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No-Poaching Agreements Under DOJ's Microscope: Criminal Indictments May Be Next

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In October 2016, the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission jointly issued their Antitrust Guidance for Human Resource Professionals ("Guidance"). As stated in its prologue, the Guidance "is intended to alert human resource professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws," particularly as these laws relate "to competition among firms to hire employees."

The Guidance followed civil enforcement actions against a number of the larger technology companies in the country. The DOJ alleged that these companies had entered into naked agreements (i.e., agreements that were not ancillary to any efficiency-enhancing endeavor) not to hire (or "poach") each other's employees. Importantly, the Guidance provides an explicit warning that future naked agreements not to hire employees would be treated as a criminal—rather than a civil—violation of the antitrust laws. Recent speeches by representatives of the DOJ suggest that certain companies have not gotten the message, and criminal indictments based on this type of conduct are under active consideration.

Given the prevalence of non-competes and non-solicitation agreements in the health care industry, contracts and other agreements containing no-poaching clauses should be reviewed to ensure that they are ancillary to an efficiency-enhancing endeavor and appropriately justified.

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