

Lawyer Insights

What Cartel Enforcement Under Biden's DOJ Might Look Like

By Leslie Kostyshak, Craig Lee and Alex Glazer
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President Joe Biden has yet to appoint the new head of the Antitrust Division of [U.S. Department of Justice](#) more than 150 days into his administration.

Acting Assistant Attorney General Richard Powers remains in charge of criminal antitrust prosecutions as the designated head of the unit.

Biden's recent executive order on promoting competition in the American economy signals the intent to ensure competition policy is a key aspect of the Biden administration.¹

Without specific mention of cartel enforcement in the executive order or a new politically appointed leader at the helm of the Antitrust Division, though, we look to what we know from the past to predict the future of cartel enforcement in the Biden administration.

At the outset, we have seen effects of cartel enforcement from both the Obama and Trump administrations play out within Biden's first months.

At the tail end of the Obama administration, the DOJ and [Federal Trade Commission](#) issued joint guidance announcing their decision to investigate and prosecute no-poach and wage-fixing agreements as criminal matters, a change from the agencies' prior practice of investigating such agreements as civil matters.²

Throughout the Trump administration, the Antitrust Division continued to echo a warning that criminal charges related to labor market agreements and unlawful collaborations between employers were forthcoming.

However, not until the end of 2020 and the beginning of 2021 did the unit bring the groundbreaking wage-fixing and no-poach criminal charges in two separate cases, setting the stage for these cases to make their way through the court system just at the beginning of the Biden administration.

We have also seen a rise in deferred prosecution agreements at the start of Biden's first term. DPAs present opportunities for companies, other than the leniency applicant, to delay prosecution of filed charges for a number of years in exchange for compliance with a negotiated set of terms. Such terms range from monetary penalties to agreements to cooperate in the investigations.

Previously reserved for companies in certain industries with regulations that would bar the entities charged with an antitrust violation from doing business with the government, the division appears to be expanding the industries with which they are willing to enter DPAs or abandoning the prior limitations

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altogether.

As noted in this article, we have yet to see whether the Biden administration will continue to offer what is considered a consolation prize to companies that have lost the race to leniency.

As businesses, consumers and legal practitioners wait to see which direction Biden will take when it comes to cartel enforcement, one thing remains true — such enforcement tends to increase during Democratic administrations.³

Criminal investigations have a strong deterrent effect, and though Biden has made clear his initial focus is predominantly on Big Tech when it comes to antitrust regulations and promoting competition, we will likely see the administration strengthen efforts to crack down on criminal behavior.

Labor Markets

Observers of the Antitrust Division have long been waiting to see whether the DOJ would make good on its threat to criminally pursue employee no-poach and wage-fixing agreements. Investigations related to such agreements unsurprisingly take a substantial amount of time to come to fruition.

In December of 2020, the Antitrust Division brought the agency's first criminal wage-fixing charge — against Neeraj Jindal, the former owner of a health care staffing company in the Dallas-Fort Worth metro area —⁴ for engaging in a conspiracy to suppress wages of physical therapists and physical therapist assistants who provide home health care.

In April, the Antitrust Division brought a second indictment against another executive in the same conspiracy.⁵

Although these cases started during the Trump administration, they will inevitably be tied to the Biden administration by virtue of their timing.

In January of 2021, we also saw the Antitrust Division's first criminal no-poach charge after the indictment of [Surgical Care Affiliates](#), an operator of over 200 outpatient medical care centers around the country, for labor market collusion through the use of non-solicitation agreements.⁶

Communications since made public show SCA and its alleged conspirators discussing company policies requiring senior employees to notify their superiors when applying for jobs.⁷

In response to the charges, SCA has argued the government's case represents a "novel application of the antitrust laws" regarding employee recruitment, contending that there is no precedent or foundation for the DOJ's attempt to bring about criminal charges for such behavior.⁸

SCA filed its motion to dismiss in the Northern District of Texas in March, arguing the indictment fails to state a per se offense, and, at the very least, violates due process by extending the per se rule to non-solicitation agreements for the very first time.

As expected, several interest groups, including the [U.S. Chamber of Commerce](#), filed amicus briefs in support of SCA's motion, arguing the DOJ cannot point to mere agency guidance as an adequate means of providing "fair notice" of criminal conduct.⁹

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The chamber further argues separation of powers requires, at minimum, engagement from the legislative or judicial branches in determining what newly constitutes criminal conduct.¹⁰ The court's pending decision will be telling and potentially decisive of what the future holds for these no-poach investigations that continue to ripple throughout the business community.

As the SCA case unfolds, the Antitrust Division continues to roll out similar indictments within the labor market. In March, the division announced the indictment of a health care staffing company and its former manager for engaging in a separate no-poach and wage-fixing scheme.¹¹

The indictment charges the company and the former manager with entering into a conspiracy to fix the wages of employee nurses in a Las Vegas school district and engaging in an agreement not to recruit or hire nurses staffed by a competitor.¹²

Regardless of whether a Democrat or a Republican yields executive power, the recent developments in cartel enforcement within the labor market underscore the DOJ's broader position that employees, like consumers, should be entitled to a market free of collusion. As the country—and especially the business community—continues to recover from the COVID-19 pandemic, a focus on the labor market is assured to remain a high priority.

A Rise in DPAs

A second notable development in the cartel space that may cross over from the Trump administration to the Biden administration is an increase in the use of DPAs by the Antitrust Division.

DPAs have previously been reserved by the Antitrust Division for companies in the banking or pharmaceutical industries, where the consequences of a guilty plea are often insurmountable due to regulatory requirements. In the pharmaceutical industry, for example, a guilty plea invokes a mandatory exclusion from federal health care programs and prohibits reimbursements under Medicare and Medicaid for several years, likely reducing competition.

In the final month of the Trump administration, the Antitrust Division engaged in three separate DPAs — a sharp increase from years prior and a heavy indication the unit is broadening its horizons with regard to the industries in which it is willing to allow the use of such agreements.

In early January 2021, the Antitrust Division entered into a DPA with Argos USA, a producer and seller of ready-mix concrete, after the company was charged with participating in a conspiracy to fix prices, rig bids, and allocate market sales.¹³

On the last day of the Trump administration, the Antitrust Division also announced it had entered into two separate DPAs with foreign-language training companies, Comprehensive Language Center Inc. and Berlitz Languages Inc., after the companies were charged with engaging in a conspiracy to defraud the U.S. by impeding, impairing, obstructing, and defeating competitive bidding for a government contract.¹⁴

A rise in DPAs reinforces the Antitrust Division's renewed desire to more actively "reward and incentivize good corporate citizenship," as former Assistant Attorney General Makan Delrahim said in 2019.¹⁵

Though we have yet to see the Antitrust Division announce any new DPAs since the start of Biden's

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administration, we can expect the DOJ will still emphasize — and potentially continue to reward with DPAs — the importance of robust compliance programs.¹⁶

The government and business community alike benefit from the creation or enhancement of internal compliance programs that seek to mitigate or prevent criminal antitrust behavior.

Business as Usual — Or Is It?

While the Antitrust Division has been awaiting Biden's appointment of a new head, Acting Assistant Attorney General Richard Powers has kept the unit busy per usual.

The broiler chickens matter, involving price fixing and bid rigging for broiler chicken products, is increasingly active. In February, the Antitrust Division announced the guilty plea of [Pilgrim's Pride Corp.](#) and a resulting criminal fine of over \$107 million.¹⁷ In May, Norman W. Fries, Claxton, Georgia broiler chicken producer doing business as Claxton Farms, was indicted for participating in the conspiracy.¹⁸

Apart from the broiler chickens matter that has kept the DOJ occupied for several years, the Antitrust Division secured the guilty plea of a South Korean national for participating in a scheme to defraud the [United States Department of Defense](#) in March.¹⁹

In April, an individual pled guilty to rigging bids in an online public auction submitted to the [General Services Administration](#).²⁰

Two other individuals from Kentucky were indicted for similarly rigging bids at an estate auction in May.²¹ And finally, a North Carolina engineering firm recently pled guilty to a bid rigging and fraud scheme against the [North Carolina Department of Transportation](#).²²

Even without a permanent head of the Antitrust Division, the DOJ is still holding entities and individuals accountable for their criminal cartel behavior.

But enforcement, while robust, has been predominantly domestic. The case involving a South Korean national and the recent charges filed in the security services industry, while international, both involved procurement fraud that victimized the U.S. Government.²³

The start of the Biden administration leaves unanswered a looming question: When will we see a return of the international cartel cases that were once a mainstay of criminal antitrust enforcement?

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Law360 | July 15, 2021

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What Cartel Enforcement Under Biden's DOJ Might Look Like

By Leslie Kostyshak, Craig Lee and Alex Glazer
Law360 | July 15, 2021

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Law360 | July 15, 2021

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