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Justice Department Remains Committed to Aggressive Antitrust Enforcement Against Employers and Their Employees Even in the Wake of Recent Trial Defeats

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In this article, the authors explain that despite recent trial setbacks, the primary federal agency tasked with enforcing criminal violations of federal antitrust laws shows no signs of pulling back.

The U.S. Department of Justice Antitrust Division ("DOJ") recently suffered significant losses in two criminal trials involving alleged criminal wage-fixing and related "no-poach" agreements by and between competitors. These were the first cases ever where the parties have proceeded to trial after the DOJ pursued criminal charges under Section 1 of the Sherman Antitrust Act predicated on such conduct. The Sherman Act includes penalties for criminal violations of the statute that can reach up to $100 million per violation for companies, and individual defendants can face $1 million fines and up to 10 years in prison.

While the DOJ's trial setbacks raise legitimate questions regarding the efficacy of its aggressive antitrust enforcement agenda – particularly in labor markets – the primary federal agency tasked with enforcing criminal violations of federal antitrust laws shows no signs of pulling back on similar investigations and prosecutions in the future.

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UNITED STATES V. JINDAL

In the first case, *United States v. Jindal*,[1] the first of the DOJ's two criminal cases that have resulted in "not guilty" verdicts, the DOJ alleged that the former owner of a therapist staffing company and his employee conspired with competing businesses to lower wages for physical therapists and assistants in the Dallas-Fort Worth region.

During the six-day jury trial, prosecutors leaned heavily on four text messages sent between co-conspirators as evidence of an illegal agreement not to compete for each other's employees.

Defense counsel responded by arguing that the messages failed to establish any intent to conspire, a necessary element of the criminal charge. Counsel for defendants also attacked the credibility of the DOJ's lone witness at trial, who was an alleged co-conspirator but received a leniency agreement in exchange for her cooperation. Counsel argued that the witness' testimony was not credible because in previous testimony before the Federal Trade Commission ("FTC") during a related, prior investigation, the witness told the FTC that she did not think the defendants were sincere when they floated the idea of entering into an agreement not to compete for each other's employees. The witness later attempted to walk back her FTC testimony at trial.

In any event, while the jury returned a not-guilty verdict on the substantive Section 1 criminal charges, it did find the employee defendant guilty of obstructing the same FTC probe.

UNITED STATES V. DAVITA INC.

In the second case, *United States v. DaVita Inc.*,[2] a jury acquitted DaVita the company and its former chief executive officer on criminal no-poach charges, which centered on an alleged conspiracy the DOJ claimed was led by defendants and that sought to recruit other competitor companies into a scheme not to recruit each other's senior-level employees.

In this case, the government argued that the restraints in question were "naked" and lacked any procompetitive justifications, but defendants refuted that characterization – arguing instead that while there was an agreement between competitors, it lacked an improper purpose and did not meaningfully restrain competition in the relevant market, both of which are necessary elements to sustain a criminal antitrust charge. A parallel criminal case against DaVita's alleged co-conspirator remains pending in the Northern District of Texas with a trial date set for January 9, 2023.

SIGNIFICANCE OF THE DECISIONS

These losses are significant to the extent they call into question federal enforcers' multi-year effort to increase criminal enforcement efforts

against perceived labor-market wage suppression in all sectors of the economy. The enforcement pivot first took shape in 2016, when the DOJ and FTC jointly published their Antitrust Guidance for HR Professionals (the "Guidance"),[3] in which they emphasized that wage-fixing and no-poach agreements "eliminate competition in the same irredeemable way as agreements to fix prices or allocate customers." The Guidance announced the DOJ's intention to criminally prosecute such agreements in the future. Since 2016, high-ranking DOJ officials from both Republican and Democratic administrations have indicated that prosecutions would be forthcoming, and the Texas and Colorado cases are consistent with such prior messaging.

All of the recent criminal enforcement activities in labor market conduct cases present a sharp departure from the government's historical enforcement strategy under the Sherman Act. Before the most recent wave of criminal enforcement actions commenced in late 2020, the DOJ would use civil enforcement channels exclusively to target no-poach agreements entered into by competing employers.

In the early 2010s, for instance, the DOJ pursued civil antitrust actions against Silicon Valley technology giants, including both per se and rule-of-reason antitrust violations, arising from competitors' alleged agreements not to cold-call or hire each other's employees. Those enforcement efforts led to various defendants' settlements with the government and approximately $435 million in settlements with private plaintiffs in related class action lawsuits filed in the wake of the DOJ's enforcement actions, which is a common strategy of the plaintiffs' antitrust bar.

At least publicly, the DOJ continues to spin its two recent trial losses as relative wins, including because, in each case, the courts signed off on the DOJ's core legal theories that the alleged labor market suppression conduct undertaken by the defendants was criminal in nature. In the DOJ's view, these rulings provide key legal precedents it intends to leverage in future enforcement efforts in the labor market space. FTC Chair Lina Khan also argued recently that antitrust enforcers should not be discouraged by the lack of a "100% court record," and that there are "huge benefits to still trying," even in the face of losses, because enforcement actions send a signal to lawmakers of the need for change.

To be sure, defendants in both cases moved to dismiss the DOJ's criminal antitrust charges, and the courts denied their motions on the basis that the enforcer's charging indictments fit squarely into established price-fixing and market allocation categories for per se unlawful conduct – that is, conduct that is unlawful regardless of any potential procompetitive benefits.

The Texas court, for instance, held that "the scope of the anticompetitive conduct that constitutes price fixing is broad – it covers agreements among buyers in the labor market. . . . This type of agreement is plainly anticompetitive and has no purpose except stifling competition."

And in the Colorado case, the court decided that the alleged naked nonsolicitation agreements charged in the indictment were akin to per

se unlawful market allocation agreements if they were not ancillary to a broader procompetitive agreement, albeit warning the government that it would "have to prove more than that defendants had entered into a non-solicitation agreement – it [would] have to prove that the defendants intended to allocate the market as charged." Significantly, no judge in the other pending no-poach cases has granted a defendant's motion to dismiss on the basis of the DOJ's recent losses in similar cases.

STATE NO-POACH PROSECUTIONS

States also are jumping onto the prosecutorial bandwagon to target no-poach agreements under their respective antitrust and competition statutes. For example, on May 26, 2022, Illinois Attorney General Kwame Raoul filed a civil state court action accusing beauty products manufacturer Vee Pak (d/b/a Voyant Beauty) of orchestrating an illegal hub-and-spoke no-poach conspiracy amongst six temporary staffing companies contributing workers to Vee Pak's facilities in violation of the Illinois Antitrust Act. According to the complaint, the unlawful agreement allowed the staffing companies to "avoid having to compete by offering better wages, benefits, or other conditions of employment."

The Washington state Attorney General Bob Ferguson also has had a significant influence over no-poach practices in the food and service industries. In 2018, his office launched an investigation into no-poach clauses in franchise agreements, and subsequently negotiated with those businesses to eliminate offending provisions in over 200 U.S. contracts. The implicated franchises include McDonald's, Jiffy Lube, Anytime Fitness, and La Quita, and cover nearly 200,000 locations across the country. While states have not yet tried to flex their criminal antitrust powers, it appears the DOJ may have enthusiastic partners going forward to prosecute this type of conduct.

CONCLUSION

Based on the DOJ's limited public comments to date, there is no reason to believe it intends to throttle back their aggressive enforcement agenda.

Now that the DOJ has received court signoff on its criminal legal theories concerning alleged wage-fixing and no-poach agreements, future defendants likely will have a hard time challenging indictments at the onset of a criminal case based on substantive antitrust or due-process arguments. The DOJ's elevated focus on employer-side antitrust violations also increases public awareness of the DOJ's view of the potential impropriety of such conduct, which may invite new private plaintiff actions based on the DOJ's legal theory, at least if history is any guide. History

also suggests these potential private actions can themselves be extremely burdensome and expensive to defend or settle. As such, in the current antitrust enforcement climate, employers would be wise to ensure their current employment practices do not subject them to potential antitrust scrutiny from either government enforcers or private litigants.

Notwithstanding, defendants and their counsel also will have the benefit of absorbing key lessons from these historic trials in connection with their own defense strategy. And they can take solace in the fact that after listening to all of the government's evidence in the Texas and Colorado cases, two different federal juries came back with "not guilty" verdicts in favor of the defendants.

The antitrust laws are nuanced and complex, and their application to specific scenarios involves a fact-intensive inquiry into the contemplated restriction and the size and scope of the relevant markets. Businesses with questions or concerns relating to the antitrust implications of agreements with competing employers should consult with antitrust counsel.

NOTES

1. *United States v. Jindal*, 4:20-CR-00358 (E.D. Tex.).
2. *United States v. DaVita Inc.*, 1:21-cr-00229 (D. Colo.).
3. *https://www.justice.gov/atr/file/903511/download*.