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The DOJ continues its efforts to create a novel area of potential criminal liability for labor market investigations. Historically, government enforcement of alleged anticompetitive labor market practices occurred in the civil context, resulting in fines for companies and individuals found to have participated in inappropriate practices. In late 2016, the DOJ began its campaign to expand Section 1 of the Sherman Act to include naked wage-fixing and no-poach agreements. Since then, labor market criminal investigations—now under their third administration—have become a programmatic and core DOJ investigative priority. This policy shift has resulted in many investigations and more than a dozen criminal cases filed against individuals and corporations to date.

The DOJ's first two prosecutions for alleged labor market crimes went to trial in spring 2022. The DOJ's attempts to jam a square peg into a round hole of a *per se* antitrust law violation resulted in full acquittals on the charged Sherman Act conduct in both instances. Despite the lack of precedent supporting the prosecution of certain labor market practices as *per se* criminal violations, the DOJ in both instances asserted that the mere existence of any naked wage-fixing or no-poach agreement would constitute a crime. In *United States v. Jindal*, the first-ever wage-fixing case, the DOJ alleged that the defendants entered into a conspiracy to suppress competition by agreeing to fix prices to lower the pay rates of certain employees. On April 14, 2022, a Texas jury found both defendants not guilty of all Sherman Act charges but convicted one defendant of obstructing a Federal Trade Commission (FTC) investigation.

In *United States v. DaVita, Inc. and Kent Thiry* (McDermott represented Mr. Thiry in the investigation and trial), the DOJ indicted the defendants on three counts of criminal conspiracy to allocate the market for employees by allegedly entering into non-solicitation agreements with three other companies. This was a landmark case of first impression—the first criminal trial of its kind for liability under the Sherman Act for so-called non-solicit agreements. The court did not agree with the DOJ that a typical *per se* approach was appropriate. First, the judge held that not every non-solicitation, or even every no-hire, agreement would allocate the market and be subject to *per se* treatment. The court also required the DOJ to prove that the defendants acted with the specific intent to constrain the labor markets. Given the draconian nature of the *per se* standard, the court held that the DOJ would "not merely need to show that the defendants entered the non-solicitation agreement and what the terms of the agreement were. It will have to prove beyond a reasonable doubt that the defendants entered into an agreement with the purpose of allocating the market" and that the defendants "intended to allocate the market as charged in the indictment."

There were two important jury instructions in the same matter. In one, the court instructed that the jury "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." The jury inquired about what "meaningful competition" meant. The court instructed that "meaningful competition" essentially is another way of saying "significant competition" or "competition of consequence." In the other key jury instruction, the court instructed the jury that "*evidence of lack of harm or procompetitive benefits might be relevant* to determining whether defendants entered into an agreement with the purpose of allocating the market."

Ultimately, on April 15, 2022, a Colorado jury acquitted both defendants of all charges, casting doubt as to whether the *per se* standard is appropriate for alleged "no-poach agreements" and whether criminal prosecution is appropriate for such alleged agreements.

Other defendants charged with alleged no-poach agreements have challenged the appropriateness of the per se standard in labor market criminal prosecutions. In *US v. Patel, et al.*, the DOJ indicted six former aerospace executives for allegedly agreeing not to hire or solicit employees from one another's companies. In a recent motion to dismiss, the defendants argued that their case did not involve a naked horizontal agreement between competitors. Instead, the "allegations hinge on an agreement in furtherance of a legitimate business collaboration, removing it further from the reach of the *per se* rule than any prosecution to date." Defendants further argued that the alleged no-poach was limited, applying only to specific employees working on specific projects. The court has yet to decide whether it will sustain the DOJ's aggressive stance and allow this case to proceed to trial.

TAKEAWAYS

- In the *DaVita/Thiry* trial, the court ruled that the DOJ would need to prove that the defendants acted with the purpose or intent to allocate the market as charged in the indictment. This is a potential watershed moment for Section 1 litigation. In typical criminal antitrust enforcement, the general intent is conflated with the agreement itself—*i.e.*, the parties knowingly intended to agree. But where the DOJ seeks to create a new category of *per se* liability or push the outer boundaries of traditional categories of *per se* offenses, a required specific intent to allocate the alleged market may be significant.

- The DOJ continues to take an assertive posture on what it means to be a horizontal competitor in labor market investigations and prosecutions. Even in instances where a company may not compete with another company in its business, or where vertical relationships exist, the DOJ deems competition for employee labor to be the determining factor. This has the potential to significantly broaden the definition of "competitor" for Section 1 litigation.

- In typical antitrust cartel investigations, the focus has traditionally been on alleged conspiracies relating to pricing, sales or bidding regarding certain products or in certain geographic areas. The DOJ is trying to shift this typical landscape with its criminal approach towards labor market antitrust cases. In response to the DOJ's aggressive approach, companies should be vigilant and stay current with regard to their antitrust compliance and should recognize that labor markets remain a focus, despite the DOJ's recent trial losses. Groups and individuals involved in hiring and compensation-related decisions may benefit from antitrust training relating to these issues, and they should ensure that direct and third-party employment agreements and arrangements are made with antitrust laws in mind.

- Despite its losses, the DOJ does not intend to back off of its aggressive posture in labor market investigations. Shortly after the *DaVita/Thiry* verdict, Assistant Attorney General (AAG) Jonathan Kanter noted that the DOJ "won't back down." In a recent filing in another charged labor market case (*US v. Hee*), the parties indicated that they had reached a preliminary resolution relating to alleged wage-fixing and no-hire agreements. A potential guilty plea would provide the DOJ with its first-ever successful criminal prosecution of a labor market antitrust case and would likely embolden the DOJ even further on these matters.

NEW LABOR MARKET MOUs WITH NLRB

In July 2022, the National Labor Relations Board (NLRB) penned two interagency Memorandum of Understandings (MOU) with the DOJ and the FTC that will allow the agencies to share information and coordinate enforcement actions on potential labor market antitrust investigations and violations. Although MOUs generally do not permit agencies to do something that they are not otherwise permitted to do, it is yet another signal from the Biden administration of future collaborations between the NLRB, the DOJ and the FTC on labor market investigations. This whole-of-government approach will facilitate both the DOJ's and the FTC's robust engagement on a wide range of labor market issues. Importantly, the DOJ-NLRB MOU permits referrals to the DOJ from the NLRB, after which "the Antitrust Division will determine whether to open a civil or criminal investigation into the conduct and, after investigation, whether to bring a lawsuit based on the complaint." The potential for referrals from the NLRB to the DOJ, as well as eased information sharing, raises the stakes for individuals and companies being investigated by the NLRB.

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