

## Government steps up aggressive criminal antitrust enforcement

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At a recent meeting of government enforcers and antitrust practitioners, Department of Justice (DOJ) officials outlined several initiatives reflecting a commitment to more aggressive criminal enforcement. According to these officials, the government is willing to bring criminal monopolization cases and plans to pursue criminal convictions for collusion in labor markets. The DOJ's revised leniency program also sparked debate on whether the agency's changes introduce uncertainty.

### **Antitrust authorities remain committed to vigorous criminal enforcement of the antitrust laws**

At the recent Spring Meeting of the American Bar Association's Antitrust Law Section (ABA), officials from the DOJ and state attorneys general gave every indication that pursuing criminal punishments for violations of the antitrust laws is a continued focus of their enforcement efforts. The DOJ's Assistant Attorney General for Antitrust (AAG), Jonathan Kanter, noted that the DOJ is currently pursuing more than 20 criminal conduct cases that are expected to go to trial, and emphasized that the DOJ is "not going to let up" on criminal enforcement any time soon. State enforcers similarly emphasized the importance of criminal prosecution as a tool to further antitrust policy—either with or without the federal agencies—particularly in bid-rigging and market allocation cases. AAG Kanter and other DOJ officials stressed that the government intends to take on tough cases, including alleged collusion in markets for labor and alleged criminal violations under Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracies to monopolize.

### **The DOJ intends to bring criminal monopolization cases under Section 2 of the Sherman Act**

AAG Kanter, Principal Deputy AAG Doha Mekki, and Deputy AAG for Criminal Enforcement Richard Powers all made clear that the DOJ is open to bringing criminal monopolization cases under Section 2 of the Sherman Act. Deputy AAG Powers made similar remarks at the ABA's National Institute on White Collar Crime in March,<sup>1</sup> as did AAG Kanter at the Spring Enforcer's Summit hosted by the DOJ and the Federal Trade Commission (FTC) on April 4,<sup>2</sup> emphasizing that Congress made it a felony to violate the Sherman Act's prohibition of monopolization. This represents a significant departure from prior DOJ practice, as no criminal cases have been brought under this provision in decades.<sup>3</sup> Both AAG Kanter and Deputy AAG Powers declined to identify specific conduct warranting criminal prosecution for monopolization, and instead encouraged practitioners to look at the cases that have already been litigated for guidance on the kind of conduct the DOJ may target.

### **The DOJ intends to pursue alleged collusion in labor markets**

Criminal enforcement targeting practices aimed at suppressing wages, limiting competition for employment, or otherwise harming workers was a major theme of the Spring Meeting. AAG Kanter gave a clear indication that the DOJ prioritizes detecting and prosecuting collusion in labor markets, calling the DOJ's prosecution of employee no-poach and wage-fixing agreements between companies "its most important work." Since early 2021, the DOJ has brought five no-poach criminal cases and one wage-fixing criminal case (five of the six cases are in the healthcare space and one is in aerospace).<sup>4</sup> The DOJ has already survived motions to dismiss in both the wage-fixing case and one no-poach case.

Practitioners from around the world noted that companies may not realize that no-poach agreements can be considered illegal or criminal, and pressed James J. Fredericks, Chief of the DOJ's Washington Criminal II Section, to provide clarity around difficult cases. Section Chief Fredericks said that the DOJ was unlikely to bring criminal charges in cases representing close calls (for example, where debate exists over the reasonableness of a 12-month versus an 18-month non-solicitation agreement that is related and necessary to a legitimate transaction). However, he argued that the DOJ's considered legal analysis led to a "self-evident" conclusion that wage-fixing, no-poach, and no-hire agreements "that are unrelated or unnecessary to a larger legitimate collaboration between employers"<sup>5</sup> should be criminally prosecuted.<sup>6</sup>

Section Chief Fredericks further cautioned practitioners about the intersection of labor market collusion issues and service on multiple corporate boards. He noted that even if two companies only compete for employees in a very generalized category, an individual sitting on both companies' boards could facilitate a no-poach agreement between the companies. Other Spring Meeting discussions emphasized that enforcement in this space requires companies to think differently about who their competitors are; the 2016 "Antitrust Guidance for Human Resources Professionals" issued jointly by the FTC and the DOJ takes the position that firms in competition to hire or retain employees are "competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services."<sup>7</sup>

## The DOJ's revised leniency policies sparked vigorous debate

On April 4, 2022, the DOJ issued revised leniency policies and procedures for organizations or individuals who are the first to self-report participation in a criminal conspiracy in violation of the antitrust laws.<sup>8</sup> The revised policy reflects three significant changes imposing additional requirements on applicants to receive leniency. Marvin Price, Director of Criminal Enforcement at the DOJ Antitrust Division, explained the rationale behind each change:

- **First**, the DOJ now requires that companies *promptly report* illegal conduct upon its discovery. Director Price stated that the dual purposes of this change are to (a) encourage timely reporting as a matter of good corporate citizenship, and (b) allow the DOJ to engage in consensual monitoring for investigative purposes before the conduct ceases.
- **Second**, the DOJ will now require that companies undertake remediation efforts that "fully remedy the harm caused by the offense" (beyond providing restitution to victims) and improve their compliance policies (in a way that "eliminates or reduces the risk of recidivism") to receive leniency.<sup>9</sup>
- **Third**, the updated policy reflects a few changes to leniency for individual employees. Employees who self-report before the DOJ has any information about the illegal activity and who fully and truthfully cooperate will be covered by leniency without having to admit involvement in the illegal activity. Director Price noted that this change was intended to cover employees who have information about, but were not, in fact, involved in, illegal conduct. Where the DOJ already has received information regarding, or opened an investigation into, the illegal activity by the time an employee reports it, the DOJ will exercise its discretion to determine whether to include that employee in non-prosecution agreements, taking account of that employee's criminal history.

Practitioners from the defense bar raised particular concern about the policy's new prompt reporting requirement and what they view as a new approach to individuals who self-report. Some panelists suggested that these changes could introduce significant uncertainty into the leniency program and may make it more difficult to counsel clients effectively. Deputy AAG Powers responded that the Division's recent updates to its leniency policy and its related public-facing FAQs seek to increase the program's transparency to the public. AAG Kanter acknowledged that the "carrot" offered by the leniency program may now be "less sweet," but he argued that the policy's real "carrot" is the potential of avoiding jail time or a corporate guilty plea.

## The DOJ will continue to focus on cartel enforcement

Practitioners and companies should continue to expect aggressive prosecution of cartel cases, including those that the DOJ does not foresee a high likelihood of winning. Director Price expressed that the DOJ has a "duty to bring the tough

cases” to prevent under-enforcement of the antitrust laws.

Director Price's remarks follow significant setbacks in the DOJ's prosecution of what the government alleges to be a sprawling price-fixing and bid-rigging scheme by chicken industry executives. So far, the Division's years-long investigation into the broiler chicken industry has resulted in a guilty plea and criminal fine for one corporate defendant. But its two attempts to prosecute ten chicken industry executives for the alleged scheme have both ended in mistrials, most recently on March 29 after a Colorado jury was unable to reach a verdict as to any individual defendant. Following the second mistrial, the DOJ announced plans to move forward with a third attempt to prosecute five of the ten defendants. U.S. District Judge Philip A. Brimmer, apparently skeptical of the DOJ's insistence on a third trial, ordered AAG Kanter to appear in federal court to explain why the DOJ believes that a third trial will be sufficient to obtain and sustain a conviction.

Some panelists at the Spring Meeting appeared to share Judge Brimmer's skepticism toward the DOJ's current cartel enforcement practices. In particular, panelists from the defense bar pointed out that a rush to indictment discourages cooperation and weakens the DOJ at trial by reducing the chances of having witnesses at trial to testify to allegedly illegal conduct. How courts in general will respond to the DOJ's planned influx of criminal cases, and how long the DOJ continues to bring “tough” criminal cases in the face of judicial skepticism, remains to be seen.

In the coming days, we will continue to brief our clients on key takeaways from the Spring Meeting. Please do not hesitate to contact us if you would like to discuss any of these developments.

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- <sup>1</sup> David Reichenberg, *Biden's DOJ Antitrust Division Teases Potential Jail Time for Monopolization*, Forbes (Mar. 14, 2022), <https://www.forbes.com/sites/davidreichenberg/2022/03/14/bidens-doj-antitrust-division-teases-potential-jail-time-for-monopolization/?sh=5ffb009e2ed8>.
- <sup>2</sup> See Davis Polk, *FTC and DOJ Officials Signal Robust Antitrust Agenda at Enforcers Summit* (Apr. 12, 2022), <https://www.davispolk.com/insights/client-update/ftc-and-doj-officials-signal-robust-antitrust-agenda-enforcers-summit>.
- <sup>3</sup> The DOJ most recently sought criminal violations for monopolization, attempted monopolization, or conspiracy to monopolize in 1977. See *United States v. Braniff Airways, Inc.*, 453 F. Supp. 724 (W.D. Tex. 1978).
- <sup>4</sup> See Press Release, Department of Justice, *Health Care Company Indicted for Labor Market Collusion* (Jan. 7, 2021), <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>; Press Release, Department of Justice, *Health Care Staffing Company And Executive Indicted For Colluding To Suppress Wages Of School Nurses* (Mar. 30, 2021), <https://www.justice.gov/usao-nv/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school>; Press Release, Department of Justice, *Second Individual Charged with Fixing Wages for Health Care Workers and Obstructing FTC Investigation* (Apr. 19, 2021), <https://www.justice.gov/opa/pr/second-individual-charged-fixing-wages-health-care-workers-and-obstructing-ftc-investigation>; Press Release, Department of Justice, *DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry* (July 15, 2021), <https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care>; Press Release, Department of Justice, *Former Aerospace Outsourcing Executive Charged for Key Role in a Long-Running Antitrust Conspiracy* (Dec. 9, 2021), <https://www.justice.gov/opa/pr/former-aerospace-outsourcing-executive-charged-key-role-long-running-antitrust-conspiracy>; Press Release, Department of Justice, *Four Individuals Indicted on Wage Fixing and Labor Market Allocation Charges* (Jan. 28, 2022), <https://www.justice.gov/opa/pr/four-individuals-indicted-wage-fixing-and-labor-market-allocation-charges>.

- <sup>5</sup> Press Release, FTC, FTC and DOJ Release Guidance for Human Res. Prof'ls on How Antitrust Law Applies to Emp. Hiring and Comp. (Oct. 20, 2016), <https://www.ftc.gov/news-events/news/press-releases/2016/10/ftc-doj-release-guidance-human-resource-professionals-how-antitrust-law-applies-employee-hiring>.
- <sup>6</sup> Fredericks did note that agreements in the franchising context represent a “gray area” and suggested that further formal guidance on this topic might be forthcoming.
- <sup>7</sup> See Davis Polk, Antitrust Guidance for Human Resource Professionals and the Potential for Criminal Liability (Nov. 4, 2016) <https://www.davispolk.com/insights/client-update/antitrust-guidance-human-resource-professionals-and-potential-criminal>.
- <sup>8</sup> The revised policy can be found on the DOJ's website, <https://www.justice.gov/atr/leniency-program>.
- <sup>9</sup> Frequently Asked Questions About the Antitrust Division's Leniency Program, <https://www.justice.gov/atr/page/file/1490311/download>.