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The Department of Justice's first criminal wage-fixing and no-poach cases ended in acquittals, but we don't expect this will lessen the DOJ's scrutiny on competition in labor markets.

Over the past year, the DOJ has filed a number of indictments based on alleged agreements between or among employers of different companies to not recruit or solicit employees of the other, often called "no-poach" agreements, as well as on wage-fixing agreements, which are price-fixing agreements and include agreements to fix salaries at a certain level. In two recent cases involving no-poach and wage-fixing agreements, the juries acquitted all defendants for their alleged conduct around hiring. While these losses by no means put an end to the DOJ's "**commitment to prosecuting labor market collusion**," they are a serious blow to the DOJ's intent to criminally prosecute such agreements.

The US antitrust agencies, the DOJ and the Federal Trade Commission (FTC), first took the position that the DOJ would criminally prosecute no-poach agreements in 2016, when the agencies issued their **joint Antitrust Guidance for Human Resource Professionals** regarding the application of federal antitrust laws to hiring practices and certain employment agreements. The agencies warned the business community: "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."

More than a year has passed since the DOJ made true on its promise, as the DOJ announced **its first criminal indictment for wage-fixing agreements in December 2020**, which was followed shortly **by the DOJ's first criminal indictment for no-poach agreements in January 2021**. Since then, there has been a significant increase in the number of investigations, criminal indictments, and private lawsuits based on alleged no-poach or wage-fixing agreements.

President Joe Biden also has signaled that competition in the labor market would be a priority for his administration, issuing in July 2021 an **Executive Order on Promoting Competition in the American Economy**, which includes 72 initiatives by more than a dozen federal agencies in an aim to address competition issues across the economy. Attorney General Merrick Garland **recently said**, "We continue to aggressively prosecute antitrust violations that undermine competition in labor markets or otherwise harm workers – no matter the industry, no matter the company, no matter the individual."

The momentum seemed to be in the DOJ's favor, as the DOJ secured a significant win in January 2022 in *United States v. DaVita Inc.*, in which the district court judge **denied the defendants' motion to dismiss**, holding that naked horizontal non-solicitation agreements that allocate the market – i.e., those that are not ancillary to a legitimate procompetitive business purpose and have "no purpose except stifling competition" – are *per se* violations of the Sherman Act.

However, this momentum hit a major roadblock when juries in Texas and Colorado acquitted defendants charged with violating the antitrust laws by fixing wages and conspiring to suppress competition through no-poach agreements.

United States v. Neeraj Jindal and John Rodger

No. 4:20-cr-00358-ALM-KPJ (E.D. Tex.)

In December 2020, the DOJ charged two former employees of a therapist staffing company for conspiring with competing companies to lower wages for physical therapists and physical therapist assistants. The DOJ's allegations include communications

between Neeraj Jindal, John Rodgers and other unnamed co-conspirators about exchanging non-public wage information for physical therapists and physical therapist assistants, and agreeing to and implementing wage decreases.

In response, the defense argued there was no agreement among any of the competitors, citing as evidence that a co-conspirator initially agreed to the arrangement but later stated that she never planned to go through with it. The defense also attacked the credibility of the co-conspirator, whose testimony differed from statements given to the FTC as part of the FTC's earlier investigation.

On April 14, 2022, after a six-day trial and less than a day of deliberation, the jury found both defendants not guilty on the conspiracy charges. (Jindal was found guilty on a single count of obstruction of the FTC's prior proceedings.)

United States v. DaVita Inc. and Kent Thiry

No. 1:21-cr-00229 (D. Colo.)

In November 2021, the DOJ alleged that DaVita Inc. and its former CEO, Kent Thiry, engaged in a *per se* unlawful conspiracy with three other healthcare companies, all owners of outpatient medical facilities, by agreeing not to solicit each other's employees. At trial, the DOJ alleged that Thiry orchestrated the scheme with DaVita's competitors, which stifled competition and hindered the employees' opportunities for advancement in their careers.

In response, the defense argued there was no evidence that the agreements were made to harm competition and that the executives at competing companies acquiesced in order to maintain their relationships with Thiry.

On April 15, 2022, after a two-day deliberation, the jury voted to acquit DaVita and Thiry on all counts.

Going forward, companies should not expect the DOJ's interest in criminally prosecuting no-poach and wage-fixing agreements to substantially diminish. After the *Jindal* verdict, a DOJ official **said**: "In no way should the verdict today be taken as a referendum on the Antitrust Division's commitment to prosecuting labor market collusion, or on our ability to prove these crimes at trial." Assistant Attorney General Jonathan Kanter, head of the Antitrust Division, **echoed that sentiment**: "We're going to continue to bring the cases – we're not backing down."

Moreover, there are other cases pending, including one case set for trial in July and another in January 2023. It is possible these setbacks may push the DOJ to rely more heavily on civil prosecutions, rather than criminal, but for now companies and employees should continue to avoid conduct that may raise red flags and should consider implementing a robust antitrust **compliance policy**, including antitrust training for employees, and engaging antitrust counsel to review their current non-solicitation provisions and non-compete clauses.

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