

# DOJ Wage Suppression, Job Mobility Charges Signal a New Priority



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## DOJ Wage Suppression, Job Mobility Charges Signal a New Priority

By Henry J. Hauser, Kim Ng, and T. Markus Funk

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A recent DOJ indictment charges several Maine health-care agency managers with allegedly suppressing wages and limiting the job mobility of essential workers during the pandemic. Perkins Coie LLP attorneys say this action reflects a new enforcement priority that employers need to understand.

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The Department of Justice Antitrust Division revealed on Jan. 28 the criminal prosecution of a conspiracy that allegedly suppressed wages and limited job mobility for essential health care workers. A federal grand jury in Portland, Maine, returned a criminal indictment charging four managers of home health care agencies with participating in a conspiracy at the dawn of the Covid-19 pandemic to eliminate competition for Personal Support Specialist (PSS) workers.

Notably, the indictment appears to further several goals in President Biden's executive order on promoting competition in the American economy, which seeks to "protect workers from wage collusion," to enhance "the economic freedom to switch jobs or negotiate a higher wage," and to promote "the welfare of workers."

Employers should keep a watchful eye on these developments, particularly those employing essential workers. As Assistant Attorney General Jonathan Kanter highlighted in the announcement, "essential workers risked their health caring for others at the onset of the COVID-19 pandemic" and the scheme alleged in this indictment "deprive[d] them of opportunities to earn better wages."

These charges are part of an "ongoing federal antitrust investigation into wage fixing and worker allocation in the home health care industry," suggesting that further action in this industry is forthcoming. In fact, the indictment mentions several unnamed individuals, some of which "shared managerial responsibilities" or were "business partner[s]" with the indicted defendants.

This indictment, when viewed in tandem with the DOJ's other recent wage fixing and no-poach prosecutions, impacts all sectors and is an important reminder for employers to be vigilant in training employees to steer clear of even the inference of a conspiracy to suppress wages and restrict geographic mobility of workers.

### **The Indictment**

According to the one-count indictment, the defendants agreed to fix the rates paid to PSS workers and to not hire each other's workforces beginning as early as April 2020. The conspiracy allegedly reduced wages and restricted job mobility for these essential workers, who provide personal care services to ill, injured, mentally or physically disabled, elderly, and otherwise fragile individuals in and around Portland, Maine.

To reach these agreements, defendants allegedly used an "encrypted messaging app," participated in "virtual meetings," and met in-person at corporate offices. The references to virtual meetings and an encrypted messaging app are worth highlighting as examples of how the existence of new communication platforms are impacting investigations and litigation.

The indictment goes on to recount statements from each of the four defendants that appeared in group messages about fixing rates to \$15 and \$16 per hour for their essential workers:

"Brothers, everyone has agreed that the rate is from 15-16" "[W]e have agreed on 15 and 16 and I started announcing it" "I am committed and told the employees 15-16" "Yes, this is the agreement . . . I am still going with 15 and 16."

The indictment also places particular emphasis on the government's pandemic response programs. For instance, effective April 1, 2020, the Maine Department of Health and Human Services increased the reimbursement rate paid to home health care providers by \$5.68 per hour to "allow them to fund pay raises for approximately 20,000 personal care workers."

According to the Antitrust Division, the defendants colluded to pocket most of these funds instead of passing them on to essential workers in the form of competitive wages. Additionally, the indictment notes that some of defendants received loans from the Small Business Administration's Paycheck Protection Program (PPP), which was established by the Coronavirus Aid, Relief, and Economic Security (CARES) Act in response to the pandemic. The indictment also indicates PPP loans were forgiven if "a certain portion of the proceeds were applied toward payroll."

In alleging that the conspiracy occurred "within the flow of, and substantially affected, interstate trade and commerce," the indictment states that "PPP loan funds and Medicaid funds traveled from locations outside of Maine to the Defendants and PSS workers in Maine."

### **What Businesses Should Know**

Courts generally treat wage fixing as per se illegal, and do not recognize defenses to this type of conduct. Arguing that the Sherman Act should not apply to labor markets, or that the companies set "fair" or "reasonable" wages, are not viable strategies.

However, prosecutors still need to prove, beyond a reasonable doubt, that the defendants engaged in an unlawful conspiracy by introducing evidence to show a sufficient “meeting of the minds” to constitute an agreement. Such evidence need not be direct; it can also be inferred.

Businesses should implement trainings and review best practices to avoid even the appearance of improper discussions with competitors about labor and employment issues.

Government enforcers provide useful resources for businesses seeking to ensure that their employment practices are following the law, including several “Antitrust Red Flags.”

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