Lessons From DOJ's Wave Of Labor Market Prosecutions

By **William Cavanaugh Jr., Amy Vegari and Andrew Haddad** (December 14, 2023)

William Cavanaugh Jr.

Amy Vegari

Andrew Haddad

Over the last three years, the U.S. Department of Justice has pursued its first-ever criminal antitrust cases targeting alleged deals between companies to avoid poaching each other's employees and to fix wages. In total, the DOJ has brought six cases.

Four resulted in acquittals, while just one case yielded guilty pleas. Last month, the DOJ voluntarily dismissed its sixth and last case without explanation.

A number of lessons can be drawn from this wave of labor-market prosecutions. In terms of a legal theory, the DOJ did quite well.

Courts denied motions to dismiss these cases and endorsed the DOJ's theory that no-poach or wage-fixing deals untied to a legitimate collaboration could constitute per se illegal agreements among competitors.

But when it came to the ultimate merits of the cases, these courts required the DOJ to prove at trial that the defendants making no-poach deals intended to end meaningful competition in the relevant labor market — a high bar the DOJ apparently had difficulty meeting.

And even after finding no-poach deals to be per se illegal, these courts permitted the jury to consider evidence of the schemes' pro-competitive benefits as probative of the defendants' intent.

The DOJ and FTC's Joint Guidance

The DOJ and the Federal Trade Commission laid the foundation for prosecutions in the employment context in 2016, when they issued joint guidance asserting that no-poach and wage-fixing deals are per se unlawful under Section 1 of the Sherman Act if they are naked — i.e., not tied to a legitimate collaboration.

The guidance stated that, "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements" and "bring criminal, felony charges against the culpable participants … including both individuals and companies."[1]

The DOJ's long-standing policy has been to file criminal antitrust charges only for per se offenses, and not when the violation would require a rule of reason analysis.[2] Per se offenses are traditionally limited to horizontal agreements to fix prices or allocate markets.

The joint guidance analogized the competitive benefits of price competition to the benefits of competition for employment, stating:

> Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and

> greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment.[3]

Per the joint guidance, no-poach and wage-fixing deals "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers" and should be treated as per se unlawful.[4]

But as of 2016, the DOJ had never tested this theory in court. In civil cases brought by private plaintiffs, district courts had held that wage-fixing was per se unlawful, but no appellate court had decided the issue.

The case law on no-poach agreements was even more limited: no appellate court had addressed them, and the few district courts that had faced these arrangements did not apply the per se rule. Some of those courts declined to do so,[5] while others deferred the issue and never needed to resolve it.[6]

The DOJ's Six Indictments

Four years later, the DOJ started prosecuting these alleged agreements. Between late 2020 and early 2022, the DOJ brought six cases alleging no-poach or wage-fixing agreements — and sometimes both.

These cases were brought in the U.S. District Courts for the Districts of Colorado, Connecticut, Maine, Nevada, and the U.S. District Courts for the Eastern and Northern Districts of Texas.[7]

The sixth indictment, United States v. Patel,[8] charged executives from a jet-engine manufacturer, Raytheon Technologies Corp.'s Pratt & Whitney division, and its outsourced engineering providers with agreeing not to poach the engineers who worked on the manufacturer's projects. In each indictment, the DOJ alleged that the deal was per se illegal.

Courts Denied Motions to Dismiss These Indictments

In all six cases, the defendants moved to dismiss the indictments for failure to state an offense. Each of the defendants argued that no-poach and wage-fixing deals are not per se illegal. They also asserted that their due process rights were violated because they lacked fair warning that their conduct was a crime, particularly when the alleged misconduct occurred before the 2016 joint agency guidance.

The aerospace executives in Patel made two more arguments unique to their set of facts. First, they contended that their alleged no-poach deal was not a naked restraint, but rather was tied to a legitimate collaboration — namely, the manufacturer outsourcing engineering services from its providers. And second, they maintained that the alleged deal could not be per se illegal because it was related to a vertical commercial relationship between the manufacturer and its outsourced providers, and vertical agreements are not per se unlawful.

In five of these six cases, district courts denied the defendants' motions to dismiss. The sixth motion to dismiss remained pending when the DOJ voluntarily dismissed its last no-poach case in November. In denying these various motions to dismiss, the courts held that no-poach deals are a form of market allocation and that wage-fixing is analogous to price-fixing.

Because market allocations and price-fixing have long been held illegal per se, the courts also found the indictments consistent with due process.

In the January 2022, U.S. v. DaVita Inc. decision, U.S. District Judge R. Brooke Jackson in the District of Colorado acknowledged that "there are no cases perfectly analogous to this case," but nevertheless stated, "that is the nature of Section 1 of the Sherman Act: as violators use new methods to suppress competition by allocating the market or fixing prices these new methods will have to be prosecuted for a first time."[9]

DOJ Assistant Attorney General Jonathan Kanter noted these decisions as "extremely important cases establishing that harm to workers is an antitrust harm."[10]

In Patel, Senior U.S. District Judge Judge Victor A. Bolden of the District of Connecticut also rejected the defendants' theories that their alleged deal was ancillary and vertical. On April 28, Judge Bolden held that, "from the face of the indictment," the no-poach deal was naked because the outsourced providers had no joint venture together, but rather competed to work on the manufacturer's projects. [11]

Judge Bolden also held that, while the manufacturer and its providers had a vertical commercial relationship, they competed for the same employees, so their alleged no-poach deal was in fact a horizontal labor-market restraint.[12]

Additionally, Judge Bolden characterized the alleged deal as an interbrand restraint, not an intrabrand restraint, the latter of which would have received more deference under antitrust law because it can enhance interbrand competition. Because the manufacturer did not directly hire those engineers and the engineers worked on other projects for other companies, the engineers employed by the outsourced engineering providers were not part of the jet-engine manufacturer's "brand."[13]

In one case, after the district judge expressed his intent to deny the motions to dismiss, the defendants pleaded guilty. In the District of Nevada on Oct. 23, 2022, VDA OC LLC, a Nevada healthcare staffing company, admitted to a wage-fixing and no-poach deal with a rival firm and agreed to pay a criminal fine of $62,000 and restitution of $72,000, for a total of $134,000 in penalties. VDA's regional manager reached a deferred prosecution agreement with the DOJ, under which he agreed to perform 180 hours of community service.

But the other four sets of defendants whose motions were denied continued to defend themselves through trial. Two of these cases, DaVita and Patel, involved alleged no-poach deals, the third involved wage-fixing allegations, and the fourth alleged both.

Favorable Pretrial Rulings for Defendants

Before their trials, the DaVita and Patel defendants obtained several key rulings that potentially undermined the impact of the earlier rulings that no-poach deals were per se unlawful. Although a naked per se offense is illegal by definition without the need to examine its effects on competition, the DaVita and Patel courts held that, to be guilty, the defendants must have intended to end meaningful competition in the relevant labor market.

And the courts permitted the jury to consider evidence of the pro-competitive benefits resulting from the no-poach deals when assessing the defendants' intent.

In DaVita, Judge Jackson agreed to instruct the jury that the government had to prove the

defendants "sought to end meaningful competition for the services of the affected employees." Judge Jackson rejected the government's theory that it only had to prove a "conspiracy to allocate employees," reasoning that "non-solicitation agreements are not per se violations of the Sherman Act, but non-solicitation agreements aimed at allocating markets are."[14]

This is an important qualification as to what it means to be a per se offense in the labor context: Only no-poach deals with the requisite anticompetitive intent qualify, in Judge Jackson's view. When the jury asked the court to define "meaningful competition" while it deliberated, the court responded that it is "another way of saying 'significant competition or 'competition of consequence.'"

Judge Jackson's ruling on the jury instructions led the court to permit the defendants to introduce "evidence of salary increases and other beneficial effects."[15] Judge Jackson reasoned that this evidence was "relevant to disprove that the purpose of the agreement was to allocate a market."[16]

The government objected that the defendants could use this evidence to argue the alleged no-poach deal was justified, which is impermissible in a per se case. To address that concern, Judge Jackson instructed the jury that they should consider only whether the conspiracy's intent was to allocate the market, and not whether the conspiracy was good for the company or the market as a whole.[17]

In Patel, Judge Bolden relied on the DaVita decisions to make several pretrial rulings that favored the defendants. The court permitted the defendants to use evidence showing that their scheme had pro-competitive benefits and did not suppress wages or materially restrain employee mobility.

In Judge Bolden's view, this evidence was relevant to the defendants' intent and whether their no-poach deal was a naked restraint.[18] Judge Bolden also instructed the jury that it was the government's burden to prove the no-poach deal was a naked restraint on competition in order to qualify as a per se violation.

The Four Acquittals

All four cases that went to trial resulted in acquittals on the Sherman Act charges.

In the DaVita case, DaVita, a kidney dialysis provider, and its CEO were accused of pressuring three of DaVita's competitors to agree to (1) avoid recruiting DaVita's executives and (2) instruct DaVita employees applying to work for the competitors that they had to inform DaVita they were applying for other jobs before they could receive an offer.

The defense admitted DaVita made these deals, but asserted that a deal among four companies was too small to meaningfully restrain competition in such a big market and put forth an expert witness to opine that there was no statistical evidence of reduced employee mobility or compensation at DaVita.

Furthermore, the court's admission of pro-competitive-benefit evidence enabled the defendants to argue that one purpose of the deals was to increase competition: when DaVita learned its employees were applying elsewhere, they offered raises and promotions to try to keep those employees. After the court answered the jury's request to define "meaningful competition," the jury acquitted DaVita and its CEO on all counts.

Meanwhile, in Patel, the government presented evidence to the jury for nearly a month. After the government rested, Judge Bolden granted the defendants' motion for judgment of acquittal, holding that "this case does not involve a market allocation under the per se rule."[19]

This was because no reasonable jury could find that there was a "cessation of 'meaningful competition' in the allocated market."[20] In Judge Bolden's view, "the alleged agreement itself had so many exceptions that it could not be said to meaningfully allocate" the relevant labor market.[21]

Written communications between the alleged co-conspirators showed that "restrictions shifted constantly throughout the course of the conspiracy" and "often hiring was permitted, sometimes on a broad scale."[22]

Indeed, statistical evidence illustrated that "[h]iring among the relevant companies was commonplace, throughout the alleged agreement."[23] Per Judge Bolden, while the alleged scheme "may constrain the applicants to some degree, it does not allocate the market for" engineers at these companies "to any meaningful extent."[24]

So, even though Judge Bolden had held that the indictment alleged a naked no-poach deal, upon reviewing the facts he concluded that the alleged scheme was not a true no-poach deal.

The jury acquittals in the other two cases, United States v. Jindal in the Eastern District of Texas on April 14, 2022, and United States v. Manahe in the District of Maine on March 22 of this year, seemed more dependent on the facts of those cases. But they may suggest that juries are less sympathetic to the government's theories than in cases about restraints on price competition.

What Comes Next

After bringing six no-poach or wage-fixing cases in rapid succession, the DOJ has not brought a new one since January 2022 and just abandoned its last case, where a motion to dismiss had been pending since 2021.

Though the 2016 DOJ and Federal Trade Commission Guidance remains in place, whether the DOJ will bring additional criminal labor-market antitrust cases remains an open question. It may take a particularly compelling set of facts and supporting evidence to lead DOJ to bring a new case.

This wave of DOJ prosecutions in the labor market may illuminate how future cases, if any, may unfold. With DaVita, Patel, Jindal and Manahe all surviving motions to dismiss, the DOJ can continue to prosecute alleged naked no-poach and wage-fixing deals as per se illegal.

But even with tailwinds on those early motions, the DOJ may continue to struggle on the merits — with jury instructions, evidentiary rulings and acquittal motions all posing meaningful challenges after these initial trials.

Compliance Measures Suggested By the DOJ and FTC

The 2016 joint guidance advises employers on how to ensure their employment practices comply with the antitrust laws. Specifically, the guidance provides advice on what sorts of agreements and information-sharing are unlawful and best practices for sharing

employment information, such as employees' wages and benefits, with other companies.[25]

Additionally, the guidance points companies to a list of "antitrust red flags for employment practices,"[26] as well as a section of the DOJ and FTC's enforcement policy for the healthcare industry that addresses the legality of written surveys of employee wages and benefits.[27]

The guidance further recommends that companies utilize the agencies' advisory processes to assess how the agencies will react to future conduct before it takes place.[28]

William F. Cavanaugh Jr. and Amy Vegari are partners, and Andrew Haddad is an associate, at Patterson Belknap Webb & Tyler LLP.

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[1] Antitrust Guidance for Human Resource Professionals, DOJ Antitrust Division and Federal Trade Commission, October 2016 ("Joint Guidance"), available at https://pbwt2.gjassets.com/content/uploads/2022/02/2016-DOJ-FTC-Guidance.pdf at 4.

[2] See United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1274 (10th Cir. 2018).

[3] Joint Guidance at 2.

[4] Id. at 4.

[5] Yi v. SK Bakeries, LLC, No. 18-cv-5627 (RJB), 2018 WL 8918587 (W.D. Wash. Nov. 13, 2018), at *4.

[6] United States v. eBay, Inc., No. 5:12-cv-5869 (EJD), 968 F. Supp. 2d 1030 (N.D. Cal. 2013).

[7] United States v. Jindal, No. 4:20-cr-358 (E.D. Tex.); United States v. Surgical Care Affiliates LLC, 3:21-cr-11 (N.D. Tex.); United States v. Hee, No. 2:21-cr-98 (D. Nev.); United States v. DaVita, Inc., 1:21-cr-229 (D. Col.); United States v. Manahe, 2:22-cr-13 (D. Me.).

[8] United States v. Patel, 3:21-cr-220 (D. Conn.) (VAB).

[9] United States v. DaVita, Inc., No. 1:21-cr-00229 (RBJ), 2022 WL 266759 (D. Colo. Jan. 28, 2022), at *5.

[10] Law360, DOJ Antitrust Head: No "Chickenshit Club" Despite Losses, Jack Queen, article dated April 21, 2022, available at https://www.law360.com/articles/1486196/doj-antitrust-head-no-chickenshit-club-despite-losses.

[11] United States v. Patel, No. 3:21-CR-220 (VAB), 2022 WL 17404509 (D. Conn. Dec. 2, 2022), at *13.

[12] Id. at 15.

[13] Id. at 16–17.

[14] DaVita, 2022 WL 1288585 (Mar. 25, 2022), at *2.

[15] Id. at *5.

[16] Id.

[17] Id.

[18] Patel, 2023 WL 2643715 (D. Conn. Mar. 27, 2023), at *7–9.

[19] Patel, 2023 WL 3143911 (D. Conn. Apr. 28, 2023), at *5.

[20] Id. at *9.

[21] Id.

[22] Id. at *7.

[23] Id.

[24] Id.

[25] Joint Guidance at 1–6.

[26] Id. at 10 (citing Antitrust Red Flags for Employment Practices, available at https://www.justice.gov/atr/file/903506/download).

[27] Id. at 5 (citing Statements of Antitrust Enforcement Policy in Health Care, DOJ and Federal Trade Commission, August 1996, at Statement 6, available at https://pbwt2.gjassets.com/content/uploads/2022/02/1996-DOJ-FTC-Guidance.pdf).

[28] Id. at 6.