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Plea Details In Flux In Vegas School Nurse 'No Poach' Case

By **Matthew Perlman**

Law360 (September 9, 2022, 9:58 PM EDT) -- A Nevada federal judge delayed a staffing company's guilty plea in what would be the government's first win on a criminal labor market antitrust case after a dispute arose over how prosecutors described the impact of an alleged "no poach" agreement.

VDA OC LLC was looking to change its **plea to guilty** during a hearing on Thursday in a case alleging the company agreed with a rival to not raise the wages of nurses working in Las Vegas schools and not to hire the nurses from each other.

But as prosecutors recited the "elements" of a Sherman Act offense ahead of the plea, an attorney for the company, Carole S. Rendon of BakerHostetler, interjected to say the elements are not supposed to include the term "substantially" when describing the conduct's impact on interstate commerce.

"Your Honor, if I might, I actually think that that is not a correct reading of the elements," Rendon said, according to a transcript of the hearing obtained by Law360. "There is no 'substantial' requirement."

After attorneys for the government told U.S. District Judge Richard F. Boulware II that "substantially affected" is the correct wording, the judge responded that the issue needs to be resolved before VDA's representative can enter a guilty plea, since there's expected to be a contested sentencing hearing down the road.

"I don't want us to move into sentencing if we think that what we're talking about is an actual essential element and then have to potentially unwind or do something else with the plea," the judge said.

Christopher J. Carlberg, an attorney for the government, noted that in a change of plea notice from VDA earlier this month, the company acknowledged that the business activities "substantially affected interstate trade and commerce" in the filing's "factual basis" section and said the plea should be able to proceed.

"I don't think we should," the judge responded. "I'm not comfortable moving forward if there's some underlying disagreement."

Judge Boulware instructed the parties to confer with one another on the subject and then file additional briefs.

The judge later scheduled a Jan. 6 hearing for both the change of plea and sentencing, with witnesses potentially testifying about the amount of money at stake and the alleged scheme's impact. The sides will also have to brief the court on the issues beforehand, according to the transcript.

A grand jury indicted VDA and its former regional manager, Ryan Hee, in March 2021 over claims that the company agreed with another contractor providing nurses to Clark County School District to not raise wages or hire nurses from each other. The other company is not named in the indictment. The agreement was allegedly in effect from October 2016 until July 2017, when a new owner purchased the company.

The contracts were for nurses who provide constant care to students with complex medical needs, perform specialized health procedures, and accompany the students in classrooms, hallways and bus rides, the indictment said.

VDA and Hee indicated in June that they were negotiating with the U.S. Department of Justice and had reached a "preliminary resolution as to both defendants" but only the company filed a change of plea notice on Sept. 1.

During Thursday's hearing, VDA counsel Rendon discussed the issues expected to arise during VDA's sentencing, including the "volume of commerce" allegedly affected and the fact that the agreement was struck on Oct. 21, 2016, literally a day after the DOJ and Federal Trade Commission issued joint guidance on the potential for criminal prosecutions of so-called no poach agreements.

The guidance warned companies that employment-related agreements restricting competition that are not tied to some broader collaboration can be prosecuted criminally, the way traditional price-fixing and other cartel conduct are handled. Such cases had been handled through civil prosecutions in the past, which have lower penalties and no risk of prison time for individuals.

Rendon also noted Thursday the short duration of VDA's alleged pact and that it was reached between two individuals without any involvement from other employees.

"The agreement lasted for a mere seven months and ended no later than the date that VDA was sold in its entirety, which was July 1st of 2017," Rendon said.

The judge said that any factual disputes will have to be resolved either between the parties or with witnesses. He also warned that he doesn't want VDA to essentially negate its admission during the sentencing by arguing that it's not really responsible for the conduct.

"I'm not saying you're going to do that, but it sounds a little bit like you're doing that and I just wanted to warn you about that," the judge said.

In fighting the case, Hee has accused the DOJ of **prosecutorial misconduct**, contending that he was not informed about the criminal investigation when an FBI agent interviewed him, and that a company attorney was not present either for the interview or when the agent obtained written consent to download the contents of his electronic devices, including his corporate computer.

Hee also said the agent failed to tell him that three attorneys from the DOJ's Antitrust Division were listening to the interview on a livestream.

The DOJ has **denied any wrongdoing**, arguing that an attorney does not have to be present for "preindictment, noncustodial interviews."

On Thursday, the DOJ's Carlberg asked the judge to delay a hearing on Hee's dismissal bid scheduled for next month until after the January hearing. Judge Boulware agreed after Carlberg acknowledged that the move was out of an "abundance of caution" in case VDA's plea falls apart.

The DOJ started filing its first criminal labor-side antitrust cases in late 2020, but the agency has yet to win a conviction either through a verdict or a plea. And while judges have denied dismissal bids from the defendants and agreed to let those prosecutions proceed to trial, juries have been **less sympathetic** to the claims.

In April, a **Texas jury acquitted** the former owner and the former clinical director of a physical therapist staffing company of charges of orchestrating a wage-fixing scheme, though the jury did convict the owner of obstructing the government's investigation. That same week, a **Colorado jury acquitted** the kidney dialysis company DaVita Inc. and its former chief executive in a case alleging they conspired with three other companies not to hire each other's senior-level employees.

Trial is currently slated for April 2023 in the Las Vegas school nurse case.

Representatives for the DOJ and for VDA declined to comment Friday.

The government is represented by Albert B. Sambat, Christopher J. Carlberg, Mikal J. Condon and Paradi Javandel of the DOJ's Antitrust Division, and Christopher Chiou and Eric C. Schmale of the U.S. Attorney's Office for the District of Nevada.

Hee is represented by Richard A. Wright and Sunethra Muralidhara of Wright Marsh & Levy.

VDA is represented by Kathleen Bliss of Kathleen Bliss Law PLLC, and Carole S. Rendon and Mary Pat Brogan of BakerHostetler.

The case is U.S. v. Hee et al., case number 2:21-cr-00098, in the U.S. District Court for the District of Nevada.

--Additional reporting by Bryan Koenig, Katie Buehler and Cara Salvatore. Editing by Michael Watanabe.

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