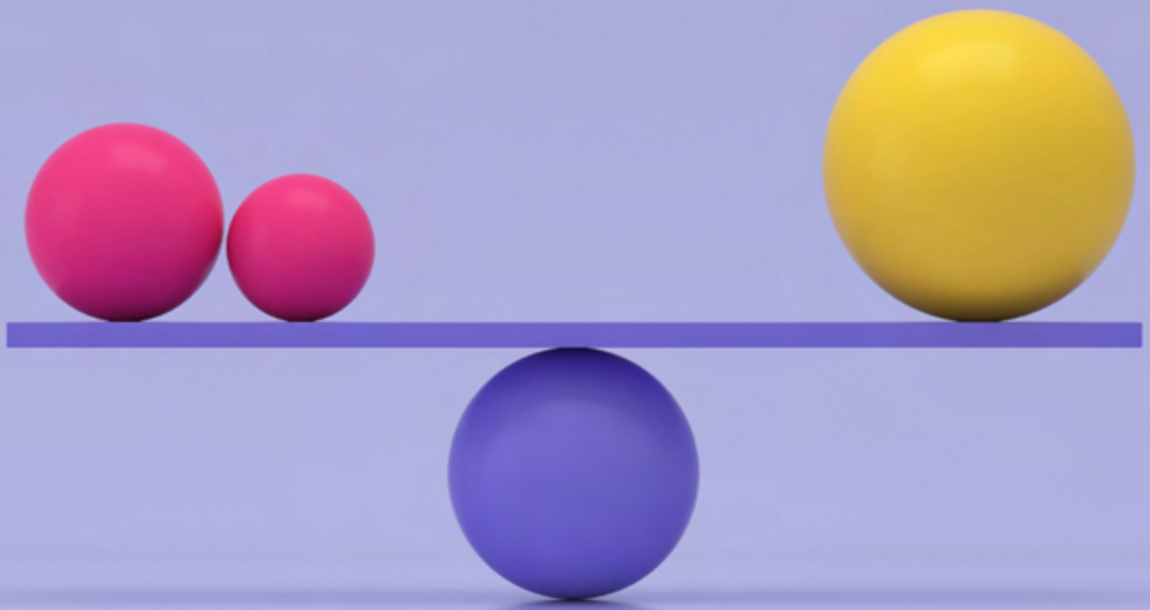
BALANCING ACT: NAVIGATING NUANCES IN LABOR MARKET ENFORCEMENT



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BALANCING ACT: NAVIGATING NUANCES IN LABOR MARKET ENFORCEMENT

By Thomas Mueller & Rochella T. Davis

In recent years, the Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") have significantly ramped up enforcement efforts in labor markets. This article delves into two key enforcement initiatives: the criminalization of no-poach agreements and the regulatory prohibition of employee non-compete agreements. The article explores the hurdles faced by the DOJ and FTC in challenging agreements that impact the labor market and suggests ways in which they could employ their authority to develop more practical strategies due to the nuances inherent in no-poach and employee non-compete agreements. These strategies could achieve faster and more impactful outcomes for employees while also garnering greater acceptance from courts, juries, and other stakeholders.

I. INTRODUCTION

In recent years, U.S. antitrust enforcers have been focused on increasing antitrust enforcement in labor markets by implementing policies and rules and increasing investigations and litigations targeting labor market practices.[2] Federal enforcers' efforts demonstrate that they have sought to leverage the broadest use of their authority to address perceived antitrust and other concerns in labor markets that have been largely unchallenged. Enforcers' exhaustive and aggressive exercise of authority may have inadvertently hindered their mission to safeguard employees and combat anticompetitive practices in labor markets. More nuanced and balanced use of enforcers' powers and tools may be necessary to effectively challenge restrictions in the labor markets. This article seeks to address two significant enforcement initiatives: the criminalization of no poach agreements and the rulemaking ban on employee non-compete agreements.

In 2016, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") took steps to establish guidelines for employers, aiming to prevent anticompetitive behavior in labor markets in their Antitrust Guidance for Human Resource Professionals ("Guidance") and list of Antitrust Red Flags for Employment Practices.[3] The DOJ explicitly stated that agreements between employers not to poach or solicit each other's employees, or to fix wages, are considered per se violations of the antitrust laws and announced a commitment to pursuing these agreements criminally.[4] While the idea that a horizontal, no-poaching agreement could be a per se violation was not entirely new, the decision to criminally prosecute these agreements marked a notable shift in DOJ's enforcement strategy.[5] The DOJ attempted to clarify the specific types of agreements that it would consider *per se* violations and therefore prosecutable, stating in its Guidance that:

> [n]aked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects. Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.

Since the announcement, DOJ has obtained six indictments leading to the prosecution of several of these agreements, but it has faced an uphill battle in courts.6 Early rulings in these cases suggest that courts are comfortable with the idea that these agreements could be viewed as per se violations but are hesitant to apply that standard in later stages of the case, putting a wrench in DOJ's decision to use its prosecutorial powers to pursue these agreements criminally.7 These courts have allowed examinations of procompetitive benefits and ancillarity; defendants have presented evidence of such.8

Meanwhile, as part of a broader effort to "promot[e] competition in the American Economy," President Biden issued an Executive Order "encourag[ing] the Chair of the FTC to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."9 In April of this year, the FTC voted to pass its Non-Compete Clause Rule banning most non-competes in the United States,

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2 There had not been many cases brought by enforcers regarding labor agreements in prior years.

3 U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* ("Guidance") (Oct. 2016), https://www.justice.gov/atr/file/903511/download; *Antitrust Red Flags for Employment Practices*, https://www.justice.gov/atr/file/903506/dl?inline (visited May 21, 2024).

4 Guidance at 4.

5 The DOJ pursued no-poaching agreements civilly prior to its 2016 Guidance. E.g. *United States v. Adobe Sys., Inc.*, No. 10-cv-01629, 2010 WL 3780278 (D.D.C. Sept. 24, 2010); *United States v. Lucasfilm Ltd.*, No. 110-cv002220, 2010 WL 5344347 (D.D.C. Dec. 21, 2010); See Complaint, *Adobe Systems*, Inc., No. 10-01629 (D.D.C. 2011), https://www.justice.gov/d9/atr/case-documents/attachments/2010/09/24/262654.pdf.

6 Dep't of Justice, Antitrust Division, *FY 2025 Performance Budget Congressional Justification (CJ) Submission* ("DOJ CJ Submission"), at 45 ("The Division … has brought six indictments for conspiracies affecting workers since December 2020."); see *infra* note 6.

7 *Compare* Order Denying Mot. to Dismiss, *United States v. Patel*, No. 3:21-CR-220 (VAB) (D. Conn. Dec. 2, 2022), ECF 257; Order Denying Mot. to Dismiss, *United States v. DaVita Inc.*, No. 1:21-CR-00229-RBJ (D. Colo. Jan. 28, 2022), ECF 132, *with* Order Granting Mot. for Acquittal at 12, *Patel,* No. 3:21-cr-00220 (D. Conn. Apr. 28, 2023), ECF 599; Order Resolving Dispute on Jury Instrs., *Davita Inc.*, No. 1:21-CR-00229-RBJ (D. Colo. Mar. 25, 2022), ECF 214.

8 Jury Instrs. at 21-22, No. 1:21-cr-00229 (D. Colo. 2022), ECF 254 ("DaVita Jury Instrs."); Jury Instrs. at 48, No. 3:21-cr-00220 (D. Conn. 2023), ECF 456 ("Patel Jury Instrs."); Ruling and Order on Pretrial Mots. at 15, No. 3:21-cr-00220 (D. Conn. 2023), ECF 457 ("Evidence concerning the ancillary restraints defense is also likely admissible; however, determining precisely what evidence is relevant requires considering the evidence in light of the Government's evidence of the charged conspiracy.").

9 White House, *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

similarly seeking to effectuate the broadest use of its authority.[10] Litigation about whether the FTC's rule has exceeded its rule making authority under the FTC Act quickly ensued just a day later.[11] Historically, state laws have governed non-competes, so the FTC's rule would overhaul the current state of non-compete law if the FTC overcomes current challenges.[12] This article examines the DOJ's and FTC's challenges in their attempts to curtail agreements affecting the labor market, and how they might deploy their powers to adopt more nuanced, balanced strategies that: (1) attain swifter and more effective results for employees; and (2) are more palatable to courts, juries, and other stakeholders.

II. THE DOJ'S CHALLENGES IN PURSUING NO-POACHING AGREEMENTS CRIMINALLY

Since announcing its Guidance, DOJ has been steadfast in its commitment to prosecute "no-poach" and wage-fixing agreements criminally.[13] Up to this point, DOJ has achieved success in the preliminary stages of its prosecutions related to no-poaching and wage-fixing agreements (overcoming motions to dismiss), but it has struggled to overcome numerous hurdles — most of which have been tied to demonstrating that the measures foreclosed meaningful competition and were entered into for the purpose of allocating labor markets.[14] These hurdles presented themselves both in the rulings on jury instructions and the factual deliberations of the judge and juries.[15] DOJ reached a significant milestone when it secured its first guilty plea in *United States v. Hee*.[16] But it was unable to secure conviction on any of the antitrust counts in trials in cases like *United States v. DaVita*,[17] *United States v. Jindal*,[18] *United States v. Manahe*,[19] and *United States v. Patel*.[20] In its last action on a criminal no-poach case, *United States v. Surgical Care Affiliates, Inc.*, the court approved the DOJ's request to voluntarily dismiss the case.[21]

Despite its challenges, DOJ is expected to persist in pursuing no-poach and wage-fixing cases criminally. Deputy Assistant Attorney General Doha Mekki was clear that DOJ "look[s] forward to charging more no-poach and wage-fixing cases" in a December 2023 address to the Women's White Collar Defense Association.[22] And Assistant Attorney General Johnathan Kanter said that the Department is "just as committed as ever to, when appropriate, using our congressionally given authority to prosecute criminal violations of the Sherman Act in labor markets" a few months prior to Mekki's comments.[23] DOJ also takes this position in its Performance Budget Congressional Justification ("CJ") Submission for

10 16 C.F.R. § 910.

11 Complaint, *U.S. Chamber of Commerce v. Fed. Trade Comm'n*, No. 6:24-cv-00148 (E.D. Texas Feb. 24, 2024), ECF No. 1, https://www.uschamber.com/assets/documents/Complaint-Chamber-v.-FTC-E.D.-Tex.pdf; Complaint, *Ryan, LLC v. Fed. Trade Comm'n*, No. 3:24-cv-986 (N.D. Texas Feb. 23, 2024), https://www.uschamber.com/cases/antitrust-and-competition-law/ryan-llc-v.-ft; *ATS Tree Services, LLC v. Fed. Trade Comm'n*, 2:2024-cv-01743 (E.D. P.A. Apr. 25, 2024), ECF No. 1.

12 Fair Comp. Law, *A Brief History of Noncompete Regulation* (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/ ("For the 200-plus-year period that noncompetes have been regulated in the United States (i.e., since at least as early as 1811), noncompetes have been the province of state regulation, and all fifty states have made policy decisions that make sense for their citizens and their economies.").

13 E.g. Indictment, *United States v. Surgical Care Affiliates*, LLC, No. 3:21-cr-0011-L (N.D. Tex. 2021); Indictment, *DaVita Inc.*, No. 1:21-cr-00229 (RBJ) (D. Colo. 2021); Indictment, *United States v. VDA OC LLC & Hee*, No. 2:21-cr-00098 (RFB-BNW) (D. Nev. 2021); Indictment, *Patel*, No. 3:21-cr-00220 (VAB) (D. Conn. 2021) ("Patel Indictment"); Indictment, *United States v. Manahe*, No. 2:22-cr-00013 (JAW) (D. Me. 2022); see *also* DOJ CJ Submission at 45 ("The Division continues its commitment to aggressively investigating and prosecuting antitrust conspiracies affecting labor markets and has brought six indictments for conspiracies affecting workers since December 2020.").

14 *Compare* Order Denying Mot. to Dismiss, *Patel*, No. 3:21-CR-220 (VAB) (D. Conn. Dec. 2, 2022), ECF 257; Order Denying Mot. to Dismiss, *United States v. DaVita Inc.*, No. 1:21-CR-00229-RBJ (D. Colo. Jan. 28, 2022), ECF 132, *with* Order Granting Mot. for Acquittal at 12, *Patel*, No. 3:21-cr-00220 (D. Conn. Apr. 28, 2023), ECF 599; Order Resolving Dispute on Jury Instrs., *Davita Inc.*, No. 1:21-CR-00229-RBJ (D. Colo. Mar. 25, 2022), ECF 214.

15 See note 13.

16 2:21-cr-00098 (D. Nev. 2022); Press Release, *U.S. Dep't of Just., Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses* (Oct. 27, 2022), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

17 1:21-CR-00229 (D. Colo.). The authors' firm represented DaVita, Inc. in the case *United States v. DaVita, Inc.* and Kent Thiry, Case No. 21-cr-0229 (D. Colo.).

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

19 No. 2:22-cr-00013 (D. Me.).

20 No. 3:21-CR-220 (D. Conn.).

21 Order Granting Mot. to Dismiss Indictment, No. 3:21-cr-00011 (N.D. Tex), ECF 204.

22 Leia Leitner, *Fourth Circuit Reverses $1 Billion Award for Vicarious Liability Claim for More than 10,000 Works*, National Law Forum (Apr. 10, 2024), https://nationallawforum.com/tag/fourth-circuit/.

23 U.S. Dep't of Justice, Office of Public Affairs, Prepared Remarks, *Assistant Attorney General Jonathan Kanter Delivers Remarks at the Fordham Competition Law Institute's International Antitrust Law and Policy Conference* (Sept. 22, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law.

fiscal year 2025.[24] Nonetheless, DOJ's request for voluntary dismissal in *United States v. Surgical Care Affiliates, Inc.* — without explanation — likely signals that DOJ recognizes that the challenges inherent in prosecuting these cases successfully means that it ought to tailor its approach to pursuing no poaching agreements (even if it continues to pursue them criminally).

III. REVIEWING AGREEMENTS IN NO-POACH CASES

Traditionally, a *per se* violation of the antitrust laws generally requires no further examination of its impact on competition, relieving plaintiffs from defining a relevant market and proving a negative effect on competition, and barring defendants from introducing procompetitive justifications for the alleged conduct at issue.[25] It is a plaintiff-friendly standard, especially in criminal cases, as it limits the prosecution's burden to proving only that the alleged agreement existed and the parties entered into the agreement knowingly. Because the Supreme Court has recognized market allocation agreements as per se violations, DOJ argues that naked non-solicitation agreements are *per se* violations of the antitrust laws because they allocate employees akin to how market allocation agreements allocate customers, thereby having similar anticompetitive effects to market allocations.[26]

A. Requiring More Than Simply Agreeing Not to Solicit

In *DaVita* and *Patel*, the courts accepted that no-poaching agreements could be *per se* violations, but introduced an additional criterion for *per se* applicability in the no-poach context: the prosecution had to prove "a cessation of meaningful competition," i.e., prove that the defendants intended to eliminate meaningful competition.[27] The *DaVita* and *Patel* courts allowed the jury to consider evidence of the pro-competitive outcomes of the alleged no-poach agreements, unlike the court in *Manahe.*[28]

In *Davita*, the court explained that "non-solicitation agreements are not per se violations of the Sherman Act, but non-solicitation agreements aimed at allocating markets are," disagreeing with the government's position that it only needs to prove a "'conspiracy to allocate employees.'"[29] The court instructed the jury that there had to be "actual employee allocation,"[30] and thus, the government had to prove the defendants "sought to end meaningful competition for the services of the affected employees."[31] The court directed the jury to focus solely on whether the conspiracy's intent was to allocate the market and to refrain from assessing whether the conspiracy benefitted the company or the market overall.[32] Similarly, in *Patel*, the court allowed evidence that would prove the pro-competitive benefits of the agreement and would show that the agreement did not restrain wages or employee mobility.[33] It instructed the jury that *the government* bears the burden of proving the no-poaching agreement at issue was a naked restraint and therefore a *per se* violation.[34]

In ruling on motions for acquittal, the *Patel* court held that the agreement at issue included "so many exceptions that it could not be said to meaningfully allocate the labor market of engineers."[35] For example, it permitted transfers and "allowed for exceptions that were regularly

24 DOJ CJ Submission at 45.

25 *National Society of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977). On the other hand, courts may assess agreements that are not categorically *per se* violations to determine whether they are reasonable; to do so, courts assess the market to determine whether the agreement has anticompetitive effects, i.e., whether it is ancillary to a legitimate business purpose. E.g. *Continental T.V.*, 433 U.S. at 49; *State Oil v. Kahn*, 522 U.S. 3, 10 (1997).

26 E.g. DaVita Indictment at 3; Order Resolving Disputes on Jury Instrs. at 6, *Davita*, No. 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022), ECF No. 214 (DOJ argued it only needs to show conspiracy to allocate employees). See also *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (*per se* application to market allocation); *United States v. Topco Assocs.*, 405 U.S. 596, 608–12 (1972) (same).

27 Da Vita Jury Instrs. at 15; Patel Jury Instrs. at 32, 36; Order Granting Mot. for Acquittal at 12, 18, *Patel*, No. 3:21-cr-00220 (D. Conn. Apr. 28, 2023), ECF No. 599; Order Resolving Dispute on Jury Instrs. at 6, *DaVita*, No. 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022), ECF No. 214.

28 Order on Pending Mots. at 3, *DaVita Inc.*, No. 1:21-CR-00229-RBJ (D. Colo. Mar. 21, 2023), ECF 210; *Id.* Order Resolving Disputes on Proposed Jury Instrs. 10 (Mar. 25, 2023), ECF 214; Order Granting Mot. for Acquittal, *Patel*, No. 3:21-cr-00220 (D. Conn. Apr. 28, 2023), ECF 599; Order on the Government's Mot. in Lim. to Exclude Evid. Irrelevant to a Per Se Conspiracy 12 –13, *Manahe*, No. 2:22-cr-00013 (JAW) (Feb. 27, 2022), ECF 182.

29 Order Resolving Dispute on Jury Instrs. at 2, *Davita Inc.*, No. 1:21-CR-00229-RBJ (D. Colo. Mar. 25, 2022), ECF 214.

30 *Id.*

31 *Id.* at *5.

32 *Id.*

33 Patel Jury Instrs. at 50 - 51.

34 Patel Jury Instrs. at 50 - 51.

35 Order Granting Mot. for Acquittal at 17, *Patel*, No. 3:21-CR-220 (VAB), (D. Conn), ECF No. 599.

used even during periods of hiring 'freezes,' such as the exception that a supplier company could hire engineers and other skilled laborers if they separated from their prior employer."[36] The court therefore granted the motion for acquittal. *Patel* demonstrates the type of agreements and facts to which courts are unwilling to apply the per se standard.

DOJ argued the *Patel* court erred because categorizing a conspiracy as horizontal at the motion to dismiss stage means that the *per se* standard would be applied in later stages.[37] But the *Patel* court maintained that its rulings did not change the *per se* legal standard.[38]

Thus, courts appear willing to subject no-poaching agreements to the per se standard under the right set of facts, but "[t]he limited experience of courts with criminal prosecutions of labor-related non-solicitation agreements may explain why courts and juries alike seem hesitant to impose criminal liability in these cases[,]"[39] or why, even in a civil case, at least one court was hesitant to apply the *per se* standard on the issue of damages.[40]

B. The Ancillarity Problem

Indeed, non-solicitation agreements between competitors are lawful if they are ancillary to a legitimate business interest.[41] A non-solicitation agreement amongst competitors is valid if: it is ancillary to a business purpose, such as an acquisition or collaboration; has procompetitive benefits; and is narrowly tailored.[42] Vertical non-solicitation agreements often fall in this lawful category and are frequently deployed in a variety of circumstances without real challenge or scrutiny.[43] Of course, horizontal restraints, too, may be lawful when reasonably tailored. [44]

But in the civil context, the Seventh Circuit held that the *per se* standard could be applied to no-poach agreements without consideration of ancillarity, if properly pleaded.[45] And in both *Patel* and *United States v. Usher, et al.*, the district courts rejected arguments that the vertical relationship and the ancillarity of the restraints to those vertical relationships warranted dismissal of the indictment.[46] The *Usher* court allowed the issue to proceed to the jury.[47] The *Patel* court made clear that where the *per se* standard applies in a criminal matter, "[e]ven if the Government proves the three elements beyond a reasonable doubt, if the charged agreement is ancillary to a legitimate business collaboration [, a jury] must find the Defendants not guilty[, and] [t]he Government bears the burden of proving the charged agreement is not ancillary."[48]

In *Patel*, although the defendants competed for the same employees, the manufacturer and its providers had a vertical relationship, introducing some complexity in evaluating the no-poach agreement between them. The defendants argued that this relationship would not warrant an application of the *per se* standard at the motion to dismiss stage.[49] The court held that for "the per se rule to be inapplicable, … the restraint itself,

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36 *Id.*at 17-18.

37 See *id.* at 18 (referencing *DaVita, Inc.*, No. 1:21-cr-00229-RBJ).

38 *Id.*

39 Perry A. Lange, et. al., *The State of "No-Poach" Prosecution: Is It Just Like Market Allocation After All?*, 38-SPG Antitrust 12, 15 (Spring 2024).

40 Ruling and Order on Pls.' Mot. for Recons. at 1–2, 6–7, *Borozny v. Raytheon Techs. Corp.*, No. 3:21-cv-1657-SVN (D. Conn. May 30, 2023), ECF No. 647 (denying the defendants' motion to dismiss) The court held "it is an element of a per se case to describe the relevant market in which we may presume the anticompetitive effect would occur," relying on *Bogan*).

41 E.g. Order Resolving Dispute on Jury Instrs. at 2, *Davita Inc.*, No. 1:21-CR-00229-RBJ (D. Colo. Mar. 25, 2022), ECF 214.

42 E.g. *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021).

43 *Id.* at 1108; 1113.

44 See *id.* at 1109.

45 *Deslandes v. McDonald's USA, LLC,* No. 22-2333 (7th Cir. Aug. 25, 2023), ECF No. 109.

46 1:17-cr-00019-RMB (S.D. N.Y. 2018) (Minute Entry, 9/13/2018: "govt motion for an order excluding evidence and argument that is irrelevant to a per se case is denied"); see *id.* Gov't's Mot. in Limine and Memo. In Support, ECF No. 115 – 116; Order Denying Mot. to Dismiss, *Patel*, No. 3:21-CR-220 (VAB) (D. Conn. Dec. 2, 2022), ECF 257. *United States v. Usher* concerned a criminal case that alleged a conspiracy to fix and stabilize purchasing Euros and U.S. Dollars in the United States.

47 *Usher*, 1:17-cr-00019-RMB (S.D. N.Y. 2018) (Minute Entry, 9/13/2018: "govt motion for an order excluding evidence and argument that is irrelevant to a per se case is denied").

48 Patel Jury Instrs. at 50.

49 Order Denying Mot. to Dismiss at 31, *Patel*, No. 3:21-CR-220 (VAB) (D. Conn. Dec. 2, 2022), ECF 257.

not just the parties' relationship, must have vertical and horizontal characteristics," allowing the case to proceed.[50] In the court's judgment for acquittal, the court avoided the verticality question. Relying on *Bogan v. Hodgkins*,[51] it appeared to assume "'plaintiffs' view of the Agreement as primarily horizontal, rather than vertical'" in analyzing whether the per se standard is applicable (and finding it is not).[52] Thus, relationship verticality might well still be an issue for defendants to raise in these cases if DOJ continues to select agreements involving vertical relationships in the future.

IV. DOJ'S PATH FORWARD

The DOJ appears to have two options under the current state of the law: it could attempt to convince future courts that traditional *per se* standards must apply to prosecutions of no-poaching and wage fixing agreements, or it could tailor its approach to cases that are more palatable to courts and juries.

Instead of DOJ attempting to limit or even focus on criminally prosecuting no-poach agreements, DOJ could instead carefully select those agreements that are so called "blanket" no-hire agreements (i.e., that have little to no exceptions) and have more compelling facts. These agreements meet the standards articulated in *DaVita* and overcome the challenges surrounding the facts in *Patel*. Importantly, these agreements would easily satisfy the requirement that no-poaching agreements must preclude meaningful competition and would appear to substantially aid the government to prove that the purpose was to allocate the market for employees. For other more factually compelling non-solicitation agreements, DOJ would be well advised to develop a record of civil enforcement under the per se standard (or even rule of reason standard in some purely vertical cases) to develop increasing court familiarity with the agreements and to develop law on the application of ancillarity to these types of agreements.

Both enforcement tools would establish clear guidelines for employers, and DOJ is more likely to have success with courts and juries beyond the motion to dismiss stage. In addition, the latter approach would help courts become more comfortable with the type of no-poaching agreements that may call for the *per se* standard. The civil prosecution program focused on creating standards around ancillarity would likely also cause more careful and limited use of such clauses in the economy as a whole. Undoubtedly, the wide scale legitimate use of non-solicitation agreements makes prosecuting a select few agreements criminally more difficult. Although the approach may take years to develop, the reality is that it has already been almost eight years since DOJ's announcement that it would pursue no-poaching agreements criminally. Thus, DOJ might have been better positioned today if it took this balanced approach eight years ago.

V. THE FTC'S NON-COMPETE RULE

The DOJ is not alone in its attempt to push the limits of its tools and powers in attempt to challenge agreements within labor markets. In April 2024, the FTC voted to pass its Final Non-Compete Clause Rule, effectively banning non-compete clauses between employers and their workers, with the rule set to become effective 120 days (about 4 months) after its publication in the Federal Register.[53] This decision was made following a 3-2 vote by the FTC, indicating a divided opinion within the Commission itself.[54] The sweeping rule provides that all non-competes in the United States are unlawful, except for existing non-competes for senior executives (defined as those earning more than $151,164 in a "policy-making position") and non-competes entered pursuant to the "sale of a business of a person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets."[55] In line with the theme of enforcers' attempts to use their broadest powers possible, this federal development on non-competes may even inspire DOJ to further explore their theory that some non-competes are per se violations of the antitrust laws.[56] Indeed, in DOJ's comment on the Non-Compete Clause Rule, DOJ said "like the FTC, the Antitrust Division is concerned by the proliferation of non-competes throughout the U.S. economy."[57]

50 *Id.*

51 166 F.3d 509, 513 (2d Cir. 1999).

52 *Id.*; Order Granting Mot. for Acquittal at 11 - 12, *Patel*, No. 3:21-cr-00220 (D. Conn. Apr. 28, 2023), ECF 599.

53 Press Release, Fed. Trade Comm'n, *FTC Announces Rule Banning Noncompetes* (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

54 *Id.*

55 § 910.3(a).

56 Statement of Interest of the United States at 11, *Beck v. Pickert Medical Group*, P.C., No. CV-21-02092 (2d Jud. Dist. Nev. Feb. 25, 2022), https://www.justice.gov/d9/case-documents/attachments/2022/02/25/400238.pdf. In *Pickert*, the DOJ argued in a statement of interest in state court that where there exist non-competes that classify the employee as a competitor, the non-competes could be classified as a horizonal, *per se* violation allocating markets. at 6-8.

57 DOJ Comment on Non-Compete Clause Rule at 4, https://www.justice.gov/atr/page/file/1580551/dl.

The public comments on the FTC's proposed rule to ban non-compete agreements were diverse. The FTC received more than 26,000 public comments in response to its proposed rule from supporters and opponents alike.[58] "The vast majority of public comments (95.4%) supported the proposed ban[,]" with supporters citing mobility; compensation; and worker's rights and freedom as the top reasons for their support.[59] On the other hand, those opposing the ban cited intellectual property & trade secrets; incentives to invest in employees and R&D; and competition and free market as the top three reasons for their opposing views.[60] "Other comments reflected a more nuanced view of non-compete clauses, recognizing that non-competes may be appropriate in certain circumstances but not in others. Some commenters voiced opposition to a 'blanket ban' on non-competes, stating that '[t]his is not a mandate that can be made for every business in the entire nation" and that '[c]hallenges to such provisions should be examined on a case-by-case basis.'"[61] Other commenters were in favor of banning non-compete agreements but said that exceptions should be made for executives, such as "'certain senior employees with a significant ownership stake'" or for "'employees that are provided significant financial incentives by the Company that would allow them to sit out for the period of their noncompete.'"[62] The volume of public comments and varying feedback underscores the issue's complexity and the balancing act required to address the concerns of employers and employees.

VI. HAS THE FTC OVERSTEPPED ITS AUTHORITY?

Although only 10 percent of comments opposing the FTC's proposed rule referenced the FTC's legal authority as their basis for opposition, the FTC's move has sparked a debate on whether the FTC has overstepped its regulatory powers. One point of contention is the assertion that Congress has not explicitly charged the FTC with regulating or, let alone banning almost entirely, employee non-compete clauses, suggesting a potential overreach in the FTC's authority to implement such a ban. This perspective raises questions about the appropriateness of the FTC's action and whether it aligns with the legislative intent and the scope of authority granted to the FTC by Congress. After the announcement of the Rule, the U.S. Chamber of Commerce was vehemently opposed to the rule, announcing plans to file a lawsuit challenging the FTC's authority to implement such a ban in a statement.[63] It criticized the FTC's decision as "unlawful" and a "blatant power grab," arguing that it would undermine the ability of American businesses to remain competitive.[64] The U.S. Chamber of Commerce followed through and sued the FTC, challenging the rule in the U.S. District Court for the Eastern District of Texas less than twenty-four hours after the FTC issued the Final Rule.[65]

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58 *FTC Announces Rule Banning Noncompetes*, https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

59 Yeseul Hyun, *Anatomy of Public Comments: An Empirical Analysis of Comments on FTC's Proposed Ban of Employee Non-Competes*, 38 Antitrust Magazine at 6 (2024), https://www.analysisgroup.com/globalassets/insights/publishing/2024-aba-anatomy-of-public-comments.pdf (The researcher notes that the analysis focuses on a few hundred comments representative of the overall comments).

60 *Id.* at 7.

61 *Id.* (citing Regulations.gov, Public Submission, Comment ID FTC-2023-0007-7517, https://www.regulations.gov/comment/FTC-2023-0007-7517, and Regulations.gov, Public Submission, Comment ID FTC-2023-0007-10512, https://www.regulations.gov/comment/FTC-2023-0007-10512).

62 *Id.* (citing Regulations.gov, Public Submission, Comment ID FTC-2023-0007-4288, https://www.regulations.gov/comment/FTC-2023-0007-4288.).

63 U.S. Chamber of Commerce, *U.S. Chamber to Sue FTC Over Unlawful Power Grab on Noncompete Agreements Ban* (Apr. 23, 2024), https://www.uschamber.com/finance/antitrust/u-s-chamber-to-sue-ftc-over-unlawful-power-grab-on-noncompete-agreements-ban.

64 *Id.* It stated the following:

> The Federal Trade Commission's decision to ban employer noncompete agreements across the economy is not only unlawful but also a blatant power grab that will undermine American businesses' ability to remain competitive.
>
> Since its inception over 100 years ago, the FTC has never been granted the constitutional and statutory authority to write its own competition rules. Noncompete agreements are either upheld or dismissed under well-established state laws governing their use. Yet, today, three unelected commissioners have unilaterally decided they have the authority to declare what's a legitimate business decision and what's not by moving to ban noncompete agreements in all sectors of the economy.
>
> This decision sets a dangerous precedent for government micromanagement of business and can harm employers, workers, and our economy.
>
> The Chamber will sue the FTC to block this unnecessary and unlawful rule and put other agencies on notice that such overreach will not go unchecked.

65 *Chamber of Commerce*, No. 6:24-cv-00148 (E.D. Texas), https://www.uschamber.com/cases/antitrust-and-competition-law/chamber-v-ftc. Ryan LLC, a tax firm based in Dallas, also sued the FTC on the same basis in the Northern District Court of Texas. *Ryan LLC*, 3:24-cv-00986-E (N.D. Tex.), https://www.uschamber.com/cases/antitrust-and-competition-law/ryan-llc-v.-ftc.

Another point of contention is that there are often legitimate reasons to enter a noncompete agreement, so long as they are reasonable in scope, duration, and geographic limitation. These reasons include protecting trade secrets; preserving client relationships; safeguarding specialized training investments; protecting company investments; and preventing unfair competition. For instance, there would certainly be well-founded reasons why a company would be concerned if its CEO resigns to become the CEO of a competitor. Yet the FTC's rule does not account for these nuances. And, as critics have pointed out, the FTC has banned a mechanism that predates even the very existence of the Commission. In its complaint, the U.S. Chamber of Commerce argued that the ban is "a vast overhaul of the national economy, and applies to a host of contracts that could not harm competition in any way," and that a categorical ban is unlawful even if the FTC has the power to issue such a rule.[66]

The rule is so hotly contested that even a small business owner has joined in suing the FTC over its expansive ban; the business argues that the rule would prevent it from protecting its techniques for difficult projects in tree care services in its region.[67]

VII. THE FTC'S PATH FORWARD

Historically, the regulation of non-compete agreements has been a matter for state law, with states adopting various approaches to enforcing these clauses. Some states, like California, have opted for more restrictive or outright bans, while other states take a more nuanced approach.[68] This underscores the level of complexity in regulating non-compete agreements and the variation in policy approaches across different jurisdictions. In commenters and stakeholders' discussions of the rule, there were some discussions around whether the FTC's final rule could be more limited than initially proposed.[69] Indeed, there was room for the FTC to consider a more nuanced approach that might have balanced the need to protect workers from overly restrictive non-compete clauses, while also considering the legitimate interests of employers in protecting their business interests. A potentially better approach could have involved a more collaborative process beyond comments (which can be overwhelming to track and review), engaging with state regulators, and stakeholders (including employers and employees), to develop a framework that addresses the concerns associated with non-compete clauses without resorting to an outright ban. Such an approach could have aimed to establish guidelines for what constitutes a reasonable non-compete agreement, taking into consideration factors like the duration of the restriction, the geographical scope, and the legitimate business interests at stake. This could have provided a more balanced solution that respects the diversity of state laws and the nuances of different industries and employment contexts.

VIII. CONCLUSION

Although the DOJ's criminal pursuit of no-poaching agreements has some notional backing, DOJ has struggled to overcome judicial and jury skepticism because, when it comes time to apply the per se standard at the trial and pre-trial stage, courts have been hesitant to apply the traditional *per se* standard and have opted for what appears to be a modified *per se* rule. Since courts' hesitancy is likely due to their inexperience with applying the per se rule to the no-poach context, DOJ might overcome their challenges by either only pursuing blanket no-hire agreements and cases with more favorable facts criminally; or playing the long game by bringing cases civilly that would develop some law about the application of the per se standard in the labor context, then moving to pursue appropriate no-poaching agreements criminally.

Moreover, while the FTC's decision to ban non-compete agreements reflects a significant shift in policy aimed at protecting workers, it has raised questions about the extent of the FTC's regulatory authority and whether an outright ban was the most appropriate course of action. A more nuanced approach, developed in consultation with a broad range of stakeholders and respecting the historical role of state law in this area, might have been a more effective solution.

Overall, enforcers should consider nuance in their attempts to increase challenges to agreements in the labor market, as enforcement tailored to the needs of the particularities of a case or issue is likely to yield better results. Nuance is inherent in the enforcement and practice of law.

66 Complaint, *Chamber of Commerce*, No. 6:24-cv-00148, ECF No. 1, https://www.uschamber.com/assets/documents/Complaint-Chamber-v.-FTC-E.D.-Tex.pdf.

67 Small business owner fights FTC's lawless non-compete ban, Pacific Legal Foundation, https://pacificlegal.org/case/ats-ftc-non-compete-delegation/.

68 E.g. Cal. Bus. & Prof. Code § 16600; Cal. Lab. Code § 432.5; Cal. Lab. Code § 23; Cal. Lab. Code § 433; Wis. Stat. § 103.465 Or. Rev. Stat. § 653.295; Or. Rev. Stat. § 653.991.

69 Fed. Trade Comm'n, Non-Compete Clause Rulemaking (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking; Fed. Trade Comm'n, Non-Compete Clause Rule (NPRM), Docket (FTC-2023-0007) (Jan. 9, 2023).

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