Trade Secrets and Restrictive Covenants
Antitrust and Competition Law
Labor and Employment

Department of Justice Prosecutions in Employment-Related Antitrust Suits Fall Flat in *DaVita Inc.* and *Jindal*

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Juries Acquit Criminal Antitrust Defendants of All Charges

This month, federal juries acquitted defendants facing criminal antitrust convictions in two trials against employers accused of improperly restraining trade in the labor market. On April 14, a Texas federal jury acquitted physical therapy staffing company executives Neeraj Jindal and John Rodgers of conspiracy to fix prices in violation of the Sherman Antitrust Act.[1] The Department of Justice alleged that Jindal and Rodgers agreed with competitors to lower the rates paid to certain categories of employees in concert.[2] One day later, a Colorado federal jury acquitted DaVita, Inc. and ex-CEO Ken Thiry of three counts of conspiracy in restraint of trade.[3] Here, the Department of Justice alleged that DaVita and Thiry agreed with rivals not to recruit or hire each other's employees. Earlier this year, the court in *DaVita* denied defendants' motion to dismiss and found the employers were sufficiently on notice that no-poach agreements were *per se* illegal under the Sherman Act.[4] This was a significant win for the Department of Justice and the first ruling of its kind. For both *DaVita* and *Jindal*, the Department sought to leverage the courts' decisions in other pending criminal prosecutions of no-poach agreements.[5] Yet, the Department was unsuccessful in translating that early *DaVita* win into success at either trial.

Case Specifics Raise Questions about Verdicts' Impact on Future Cases

The influence these verdicts may have on future labor-related antitrust cases is not entirely clear, given particularly weak prosecutorial evidence in *Jindal* and confusing jury instructions in *DaVita*.

The *Jindal* instructions were concise and to-the-point, properly explaining that if the jury concluded that there was a conspiracy to lower pay rates, the conduct would be "illegal, without consideration of the precise harm they have caused or any business justification for their use."[6] In other words, *per se* illegal under the federal antitrust laws. The *DaVita* instructions, however, seemed to drift from standard *per se* instructions, introducing a standard suggesting defendants could not be found guilty unless the jury concluded that the objective of the no-poach agreement "sought to end meaningful competition for the services of the affected employees,"[7] which arguably requires more evidence than the *per se* standard of liability would typically require. The defendants' closing arguments honed in on this aspect of the jury instructions, arguing that the government had not shown that the purported conduct ended meaningful competition in the labor market. Tellingly, the jury then asked for a definition of meaningful competition during deliberations, indicating both their confusion and seemingly outcome-dependent view of the conduct instead of its potentially illegal nature.

While the *Jindal* defendants emerged victorious in the antitrust counts under proper legal instruction, this is no promise of acquittal for similarly situated defendants. The outcome likely resulted from the government's insufficient evidence. The only witness for the government first told the FTC that she did not believe Jindal was serious when he reached out concerning fixing wages. However, on the stand she reversed her testimony. This reversal was a key component of the defense case. Defendants with stronger evidence against them may not be so lucky. Indeed, there are multiple outstanding criminal

cases with comparable legal and factual issues that could see different outcomes.[8]

In spite of these losses, the Department of Justice remains keen to prosecute no-poach agreements and similar conduct. In the days following the *DaVita* verdict, the Department commented that it "remain[s] committed to enforcing the antitrust laws in the labor markets."[9]

Employers Should Remain Cautious When Dealing with Employee Restrictions Including No-Poach Agreements and Restrictive Covenants

We continue to encourage employers to take stock of their existing restrictive covenants with employees and any agreements made with competitors that could run afoul of federal and state antitrust laws. In addition to conducting a comprehensive assessment of preexisting agreements, employers should consider whether restrictive covenants can be narrowed to apply only to senior-level employees or those with access to the company's most confidential information. When seeking to enforce restrictive covenants, we encourage businesses to tread carefully, particularly when engaging with the former employee's new employer, so as to avoid allegations of an anti-competitive conspiracy between competitors.[10] Employers should remember that even if they provide antitrust training to their employees on price fixing, those employees may not realize that those principles also apply elsewhere, like wages.

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[1] *United States v. Jindal*, No. 4:20-CR-00358, ECF No. 56 (E.D. Tex. Nov. 29, 2021).
[2] *Id.*
[3] *United States v. DaVita Inc.*, No. 21-cr-00229, ECF No. 264 (D. Colo. Apr. 15, 2022).
[4] *United States v. DaVita Inc.*, No. 21-cr-00229, ECF No. 132 (D. Colo. Jan. 28, 2022) (holding that "Defendants had ample notice that entering a naked agreement to allocate the market would expose them to criminal liability, however they did it.")
[5] *See also* Client Alert: DOJ Continues to Push Against Non-Competes, Non-Solicitations, and Other Post-Employment Restrictions (Mar. 1, 2022), https://jenner.com/library/publications/21633.
[6] *United States v. Jindal*, No. 4:20-CR-00358, ECF No. 111 at 11–12 (E.D. Tex. Nov. 29, 2021) ("Section 1 of the Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are unreasonable restraints on trade. Conspiracies to fix prices by lowering pay rates are deemed to be unreasonable restraints of trade, and therefore illegal, without consideration of the precise harm they have caused or any business justification for their use.").

[7] *United States v. DaVita Inc.*, No. 21-cr-00229, ECF No. 254 at 19–20 (D. Colo. Apr. 13, 2022) ("[Y]ou may not find that a conspiracy to allocate the market for the employees existed unless you find that the alleged agreements and understandings sought to end meaningful competition for the services of the affected employees.").
[8] *United States v. Hee, et al.*, No. 2-21CR00098-RFB0BNW (D. Nev. Mar. 30, 2021); *United States v. Surgical Care Affiliates, LLC*, No. 3-21CR0011-L (N.D. Tex. Jan. 5, 2021); *United States v. Patel et al.*, No. 3-21CR00220 (D. Conn. Dec. 15, 2021); *United States v. Manahe et al.*, No. 2:22-cr-13-JAW (D. Maine Jan. 27, 2022).
[9] *Id.*
[10] *See also* Client Alert: DOJ Continues to Push Against Non-Competes, Non-Solicitations, and Other Post-Employment Restrictions (Mar. 1, 2022), https://jenner.com/library/publications/21633; Client Alert: FTC May Wade into Enforceability of Non-Compete Agreements (Jan. 16, 2020), https://jenner.com/library/publications/19503; Client Alert: Employers Take Note: State AGs Urge FTC to Step up Scrutiny of Employee Restrictions (Aug. 1, 2019), https://jenner.com/library/publications/19184; Client Alert: Biden Administration Announces Plans to Curtail Non-compete Agreements for Workers (July 12, 2021), https://jenner.com/library/publications/21119; Client Alert: The Biden White House Ramps up Antitrust Enforcement and Reform (July 20, 2021), https://jenner.com/library/publications/21136.