Labor Pains: Taking Stock of Criminal Antitrust Enforcement Against Wage-Fixing and No-Poach Agreements

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In April 2022, juries in two separate criminal cases—both prosecuted by the Department of Justice's (DOJ's) Antitrust Division—delivered their verdicts. *United States v. DaVita Inc.* involved the publicly traded operator of outpatient dialysis centers across the United States and its former CEO. No. 21-cr-00229 (D. Colo.). *United States v. Jindal* involved the owner of a small physical therapist staffing company and his clinical director. No. 20-cr-00358 (E.D. Tex.). Despite the seemingly disparate scale of the cases, they shared more than just their timing and prosecutor: Both cases alleged criminal antitrust violations arising from the defendants' employment practices and were DOJ's first prosecutions to proceed to trial on charges of criminal antitrust violations in labor markets.The cases also shared similar verdicts, with both juries acquitting all defendants on all antitrust counts.

Despite these setbacks, in the wake of the acquittals, the Antitrust Division vowed that it would not be deterred from its commitment to the criminal investigation and prosecution of antitrust violations in labor markets, and it has persisted in its efforts to drive legal doctrine on the application of antitrust laws in labor markets.

This article examines the developments in the Antitrust Division's criminal enforcement efforts in labor markets to take stock of where they stand more than a year removed from these initial trial losses.

Background

The April 2022 verdicts had roots going back to October 2016, when the Antitrust Division and Federal Trade Commission (FTC) jointly released their Antitrust Guidance for Human Resources Professionals (HR Guidance), in which both agencies committed to the vigorous enforcement of antitrust laws in labor markets. US Dep't of Just. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resources Professionals* (Oct. 2016), https://bit.ly/3L1wXsi.

Motivating their commitment was a simple principle: Just as antitrust laws require sellers of goods and services to compete on factors like price and quality, they also require employers to compete to recruit or retain workers, such as by offering better wages or benefits.

Incident to publication of the HR Guidance, the DOJ Antitrust Division said that, moving forward, it would consider two types of conduct for possible criminal prosecution under Section 1 of the Sherman Act, which prohibits agreements between competitors that unreasonably restrain trade. 15 U.S.C. § 1. First, the Division said that **wage fixing**—agreeing not to compete with another employer on terms

of compensation such as salary, benefits, or paid leave—was a form of and would be prosecuted as illegal price-fixing. Second, the Division identified **"no poach" or no hire agreements**—agreements with competing employers not to solicit or hire away another company's employees—as illegal market allocations.

DOJ said that its focus would be on "naked" agreements, or those that "are not reasonably necessary to any separate, legitimate business collaboration between the employers." US Dep't of Just., *Antitrust Div. Update Spring 2018* (Apr. 10, 2018), https://bit.ly/2Kuraie.

The HR Guidance made clear that these types of agreements between employers—whether or not those employers were in the same industry, made the same goods, or offered the same services—were illegal, as they affected the marketplace for workers.

Despite its origins in the Obama administration, DOJ's enforcement focus on labor markets has been resilient across three presidential administrations. Following publication of the HR Guidance, the Antitrust Division opened numerous criminal investigations in the Trump administration, and by late 2020 obtained its first indictment for antitrust violations relating to employment practices. The focus continued into the Biden administration and received a boost in July 2021, when President Biden issued an expansive Executive Order on Competition that prioritized antitrust enforcement in labor markets. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021), https://bit.ly/3Amq6os.

Jindal and *DaVita:* Winning Despite Losses?

The *Jindal* and *DaVita* cases, respectively, were the Antitrust Division's first wage-fixing and no-poach cases to proceed to trial.

Jindal alleged that the owner and clinical director of a physical therapist staffing service conspired with competitors to lower the wages of physical therapists and their assistants. The indictment included transcriptions of text messages sent between the two defendants and their alleged co-conspirators, urging other businesses to lower the hourly pay for the therapists and their assistants. First Superseding Indictment, *Jindal*, No. 20-cr-00358, ECF No. 21, https://bit.ly/3H6a6e0.

DaVita charged two no-poach agreements between the defendant company, its former CEO, and their competitors, alleging that they agreed not to solicit certain employees, including those at senior levels. Indictment, *DaVita*, No. 21-cr-00229, ECF No. 1. As with the *Jindal* case, the indictment claimed that the alleged agreements were formed and maintained through a series of meetings and communications between executives at competing companies and cited the defendants' own communications as evidence of the alleged agreements.

Despite jury verdicts that acquitted all defendants on the antitrust charges (in *Jindal*, one defendant was convicted of obstructing an FTC investigation, for which the court imposed a probationary sentence after finding that the applicable advisory guideline range of 24–30 months "overstate[d] the seriousness of the offense"), DOJ claimed wins in each case because it survived substantive motions to dismiss. Judgment, *Jindal*, No. 20-cr-00358, ECF No. 156. Shortly after the verdicts, for instance, Antitrust Division Assistant Attorney General Jonathan Kanter said that "[i]n terms of establishing viable precedent, these cases will most often be cited in our favor going forward because courts agree that antitrust harms that affect workers are actionable antitrust harms." *See* Brian Koenig, *DaVita Acquittal Sets High Bar for DOJ No-Poach Cases*, Law360 (June 2, 2022, 10:19 AM), https://bit.ly/3oDsB30.

As novel issues before federal courts for the first time, these decisions undoubtedly created important

precedents for the Antitrust Division's future enforcement efforts. But the orders in the two cases are best read as a mixed outcome for DOJ, and the Antitrust Division's subsequent discussion of each in legal filings indicates that it shares this view.

Critical in each case was a ruling that the charged conduct constituted a *per se* violation of the Sherman Act, a designation for conduct that courts have determined always or almost always harms competition, such that the conduct, if proved, establishes a violation, without inquiring into its purpose, harms, benefits, or other competitive effects. *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 19–20 (1979) (citations omitted).

The evidentiary significance to criminal antitrust prosecutions of *per se* treatment is tremendous: If the alleged agreement is proved, no justification of or defense for the conduct matters, and evidence and argument about these may be excluded from trial. The Antitrust Division historically has limited its criminal enforcement of Sherman Act violations to *per se* violations, in part because of this evidentiary calculus.

In *Jindal*, the court rejected the defendants' arguments that greater judicial experience was needed to consider whether wage fixing could be good for competition and held both that the Sherman Act's prohibitions on price-fixing conspiracies applied to labor markets and wage fixing was a *per se* violation of the antitrust laws. Mem. Op. & Order, *Jindal*, No. 20-cr-00358, ECF No. 56. DOJ's claim of a win on this order seems well supported by its subsequent citation of the ruling to other courts, as well as other courts' citations to the ruling. In late February 2023, for instance, a district court in Maine cited to *Jindal* as persuasive and granted several government motions in limine based on the *per se* rules. Order, *United States v. Manahe*, No. 22-cr-00013 (D. Me. Feb. 27, 2023), ECF No. 182.

The *DaVita* court's order on the motion to dismiss, however, was an equivocal win for DOJ. As in *Jindal*, the *DaVita* court held that no-poach agreements could be *per se* market allocations under the Sherman Act. But in addition to proving the existence of an agreement—the typical requirement to establish a *per se* violation—the *DaVita* court also required that the government prove the defendants' purpose in entering the agreement was to allocate the market. In formulating the government's burden this way, the *DaVita* court raised the bar for prosecutors by layering on an additional element of proof and set a problematic precedent for jury instructions in no-poach cases.

While it publicly hailed the orders from both cases as wins, in other court filings, the Division has said that the *DaVita* court "erred" in its ruling, and DOJ has continued to advocate for a traditional *per se* treatment of no-poach (and no-hire) agreements that does not graft onto the government's burden the additional purpose requirement. United States' Resp. to Notice of Judgments of Acquittal, *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 21-CV-00305 (N.D. Ill. May 11, 2022); Statement of Interest of United States, *Markson v. CRST Int'l, Inc.*, No. 17-CV-01261 (C.D. Cal. July 15, 2022), ECF No. 637. The DOJ's advocacy in no-poach litigation has seized on remarks by the *DaVita* trial judge that he was throwing the defendants in that case a "lifeline" by requiring proof of intent to allocate employees. *See id*. Whether other courts would fashion similar "lifelines" or instruct juries in a manner more favorable to Antitrust Division prosecutors became a critical question in determining the viability of subsequent no-poach cases.

A Win, but How Much of a Win?

Shortly after its April 2022 trial losses, DOJ seemed on the verge of its first win in a case that charged a health care staffing company and its regional manager for their roles in a conspiracy to allocate nurses and fix the wages of those nurses. *United States v. Hee & VDA OC, LLC*, No. 21-cr-00098 (D. Nev.

2022). And while the Antitrust Division ultimately succeeded in obtaining its first conviction for a criminal antitrust labor market offense, the summer and fall of 2022 provided an odd will-they/won't-they arc for careful readers of the docket in that case.

Corporate defendant VDA OC, LLC—which during the indictment period operated as Advantage On Call (AOC)—was one of two primary providers of contract nursing services to the Clark County School District in Nevada. Ryan Hee was AOC's regional manager. A grand jury indicted both in March 2021 for Sherman Act violations.

The case initially headed to litigation, including a motion to dismiss the indictment that challenged whether no-poach conduct could be deemed a *per se* violation. But in June 2022, the parties stipulated to a continuance, indicating that they had reached preliminary resolutions as to both defendants. Stipulation to Continue Evidentiary Hearing, *Hee*, No. 21-cr-00098, ECF No. 92.

In early September, however, VDA filed a notice of its intent to plead guilty, absent any indication of a plea agreement with DOJ. In its notice, the company admitted to just two acts as the basis for its liability: a conversation and an email communication, both of which took place on October 21, 2016, the day *after* DOJ and the FTC released the HR Guidance. Notice of Intent to Plead Guilty, *Hee*, No. 21-cr-00098, ECF No. 96. At a change of plea hearing that followed, after the parties argued about an element of the offense, the court did not accept the changed plea and instead scheduled a combined plea and contested sentencing hearing for January 2023.

By early October, however, the case trajectory changed again, with VDA and DOJ arriving at a plea agreement that cited as its factual basis the same two communications identified in VDA's earlier filing. This time, the court accepted the plea, and DOJ secured its first criminal conviction in a labor market case. Consistent with the terms of the plea agreement, the court ordered VDA to pay $62,000 as a criminal fine and $72,000 in restitution, basing the fine on a volume of commerce (the relevant metric under the federal sentencing guideline for antitrust offenses) that included all of the impacted nurses' wages during the conspiracy period. *See* U.S.S.C. § 2R1.1.

The Division then quietly resolved its case against its former manager, who was responsible for the two communications that formed the basis for VDA's criminal conviction. On January 23, 2023, the parties filed a six-month deferred prosecution agreement, under which the defendant agreed to complete community service and a pretrial diversion program, after which the charge against him would be dismissed. Pretrial Diversion Agreement as to Ryan Hee, *Hee*, No. 21-cr-00098, ECF No. 115.

Hee stands as a Division success inasmuch as DOJ obtained its first conviction for a wage-fixing and no-poach violation. The case also demonstrates how little conduct is needed to substantiate a criminal Sherman Act violation: Two communications on a single day formed the factual basis of the conspiracy. And in spite of the modest fine amount, the inclusion of all the affected nurses' wages in the corporation's sentencing calculation could scale to produce larger fines if DOJ obtains convictions in cases that implicate more employees, longer time periods, or higher wages.

But the extent of the *Hee* win is limited by the outcome as to the individual defendant. Nothing in the record indicated that Hee provided substantial assistance or otherwise engaged with DOJ in such a way that led to the disposition of his case on such favorable terms, and the outcome appears to temper DOJ's position on the seriousness of these offenses. Further, as the first sanction of an individual for a labor market violation, the case likely will be used by future defendants to argue for more lenient penalties if they are convicted.

2023: More Trials, More Struggles

Three 2023 trials have further defined and will continue to define the Antitrust Division's prospects in and the viability of its labor market prosecutions. As with *Jindal* and *DaVita*, Division prosecutors have so far succeeded in obtaining favorable pretrial rulings on the application of *per se* rules to labor market conduct. The Division has cited these rulings in claiming a growing body of precedent that supports its underlying legal theory in these cases. But these cases also have resulted in less favorable rulings, including a stunning rebuke at the end of April 2023. Like the *DaVita* jury instruction, these rulings create issues for prosecutors that could reverberate and impact the Division's future efforts in this area. And perhaps most importantly, the Division has yet to prove its ability to prevail in front of juries in criminal labor market cases, with a jury acquitting all defendants in the first of these trials to reach verdict.

United States v. Manahe

In *Manahe*, a grand jury charged four operators of home health care agencies with participation in a conspiracy to suppress wages and restrict hiring of personal support specialists during the COVID-19 crisis. *United States v. Manahe*, No. 22-cr-00013 (D. Me.).

DOJ succeeded in advancing its view of the violations in pretrial motions in the case. In August 2022, the *Manahe* court denied defendants' motion to dismiss, ruling that the indictment charged *per se* violations of the Sherman Act. Order on Mot. to Dismiss the Indictment & for a Prelim. Hearing Concerning Conspiracy Evidence, *Manahe*, No. 22-cr-00013, ECF No. 112. The court later granted several DOJ motions in limine that were based on the *per se* offense, citing favorably to the *Jindal* ruling and barring the defendants from offering evidence or argument related to the reasonableness of their conduct or their specific intent to achieve anticompetitive results. *See, e.g.*, Order on the Gov't's Mot. in Limine to Exclude Evidence Irrelevant to a Per Se Conspiracy, *Manahe*, No. 22-cr-00013, ECF No. 182.

Despite these favorable rulings and jury instructions that conformed to DOJ's views of the law, however, on March 22, 2023, the jury acquitted all defendants in the *Manahe* case following a two-week trial. Jury Verdict, *Manahe*, No. 22-cr-00013, ECF No. 247.

United States v. Patel

Indicted in 2021, the *Patel* case presented a more complex fact pattern: an alleged hub-and-spoke no-poach conspiracy between a manager at an aerospace firm and executives at five outsourced engineering service providers to that firm. The indictment charged that the alleged conspirators agreed not to compete for—by either hiring or soliciting from each other—engineers and other skilled workers on projects for the aerospace firm. *United States v. Patel*, No. 21-cr-00220 (D. Conn.).

As in *Manahe*, the government fared well in early pretrial motions. In a December 2022 order, the court denied defendants' motions to dismiss the case, finding that the alleged conduct could be a *per se* market allocation, was not subject to dismissal as ancillary (a defense to *per se* treatment of horizontal conduct that is found to be subordinate and collateral to a legitimate collaboration between competitors and reasonably necessary to achieving a procompetitive objective of the collaboration) at that stage of litigation, and operated as a horizontal restraint despite a vertical relationship being involved. Order Denying Mot. to Dismiss, *Patel*, No. 21-cr-00220, ECF No. 257. The court also denied the defendants' motion on a due process basis, saying that a novel way of allocating a market—here, the alleged no-poach agreement between competing employers—was still a market allocation, the likes of which long have been considered *per se* illegal.

These rulings allowed the *Patel* prosecution to proceed and appeared to add to the body of useful precedent that DOJ could cite in subsequent no-poach cases, which it did nearly immediately,

supplementing its response to a pending motion to dismiss in the *Surgical Care Affiliates* case (discussed below) three days after receiving the order.

The government fared less well, however, as the *Patel* trial neared its start. On the day before trial, despite its earlier ruling that the conduct could be *per se*, the court denied a prosecutorial motion in limine that would have barred the defendants from presenting evidence of the procompetitive justifications for their conduct. The court said that, in addition to being relevant to defendants' planned ancillarity defense, "[t] he procompetitive evidence at issue here is relevant because it relates to whether Defendants joined the charged conspiracy, whether the conspiracy existed as alleged, and whether Defendants had the requisite intent to join such a conspiracy." Ruling & Order on Pretrial Mots., *Patel*, No. 21-cr-00220, ECF No. 457. The court further denied DOJ's motions to exclude testimony from three experts, including allowing the defendants to present testimony from an economist relating to the lack of harm from the alleged conduct.

Evidence of both procompetitive justifications and lack of harm from the alleged conduct typically has been excluded from trials when *per se* conduct is charged, and its inclusion in the *Patel* case greatly complicated DOJ's trial burden. In ruling to allow the defendants to present this evidence, the court eliminated much of the evidentiary significance of its earlier *per se* designation and effectively forced the government to prove a "rule of reason" case (an alternative to *per se* treatment that conducts a fact-specific assessment of the conduct's actual effects on competition), thereby diluting the DOJ's "win" on the motion to dismiss ruling.

In addition to its pretrial evidentiary ruling, the *Patel* court's jury instruction relating to the defendants' ancillarity defense also was problematic for prosecutors. As with *DaVita*, the *Patel* jury instructions would have directed jurors to consider the defendants' purpose in their alleged arrangement. While not the same as the *DaVita* instruction, which required that the prosecution prove the defendants' anticompetitive purpose, jurors in the *Patel* case nonetheless were to be instructed in a way that opened inquiry into the purpose of the alleged conduct, further undercutting the traditional significance of the *per se* treatment. Annotated Post-Trial Jury Instructions, *Patel*, No. 21-cr-00220, ECF No. 456.

Patel went from bad to worse for DOJ at the close of the government's weeks-long case, when the defendants moved for acquittal pursuant to Federal Rule of Criminal Procedure 29. Following several days of litigating the issue, the court granted the motion, preventing the case from reaching the jury. Ruling & Order on Defs' Mots.for Acquittal, *Patel*, No 21-cr-00220, ECF No. 599. The ruling —which cannot be appealed—found that no reasonable juror could convict the defendants and that "[a]s a matter of law, [the] case [did] not involve a market allocation under the *per se* rule." *Id*.

United States v. Surgical Care Affiliates, LLC

United States v. Surgical Care Affiliates (SCA) charges two counts of employee allocation agreements for senior-level employees in outpatient surgical facilities. *SCA*'s second count charges the same conspiracy as Count One of the *DaVita* case, on which the *DaVita* jury acquitted the defendants. *United States v. Surgical Care Affiliates, LLC*, No. 21-cr-00011 (N.D. Tex.).

SCA was indicted in early January 2021 and holds the distinction of being DOJ's first charged no-poach case, but it has lagged behind other cases in litigation, with a number of outstanding motions, including a motion to dismiss, on which the court has not yet ruled.

The case's status as a trailing indicator has made the *SCA* docket one that demonstrates how both DOJ and defendants have deployed the limited precedents from earlier labor cases, particularly with regard to

rulings in the *Patel* case. As noted, prosecutors immediately supplemented their response to the motion to dismiss upon the court's December 2022 denial of dismissal in *Patel*. The *SCA* defendants returned the favor when the same court acquitted the *Patel* defendants. Defs' Notice of Add'l Authority, *SCA*, No. 21-cr-00011, ECF No. 200. The government filed its own supplement in response, claiming that the *Patel* ruling was "contrary to Supreme Court and Fifth Circuit precedent" and "wrong as a matter of law." United States' Response to Defs' Notice of Add'l Authority, *SCA*, No. 21-cr-00011, ECF No. 201.

Whether and how the *SCA* court looks to *Patel* —including on the pending motion to dismiss and, if it allows the case to proceed, whether it allows evidence of procompetitive justifications and lack of harm at trial—will be critical in ongoing pretrial litigation.

Given its close connection to the *DaVita* case, jury instructions also loom as a key issue in *SCA*. In October 2022, the parties filed proposed jury instructions. DOJ vigorously opposed an instruction like that given in the *DaVita* case, which would require a finding of purpose to allocate markets in addition to the agreement itself, saying that the instruction is inconsistent with both Supreme Court and circuit court precedents, and arguing that the government did not have to prove a specific intent to restrain trade. *See* United States' Objections to Defs.' Proposed Jury Instructions, *Surgical Care Affiliates*, No. 21-cr-00011, ECF No. 166. Like the motion to dismiss, the court has yet to rule on the parties' proposed jury instructions.

Expanding the Field of Play

The Antitrust Division has not limited its focus on enforcement in labor markets to criminal enforcement actions. DOJ has taken its fight to civil litigation as a party and nonparty in its efforts to create a more robust body of legal precedent for the application of antitrust laws to conduct in labor markets.

In July 2022, the Antitrust Division filed both a civil complaint and a proposed consent decree in a case that alleged a conspiracy to suppress the wages of poultry industry workers through information exchanges about worker wage and compensation information. *United States v. Cargill Meat Solutions Corp.*, No. 22-CV-01821 (D. Md. 2022). In its complaint, DOJ requests that the court rule that the defendants' alleged agreement to exchange worker compensation information, as well as the exchange of the compensation information by itself, violated the Sherman Act's prohibition on unreasonable restraints of trade.

Additionally, consistent with the Division's desire to push the law through litigation, DOJ on several occasions has intervened in private litigation to express its views on the application of antitrust laws in labor markets. *See, e.g.*, United States' Response to Notice of Supplemental Auth., *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 21-CV-00305, ECF No. 167. Through its statements of interest and amicus briefs, the Division has sought to develop the legal landscape around wage-fixing and no-poach cases and drive doctrine with respect to the application of antitrust laws to labor and employment practices.

A summary of these filings illustrates the thrust of Division efforts to generate useful precedents for future labor cases. In a July 2022 filing in a case involving alleged no-hire agreements between the defendant transportation and logistics companies, DOJ asserted plainly its position that "[a]greements among competitors to allocate markets have long been condemned as *per se* unlawful … , [and] the same rule applies whether competitors agree to allocate markets for customers." Statement of Interest of the United States, *Markson*, No. 17-CV-01261, ECF No. 637.

In November 2022, DOJ filed an amicus brief with the Seventh Circuit in *Deslandes v. McDonald's USA, LLC*, which involves allegations of no-poach agreements affecting fast-food employees. No. 17-cv-4857,

2022 WL 2316187 (N.D. Ill. June 28, 2022). Among the arguments advanced in DOJ's brief was that the district court misinterpreted the Supreme Court's 2021 decision *NCAA v. Alston* as precluding a *per se* analysis in labor allocation cases. 141 S. Ct. 2141 (2021). As argued in the DOJ's brief, the *Deslandes* case alleged "a horizontal, naked employee-allocation agreement, in which . . . a well-established *per se* rule applies" and therefore did not require a new *per se* theory, which had been an issue in *Alston*.

Most recently, DOJ filed a statement of interest in the parallel civil case to *Patel* that argued that market definition was not an element that needed to be proved in a *per se* case. Statement of Interest of the United States, *Borozny v. Raytheon Tech. Corp.*, No. 21-cv-1657 (D. Conn. Feb. 13, 2023).

Questions for Labor Cases Moving Forward

DOJ's record in labor market cases since the April 2022 acquittals is both limited and mixed, with some positive developments for the Antitrust Division on motion to dismiss rulings balanced against additional and significant setbacks, including the *Manahe* acquittals and the *Patel* evidentiary rulings, jury instructions, and Rule 29 acquittals. Despite this, Division leadership has proclaimed the righteousness of these cases and committed that its prosecutors will continue to pursue these cases criminally as a "lasting part of [the Division's] program." *See* Brian Koenig, *DOJ 'Certainly Learning' from Failed No-Poach Prosecutions*, Law360 (Apr. 10, 2023, 9:09 PM), https://bit.ly/41ueVWF.

With the Division's commitment to continued pursuit of these investigations and prosecutions against a limited body of precedent, many still-unanswered questions figure to be important to DOJ's future criminal antitrust enforcement efforts in labor markets.

Will DOJ Be Able to Isolate Patel?

Before the *Patel* acquittal, DOJ plausibly could claim that, despite jury acquittals, it was driving legal doctrine that recognized wage fixing and no poach as *per se* antitrust violations. It cannot do that with the *Patel* ruling's plain statement that the alleged allocation in that case was not a *per se* violation. The ruling demonstrates that DOJ is on a two-way street, where legal doctrine can drive in more than one direction. DOJ's ability to distinguish and isolate the *Patel* ruling, therefore, will be critical to its continued pursuit of these cases. The pretrial litigation in *SCA* is the first and most obvious place that this can happen. Further statements of interest may be another avenue for DOJ to seek additional favorable rulings. As discussed below, however, there currently are no other indicted DOJ no-poach cases in which the Division can seek rulings more in its favor.

What Burden Will the DOJ Have in No Poach Cases?

The success of future no-poach prosecutions depends heavily on how courts instruct juries in these matters. The *DaVita* case established a problematic precedent for DOJ, and if its "purpose requirement" is grafted onto the elements that Antitrust Division prosecutors must prove in other no-poach cases, it will set a high bar for convicting in no-poach cases. Similarly, the *Patel* court's jury instruction on ancillarity invited juror inquiry into the defendants' purpose in a way that presented a challenge for prosecutors. The jury instructions in *Manahe* were more favorable to the prosecution, but nonetheless did not lead to convictions.

Given this variance in jury instructions across cases, how juries are instructed on no-poach elements projects to be a key question for prosecutorial efforts in the future. Unlike many other aspects of Antitrust Division litigation, courts have not settled on a standard instruction for no-poach cases.

What Else Is Coming?

Despite the Antitrust Division's public commitments to enforcing antitrust laws criminally in labor

markets, the Division has obtained an indictment in only one labor market case since the grand jury's indictment in *Manahe* in January 2022, and the Antitrust Division went nearly 14 months without any indictment.

That lone indictment came on March 15, 2023, in *United States v. Lopez*, which charges the defendant with a single count of fixing the wages of home health care nurses in the Las Vegas area. No. 23-cr-0055 (D. Nev.). Interestingly, the case charges a conspiracy that began in March 2016—several months before the DOJ and FTC issued their HR Guidance—although the conspiracy as charged extended into 2019.

Whatever happens in the *SCA* case, *Lopez* currently is the only other litigation in DOJ's pipeline and many months away from trial. Without more charged cases, there will be few, if any, additional datapoints from which to discern a trendline in DOJ's enforcement efforts, other than the statements from Division leaders that they will continue aggressive enforcement in labor markets.

Notably, which industries (other than the health care field, which has been involved in five of six indicted cases) or employment practices might draw the sharpest scrutiny from DOJ in future criminal labor market cases remains unknown. One possible focus of future investigations is the sharing of wage and compensation information. In addition to its civil complaint against poultry processors, which dealt with this type of information exchange, DOJ recently withdrew its support for policies that created an "antitrust safety zone" for certain information exchanges that involved historical, aggregated, and anonymized data. Press Release, U.S. Dep't of Just., Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://bit.ly/3H8NSbj. In previewing this withdrawal, the Division's principal deputy noted concerns with "data at scale" in the modern economy and said that information exchanges can facilitate "tacit collusion," even when a third party is involved. Press Release, Doha Mekki, Assistant Att'y Gen., US Dep't of Just., Remarks at GCR Live: Law Leaders Global 2023 (Feb. 2, 2023), https://bit.ly/41uJGef.

Another development in the last year that suggests more cases may be coming was the Antitrust Division's March 2022 Memorandum of Understanding (MOU) with the Department of Labor (DOL), "to protect workers from employer collusion, ensure compliance with labor laws and promote competitive labor markets and worker mobility." Press Release, U.S. Dep't of Just., Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), https://bit.ly/3oCoSTD. In announcing the MOU, the agencies stressed that, under the MOU, the two agencies can refer cases of potentially illegal activity to each other. The Division entered a similar MOU with the National Labor Relations Board (NLRB) in July 2022. U.S. Dep't of Just. & NLRB, Memorandum of Understanding Between the U.S. Department of Justice and the National Labor Relations Board (July 26, 2022), https://bit.ly/3V0hSf9.

Investigations could be referred between the agencies without an MOU, but the more formal relationship under the MOU may become a force multiplier for DOJ in terms of detecting potential violations. DOL's Wage and Hour Division, for instance, employs hundreds of investigators nationwide who Division prosecutors can train to look for wage-fixing or no-poach violations. This may facilitate the detection of possible offenses and lead to further Antitrust Division investigations.

Can Juries Be Convinced?

Apart from the developing body of court rulings on the law, there is a separate question of whether juries will convict defendants for wage-fixing and no-poach conduct. The April 2022 acquittals now have been followed by the acquittals in *Manahe*, a case in which the government largely prevailed in pretrial litigation and jury instructions. With the *Patel* case not reaching the jury and no trial date for *SCA*, the potential jury appeal of these cases remains an open question, with no jury convictions obtained to date.

Will the verdicts in future cases differ, and if they do, will there be lessons to learn from the impact of different approaches to the prosecutions?

DOJ's criminal antitrust deputy recently claimed that Division prosecutors are learning from their trials and argued that the cases "have a lot of appeal" for jurors. *See* Koenig, *DOJ 'Certainly Learning' from Failed No-Poach Prosecutions*, *supra*. To date, albeit against a limited set of data points, DOJ has yet to demonstrate proof of this claim.

What Sentences Will Be Imposed?

The Antitrust Division will first have to obtain convictions to know what potential sentences might be obtained in labor market cases. But in the event that there are future convictions, what sentences are likely to follow?

To date, courts have imposed penalties only three times in the Antitrust Division's criminal labor market cases: (1) the corporate fine and restitution order against VDA; (2) the resolution negotiated in the deferred prosecution agreement with VDA's former manager, which was contingent on community service and a diversionary program; and (3) the probationary sentence for the obstruction count in *Jindal*. These penalties are not likely to have a generally deterrent effect. Will DOJ take on cases involving more widespread conduct, and if so, will it be able to obtain both convictions and then penalties that match the Division's views about the seriousness of these offenses?

Given the applicable sentencing guideline for antitrust offenses, the Division's labor prosecutions may be structurally limited as to the volume of commerce affected by the nature of the conduct alleged, which in most cases has been local and to date has not implicated the significant volumes of commerce that lead to higher recommended sentencing ranges. Apart from its ability to secure convictions, therefore, the second-level question of applicable sanctions lingers over these prosecutions.

Will Other Enforcers Jump in?

In a surprise announcement at the ABA Antitrust Section's 2023 Spring Meeting, a representative of Maryland's state attorney general's office announced that state enforcers may pursue criminal charges against anticompetitive labor practices, citing "really good guidance" from DOJ's efforts in these cases. Khushita Vasant & Chris May, *Employers Engaging in Anticompetitive Labor Practices Can Expect Criminal Charges from US States, Maryland AG Says*, MLEX (Mar. 31, 2023), https://content.mlex.com/#/content/1461005?referrer=search_linkclick.

State-level enforcement of these matters may seem far-fetched. While most states have the ability to prosecute criminally under their antitrust or unfair competition statutes, few have exercised that authority, and state enforcers wield potential sanctions that are weak compared to those available to DOJ. *See* ABA Antitrust Law Sec., *Antitrust Law Developments* at 2-10.E (9th ed. 2022). Still, the possibility of state-level enforcement further complicates the equation.

Conclusion

The Antitrust Division promised that the April 2022 acquittals in *Jindal* and *DaVita* would not dissuade it from pursuing future criminal prosecutions involving wage-fixing and no-poach conduct. Antitrust enforcement in labor markets remains a priority in the Biden administration, and the Division has been clear about its intent to use litigation to create legal precedent for the application of antitrust laws to labor markets, vowing not to back away from these cases despite trial losses.

The Division has made some progress in the intervening year, obtaining its first criminal conviction for

labor violations, securing some pretrial rulings that establish favorable precedent for other prosecutions, and formalizing interagency relationships that might lead to greater detection of wage-fixing and no-poach conduct. It is not difficult to see in these developments a modicum of progress that could favor future prosecutions.

But the Division also has experienced additional and significant setbacks, including two more trial losses, obtaining penalties with little deterrent value that are unlikely to incentivize future plea agreements, and generating additional problematic court rulings and jury instructions.

This year promises to provide still more answers, notably with regard to pending legal rulings and the eventual jury appeal in the *SCA* case, how DOJ responds to its *Patel* and *Manahe* setbacks, and whether and how the Antitrust Division charges additional cases. Mostly, however, a number of important questions for the future of criminal antitrust enforcement in labor markets remain open. Without more cases in the pipeline, the dataset will continue to be limited, and answers to these questions will remain incomplete. The only certainty appears to be the DOJ's ongoing willingness to pursue these cases.