead every staffing organization to rethink its approach to workplace practices and policies.

The staffing company at issue agreed to pay more than \$130,000 in criminal fines after federal authorities accused it of conspiring with a competitor to fix wages for school nurses and agreeing not to solicit each other's workers. While the dollar

amount may not seem high, the staffing firm was fairly small and the violations occurred over less than a year—meaning larger companies could face larger fines for similar conduct over a longer period.

What does this historic outcome mean for your staffing business? Here's what you need to know about antitrust laws and recent federal actions against employers, as well as six steps you should take to stay on the right side of the law.

Innocent Behavior, or Major Conspiracy?

The U.S. Department of Justice alleged that the private staffing company knowingly engaged in a conspiracy to suppress competition when placing contract nurses at schools. The company made a pact with a competitor not to recruit each other's

nurses and to fix their wages, according to the indictment.

The staffing company said its no-poach agreement wasn't a vast nefarious conspiracy, however. It involved only a single telephone conversation and one email between its regional manager and a competitor's employee. The competitor's employee wrote to the regional manager, "I am glad we can work together through this and assure that we will not let the field employees run our businesses moving forward." The regional manager allegedly responded, "If anyone threatens us for more money, we will tell them to kick rocks!"

Antitrust Law Enters the Picture

The DOJ concluded that this agreement violated the Sherman Act, a federal antitrust law that prohibits activities that restrain interstate commerce and marketplace competition—including competition in the employment market. This law generally aims to block anticompetitive behavior, such as price fixing and monopolies—so you could be forgiven for thinking it has no real application to your business.

But it has increasingly been applied in the employment context to curb wage suppression and restraints on worker mobility—and federal agencies are increasingly filing criminal conspiracy charges to rein in the practice. Their two main targets include allegations of wage fixing and the use of no-poach agreements. No doubt this first-ever successful workplace plea deal will embolden federal officials to go after staffing companies even more aggressively in 2023 and beyond.

And your list of risks doesn't end with potential criminal prosecution. Because the Sherman Act provides for treble damages for injured parties, there is an active plaintiffs' antitrust bar that typically piles on and files class-action lawsuits immediately after a DOJ indictment.

Six Antitrust Compliance Steps for Staffing Companies

Staffing firms are understandably concerned about losing good employees, particularly in a time when competition for top talent is fierce and excessive employee turnover can significantly impact your bottom line. Friendly competitors also wish they could avoid the ugliness of employee poaching through mutual cooperation. But given the new focus on labor-market antitrust investigations, you should consider taking the following six actions to ensure compliance—and to avoid criminal prosecution for you and your staffing organization:

1. **Incorporate antitrust issues into your compliance and training programs.** Make sure that everyone in your organization understands the risks surrounding wage-fixing and no-poach agreements. Even informal "unspoken" wink-and-nod arrangements could land you and your company in hot water.
2. **Train key employees about the risks of exchanging employment information** with competitors. Develop strategies for reducing those risks.
3. **Be careful about entering into any no-poach agreements with other employers.** Sometimes, such agreements may be permissible if they are limited in scope and "ancillary" to a larger transaction, such as a joint venture, business collaboration, or settlement of litigation—but you will want to consult with your legal counsel with each such action to determine viability. In general, the federal antitrust agencies are taking a more critical look at such agreements and will challenge them if they are deemed "naked" restraints on the free flow of labor markets.
4. **Avoid any activity that could be deemed as an agreement to fix wage or**

benefit levels with another employer. Certain exchanges of wage and benefit information with other employers can lead to antitrust exposure. Pay particular attention to compensation and benefits information shared with industry and trade groups.

5. **Review any applicable state laws** that apply to no-poach agreements and other restrictive covenants and update agreements accordingly.
6. Given the potential criminal and civil risks, you should **consider reviewing your customer agreements with experienced legal counsel** to ensure they are compliant with modern interpretations of antitrust law.

DOJ Tightens the Belt

This groundbreaking guilty plea "demonstrates the DOJ's commitment to ensuring that workers receive competitive wages and a fair chance to pursue better work and that criminals who conspire to deprive them of those rights are held accountable," according to assistant attorney general Jonathan Kanter of the DOJ's Antitrust Division. U.S. attorney Jason Frierson for the District of Nevada added that "protecting workers from antitrust schemes—such as wage-fixing and employee allocation—remains a priority" and the U.S. Attorney's Office is "committed to working with the Antitrust Division and FBI to prosecute anticompetitive conduct that affects opportunities for workers and the labor market."

Staffing companies should take these warnings to heart if they want to avoid a massive landmine in 2023. The time has come for you to add antitrust compliance to your ever-growing list of priorities for the new year and beyond. ■

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KEY TAKEAWAY

The nation's first-ever successful criminal prosecution of a workplace-related antitrust matter poses significant risks for staffing companies. Make sure your firm is in compliance to stay out of hot water in 2023 and beyond.