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The State of "No-Poach" Prosecution: Is It Just Like Market Allocation After All?

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SINCE ISSUING THE OCTOBER 2016 ANTITrust Guidance to Human Resource Professionals ("HR Guidance") regarding potential antitrust violations in labor markets, the Antitrust Division of the Department of Justice ("DOJ") has been largely unsuccessful in criminally prosecuting such cases.[1] The HR Guidance makes clear that DOJ views certain "naked" agreements that restrain competition in labor markets, including no-poach and wage-fixing agreements, as criminal violations of the antitrust laws.[2] Courts and juries in the cases tried thus far, however, have not shared that view.

After releasing the HR Guidance, it took DOJ approximately four years to secure its first wage-fixing indictment in December 2020.[3] A flurry of five additional labor-related indictments followed in 2021 and early 2022.[4] In several of these cases, DOJ argued that no-poach agreements are effectively per se unreasonable market allocation agreements among competitors—a theory that repeatedly survived motions to dismiss. Despite success at the pleading stage, DOJ has failed to convince judges and jurors on the facts, and it has lost each of the four cases that were brought to trial. DOJ has successfully prosecuted only one labor case, *United States v. VDA OC LLC and Hee*, which resulted in a guilty plea, a $62,000 criminal fine, and a $72,000 restitution payment. The company manager agreed to a pretrial diversion agreement and 180 hours of community service.[5]

Despite this record, Assistant Attorney General Jonathan Kanter stated in a September 2023 speech that DOJ is "just as committed as ever to . . . using our congressionally given authority to prosecute criminal violations of the Sherman Act in labor markets."[6] Shortly after this statement, in November 2023, DOJ moved to dismiss its last pending criminal no-poach case, *United States v. Surgical Care Affiliates*—a case originally filed in January 2021.[7] DOJ moved for dismissal while a motion to dismiss was still pending, offering no explanation for its decision. In light of its recent trial record, DOJ may be reassessing its trial strategy in criminal labor market prosecutions. Only one criminal labor market case remains pending, *United States v. Lopez*—a case involving wage-fixing (but not no-poach) allegations.[8]

Why have courts and juries been reluctant to find that the no-poach conduct alleged in these cases rises to the level of a criminal antitrust violation? In the cases that DOJ has brought to date, the rulings on motions to dismiss, the jury instructions, and the jury verdicts suggest that courts and juries are skeptical that non-solicitation and no-hire agreements are categorically criminal. Instead, courts and juries appear to be requiring DOJ to prove beyond a reasonable doubt that these agreements constitute per se illegal market allocations. In these cases, courts and juries seem to struggle with evidence of employee mobility among the alleged conspirators, because the evidence suggests that strict employee allocation may not have actually occurred in practice. In two cases, *United States v. DaVita, Inc.* and *United States v. Patel*, the courts required that DOJ prove both intent to allocate the labor market and "meaningful cessation of competition" for labor.[9]

These outcomes raise the question: what is the proper antitrust standard for no-poach agreements? In the criminal cases, the rulings on motions and jury instructions suggest an approach that considers the intended purpose of the alleged agreements, the actual effects, and the relationship of the restrictions to other business purposes (e.g., ancillarity). Courts and juries appear to recognize that applying the traditional per se framework—i.e., naked market allocation—to non-solicitation agreements in the labor context may require a more nuanced approach than is required when dealing with traditional customer allocation.

Background

Despite acknowledging that no-poach agreements *can* constitute per se antitrust violations, courts and juries so far have been reluctant to convict defendants in these cases. An

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analysis of this apparent tension, particularly in the *DaVita* and *Patel* no-poach cases, may offer insight into the future of no-poach prosecutions.

In *United States v. DaVita, Inc.*, the first criminal trial for labor market allocation,[10] the DOJ charged kidney dialysis provider DaVita and its former CEO of entering into no-poach agreements with three competing healthcare companies—Surgical Care Affiliates ("SCA"), Hazel Health, and Radiology Partners. The DOJ alleged that DaVita and SCA agreed not to solicit each other's senior-level employees.[11] DaVita and SCA allegedly monitored compliance with this agreement by requiring executives and senior-level employees to obtain approval from their current employer before moving to the other company.[12] In contrast to SCA, DaVita's alleged no-poach agreements with Hazel Health and Radiology Partners were purportedly one-sided—i.e., these companies agreed not to solicit DaVita's employees. DOJ did not allege strict no-hire prohibitions in any of the agreements.

DOJ argued that these agreements were per se illegal restraints on trade under the antitrust laws.[13] In bringing the case, DOJ analogized the no-poach agreements to customer or other sell-side market allocation agreements, arguing that the defendants had agreed to allocate the covered employees by restricting the employees' ability to move jobs. After a nearly two-week trial, the jury acquitted the defendants of all charges.

In *United States v. Patel,* at the close of DOJ's case-in-chief, the court acquitted the defendants of all charges under Rule 29 of the Federal Rules of Criminal Procedure, finding insufficient evidence to establish a per se violation of the antitrust laws. During the trial, DOJ argued that the aerospace firm Pratt & Whitney entered into a hub-and-spoke no-poach conspiracy with certain aerospace engineering subcontractors.[14] DOJ alleged that the companies restricted the hiring of engineers and other skilled-laborers, both as between Pratt & Whitney and each subcontractor, and also among the subcontractors themselves.[15] As part of the alleged conspiracy, DOJ asserted that the companies refrained from proactively contacting, interviewing, or otherwise recruiting potential applicants already employed by another company.[16] Unlike in *DaVita*, where the DOJ challenged only horizontal no-poach agreements, the DOJ in *Patel* challenged hiring restrictions among companies that had both horizontal and vertical relationships.[17]

The Law in Motions to Dismiss

In both *DaVita* and *Patel*, DOJ defeated motions to dismiss by arguing that the indictments properly alleged non-solicitation agreements that constituted per se illegal horizontal market allocation agreements. The *DaVita* defendants challenged the indictment, arguing that the alleged non-solicitation agreement did not rise to the level of a per se illegal horizontal market allocation.[18] Based on allegations that the co-conspirators entered into "an agreement . . . to allocate senior-level employees by not soliciting each other's senior-level employees," the court ruled that the indictment sufficiently pleaded a market allocation scheme and acknowledged that a no-poach agreement could constitute a per se illegal horizontal market allocation agreement.[19] However, the court rejected the DOJ's request to deem all no-poach or non-solicitation agreements per se illegal, opting instead to hold that "if a naked non-solicit or no hire agreement allocates the market, they are per se unreasonable."[20]

The *Patel* defendants similarly argued that the alleged agreement was not a per se violation. In their view, DOJ alleged "a mixed vertical and horizontal agreement because the Indictment alleges the employee allocation agreement applies to employees 'working on projects for Company A,' which implies an 'essential vertical component[].'"[21] DOJ countered that the mere presence of a vertical component does not alter the analysis when the restraint itself is otherwise horizontal.[22] The court agreed with DOJ, finding that the indictment alleged that the no-poach agreement at issue operated as a market allocation agreement and that it therefore could be subject to per se treatment.[23] The court also agreed with defendants that not all no-poach agreements come under the per se rule.[24] The court stated that this determination is "highly fact specific."[25]

Unlike in *DaVita*, the *Patel* defendants also argued in their motion to dismiss that the alleged no-poach agreement was ancillary to a legitimate business collaboration—Pratt & Whitney's outsourcing arrangements with the engineering services firms.[26] The court rejected this argument, holding that the agreement, as charged in the indictment, was not ancillary because the engineering services firms allegedly competed with one another to service Pratt & Whitney.[27] The court stated that, to the extent defendants sought to dispute these allegations with facts not pled in the indictment, "such arguments are better suited for a later stage of the proceedings."[28] Although the *DaVita* defendants had not argued ancillarity, the court's brief discussion of ancillarity in its opinion on the motion to dismiss had a similar tenor, positioning the ancillarity analysis as the "final step" following a determination of whether the per se rule applies.[29] Both courts seemed hesitant to resolve definitively the ancillarity question at the motion to dismiss stage.

The Law in Jury Instructions

The jury instructions in the *DaVita* and *Patel* cases shed further light on how courts have interpreted the per se rule in no-poach cases. These instructions outlined for the jury the evidentiary burdens DOJ needed to meet to prove a per se violation. The instructions explained that DOJ must first prove that the purpose of the alleged agreement was to allocate markets. In the *Patel* case, the instructions assigned to DOJ the burden of rebutting the defendants' ancillarity argument (i.e., that the agreement was reasonably necessary to achieving a legitimate business purpose).

Horizontal Market Allocation. Citing the Second Circuit's decision in *Bogan v. Hodgkins*, both the *DaVita* and

Patel courts held that per se treatment for horizontal market allocation requires DOJ to show a "cessation of 'meaningful competition'" in the allegedly allocated labor market.[30] Jury instructions in both cases suggested that the jury could infer that the agreement's purpose was not solely market allocation if the agreement's structure and the defendants' actions resulted in significant cross-hiring among the defendants. In other words, continued cross-hiring could cast doubt on whether the agreement's true purpose was to allocate the labor market.[31]

The *Patel* defendants were acquitted in large part due to evidence indicating that the alleged restraint did not meaningfully impede competition. In its Rule 29 decision acquitting the defendants, the *Patel* court found that "[h]iring among the relevant companies was commonplace, throughout the alleged agreement"[32] and that "no reasonable juror could conclude that there was a cessation of 'meaningful competition' in the allocated market."[33] Similar arguments regarding the ability of employees to switch employers played a central role in the jury's acquittal of the *DaVita* defendants. In fact, the *DaVita* jury's only question during deliberations was for clarification on the definition of "meaningful competition,"[34] suggesting they specifically considered this key element and may have come to the same conclusion as the *Patel* court.[35]

Intent or Purpose. Both the *DaVita* and *Patel* jury instructions specified the requisite intent that DOJ needed to prove. For example, *DaVita*'s jury Instruction No. 13 required DOJ to prove, as an element of the offense, that "The defendant knowingly entered into the conspiracy *with the purpose of allocating the market with respect to that conspiracy.*"[36] Importantly, to convict in *DaVita*, this instruction required the jury to find that the *purpose* of the agreement was to allocate the labor market. Without such proof, the jury had to acquit the defendants.[37]

The *Patel* court did not ultimately adopt the same jury instruction language as *DaVita* since the court acquitted defendants before the question reached the jury, but the court clearly emphasized that, in order to convict the defendants, the jury had to find "that Defendants knowingly—that is voluntarily and intentionally—joined this conspiracy [allocating or dividing up a labor market in which they would otherwise compete], knowing of its goal and intending to help accomplish it."[38] This instruction suggested that the court intended to permit evidence of competition for employees among the defendants to help the jury determine whether defendants "actually entered into an agreement to allocate the labor market."[39]

The jury instructions in both *DaVita* and *Patel* also permitted defendants to introduce evidence of procompetitive effects from the alleged no-poach agreement to counter DOJ's market allocation claims. The *DaVita* 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 labor markets.[40] Similarly, in *Patel*, the court would have instructed the jury that "evidence of procompetitive benefits or lack of harm might be relevant to determining whether one or more Defendants knowingly entered into an agreement with the intent to aid or advance the purpose of the conspiracy."[41]

These instructions required DOJ to go beyond proving the mere existence of an agreement (all that is generally required for a per se violation), significantly increasing the burden on DOJ to prove beyond a reasonable doubt that the *purpose* of the agreement was market allocation. These instructions appear to move beyond a strict per se analysis and allow the jury to consider a broader range of evidence when assessing the defendants' intent to violate the antitrust laws.

The clear requirement adopted in the *DaVita* and *Patel* cases that the DOJ prove that the *purpose* of the agreement was to allocate labor markets resonates with analogous requirements in other criminal cases where the conduct in question was also not a clear cut per se violation. For example, in *United States v. Ramchandani*, the DOJ accused three FX traders of using chat rooms to conspire, suppress, and eliminate competition in the FX spot market by price-fixing and bid-rigging. The court in that case required DOJ to prove that the defendants' goal was to fix prices, instructing the jury that it was "not enough to find that the Defendants merely agreed to actions that might have had an effect on prices, unless you also find that unlawfully fixing the price was the Defendants' goal in taking those actions."[42] In other words, DOJ had to prove that the specific *purpose* of the agreements was to fix prices.

Ancillarity. A restraint of trade that would ordinarily be considered a per se antitrust violation may be exempt from per se treatment, and evaluated under the rule of reason, if the restraint is "ancillary" to a broader procompetitive agreement or purpose.[43] Generally, in order to be considered "ancillary," the restraint must be "subordinate and collateral" to the procompetitive agreement—that is, it must facilitate the procompetitive effects of the agreement.[44] At the motion to dismiss stage of *Patel*, the court held that it was required to accept the allegations in the indictment as true and could not prematurely consider ancillarity defenses. Later in the case, the court clarified that this earlier decision did not mean that ancillary restraint arguments would be rejected as a matter of law.[45] The court explained that "[e]vidence 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."[46] By acknowledging the potential for an ancillary-restraints defense, the *Patel* court provided defendants the opportunity to introduce evidence of the procompetitive benefits of the allegedly anticompetitive hiring restriction. The *Patel* court also placed the burden on DOJ to rebut the defendants' ancillary restraint arguments.[47]

A Different Approach in the Seventh Circuit. A recent Seventh Circuit decision in *Deslandes v. McDonald's USA, LLC*, involving a no-poach restriction in the civil context, examined the ancillary restraints doctrine and adopted a narrower view than that contemplated by the court in *Patel*.[48] The plaintiff in *Deslandes* challenged the legality of a no-poach clause in McDonald's franchise agreements that prohibited franchisees from soliciting employees from other franchise locations nationwide.[49] On a motion for judgment on the pleadings, the district court dismissed the complaint, concluding that the challenged no-poach clause was ancillary to the franchise agreement.[50]

The Seventh Circuit panel, in an opinion written by Judge Frank Easterbrook, reversed the dismissal. The panel found the district court's ancillarity analysis flawed because it relied on the food production benefits to consumers as a procompetitive rationale for the no-poach restrictions and required the plaintiff to "anticipate and plead around a defense."[51] The Seventh Circuit held that only procompetitive benefits directly impacting the employees affected by the restriction should be considered as part of the ancillarity analysis.[52] While increased food production would not be a procompetitive justification for no-poach clauses, the Seventh Circuit acknowledged that an employer might be able to justify hiring restrictions to recoup investments in employee hiring and training, so long as those restrictions were narrow enough to terminate upon recoupment of that investment.[53] The Seventh Circuit seemed to suggest that, at least in the context of this case, ancillarity should not be assessed until there is a comprehensive record of the facts and economic data.[54] The Seventh Circuit remanded the case to the district court for further proceedings.

Whether other courts adopt the Seventh Circuit's interpretation of the ancillary restraints doctrine in the *Deslandes* case, such as the types of relevant evidence and the appropriate burden of proof, remains to be seen.[55] Non-solicit provisions are common in supplier agreements, and they also play a role in safeguarding confidential business negotiations and other looser forms of collaboration. The line between justifiable conduct and conduct that triggers the application of the per se rule may therefore be less clear in the labor context than it is in more traditional antitrust contexts, such as price-fixing, bid-rigging, and customer allocation. This lack of clarity, coupled with the relative lack of judicial precedent in this area, likely contributes to courts' and juries' hesitancy to treat such conduct as criminal.

Lessons Learned

Courts and juries appear to recognize the need for a more nuanced approach when evaluating alleged non-solicitation agreements in the labor context compared to traditional per se violations, such as customer allocation agreements. The *DaVita* jury acquitted the defendants of all charges, apparently after finding that the challenged non-solicitation agreement did not meaningfully reduce competition and therefore did not rise to the level of per se market allocation. In acquitting the defendants after the DOJ's case-in-chief, the *Patel* court suggested that "the Government has tried to expand the common and accepted definition of market allocation in a way not clearly used before."[56] These decisions reflect an apparent reluctance to subject non-solicitation within labor markets to criminal liability.

The 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. The *Patel* court noted that the "*per se* rule is applied and a criminal prosecution is warranted only if 'courts have had considerable experience with the type of restraint at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.'"[57] Given the novelty of criminal enforcement of these non-solicitation agreements, imposing jail time on defendants may seem out of proportion, especially considering the potential justifications under the ancillarity doctrine in many of these cases.

Another potential explanation for courts' and juries' reticence to impose criminal liability in the non-solicitation cases brought to date may be skepticism that the purpose of the agreements was to allocate labor markets. Despite DOJ's arguments in both *DaVita* and *Patel* that their respective agreements were so anticompetitive as to qualify as per se violations, the factual record in both cases also revealed that these agreements did not meaningfully prevent workers from moving between jobs. For example, in *DaVita*, employees could and did switch jobs and the mechanism for enforcing the non-solicitation agreement actually increased competition for employees. Also, unlike in many customer or market allocation cases, the defendants in both *DaVita* and *Patel* had legitimate relationships with one another that may have raised doubts as to whether the arrangements were purely naked restraints. This combination of factors countered DOJ's central argument that the purpose of the agreement was to allocate labor and likely contributed to the jury's ultimate acquittal of the defendants[58] Although courts recognize the potential for circumstances where non-solicitation agreements could involve a cessation of meaningful competition and effectively allocate a labor market, the cases brought to date by DOJ have not provided sufficient evidence to support such a finding.

Conclusion

Despite its losses, DOJ has made clear through numerous public statements that it believes that criminally prosecuting no-poach conduct is righteous, and it has shown no signs of letting up on this initiative. Companies should therefore remain proactive in ensuring that non-solicitation, no-hire, and other labor market restraints are well justified by procompetitive benefits and narrowly tailored to achieve those benefits. This is particularly true in light of the Seventh Circuit's treatment of the ancillarity restraints doctrine in

Deslandes. Companies that do find themselves the subject of an enforcement action over non-solicits may have strong bases to vigorously defend their practices in the current legal landscape. ■

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download. In the years preceding the guidance, the Antitrust Division brought a number of high-profile civil lawsuits against Silicon Valley companies like eBay, Adobe, and Apple, in order to terminate existing no-poach agreements. *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).

[2] *Id*.

[3] Indictment at 2, United States v. Jindal, No. 4:20-cr-00358 (ALM) (E.D. Tex. 2020).

[4] *See, e.g.*, Indictment, United States v. Surgical Care Affiliates, LLC, No. 3:21-cr-0011-L (N.D. Tex. 2021); Indictment, United States v. DaVita Inc., No. 1:21-cr-00229 (RBJ) (D. Colo. 2021) (hereinafter DaVita Indictment); Indictment, United States v. VDA OC LLC and Hee, No. 2:21-cr-00098 (RFB-BNW) (D. Nev. 2021); Indictment, United .States v. Patel, No. 3:21-cr-00220 (VAB) (D. Conn. 2021) (hereinafter Patel Indictment); Indictment, United States v. Manahe, No. 2:22-cr-00013 (JAW) (D. Me. 2022).

[5] 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.

[6] U.S. Dep't of Just., 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.

[7] United States' Motion to Dismiss, 3:21-cr-00011-L (N. D. Tex.), ECF 203.

[8] Indictment, 2:23-cr-00055-CDS-DJA (D. Nev.), ECF No. 1.

[9] *See* Jury Instrs., No. 1:21-cr-00229 (D. Colo. 2022), ECF 254 (hereinafter DaVita Jury Instructions), at 15; Jury Instrs., No. 3:21-cr-00220 (D. Conn. 2023), ECF 456 (hereinafter Patel Jury Instructions), at 32, 36; Order Granting Mot. Acquittal at 12, No. 3:21-cr-00220 (D. Conn. 2023), ECF 599 (hereinafter Patel Rule 29 Order), at 18.

[10] Order Resolving Disputes Proposed Jury Instrs. at 3, No. 1:21-cr-00229 (D. Colo. 2022), ECF 214 (hereinafter DaVita Jury Instruction Order).

[11] DaVita Indictment at 2.

[12] *Id.* at 4.

[13] *Id.* at 3.

[14] Patel Indictment.

[15] *Id.* at 4-5.

[16] *Id.* at 5.

[17] *Id.* at 4-5.

[18] Order Den. Def.'s Mot. Dismiss at 6, No. 1:21-cr-00229 (D. Colo. 2022), ECF 132 (hereinafter DaVita MTD Order).

[19] *Id.* at 6-7, 9-10.

[20] *Id.* at 15.

[21] Order Den. Def's. Mot. Dismiss at 31, No. 3:21-cr-00220 (D. Conn. 2022), ECF 257 (hereinafter Patel MTD Order).

[22] *Id.*

[23] *Id.* at 17.

[24] *Id.* at 20.

[25] *Id.* at 21.

[26] *Id.* at 23.

[27] *Id.* at 29.

[28] *Id*.

[29] DaVita MTD Order at 9.

[30] Patel Rule 29 Order, at 12.

[31] *Id.* at 13.

[32] Patel Rule 29 Order, at 18.

[33] *Id*.

[34] Trial Tr. Day 9 at 1703:4-6, No. 1:21-cr-00229-RBJ (D. Colo. 2022), ECF 295 ("The jury has, as you know, sent out a question. The question is, Can we have a definition of, quote, meaningful competition?").

[35] Patel Rule 29 Order at 18.

[36] DaVita Jury Instructions at 15 (emphasis added).

[37] *Id.*

[38] Patel Jury Instructions at 32, 36.

[39] *Id.*

[40] DaVita Jury Instructions at 21-22.

[41] Patel Jury Instructions at 48.

[42] Req. to Charge at 72, No. 1:17-cr-00019 (S.D.N.Y. 2018), ECF 114.

[43] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986).

[44] *Id*.

[45] Ruling and Order on Pretrial Mots. at 15, No. 3:21-cr-00220 (D. Conn. 2023), ECF 457.

[46] *Id*. at 17.

[47] *Id.* at 50 and n.24 (*citing Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) for proposition that it is plaintiff's burden to prove application of the per se rule).

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

[49] *Id.* at 4-5,7.

[50] *Id.* at 2.

[51] *Id.* at 5-6.

[52] *Id.*

[53] *Id.* at 6-7.

[54] *Id.*

[55] For example, as noted above the *Patel* court held that the Government held the burden on ancillarity.

[56] Patel Rule 29 Order at 18 n.7.

[57] *Id.* at 7.

[58] DaVita Jury Instruction Order at 6.