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DOJ's Aggressive Prosecution of No-Poach Cases Results in Third Trial Loss

Yesterday, a federal jury in Maine acquitted healthcare executives in *U.S.* v. *Manahe*, marking DOJ's latest loss in criminal antitrust labor market cases. Over the past year, juries have acquitted defendants in both the wage-fixing and no-poach contexts. The Antitrust Division's aggressive prosecution of labor market cases began as part of an enforcement initiative that was announced in joint guidance with the FTC in 2016. Since then, DOJ has consistently reinforced its intention to criminally prosecute no-poach and wage-fixing agreements. As can be gleaned from the uptick in criminal antitrust trials, DOJ is staying true to its word. Yet its inability to obtain convictions when its evidence and theories are put to the test at trial perhaps should give DOJ reason to reconsider.

The acquittal in *Manahe* illustrates the challenges of criminally prosecuting no-poach agreements under the *per se* rule. In January 2022, DOJ indicted four home care managers, alleging they had fixed wages and agreed not to hire each other's staff. Such conduct, prosecutors claimed, was *per se* unlawful and a violation of Section 1 of the Sherman Act. Defense counsel insisted that no such agreements existed, and, after a two-week trial, the jury agreed. Failing to find that the executives entered into these agreements, the jurors concluded no conspiracy existed and issued a total acquittal.

The cases in this arena that have been tried to verdict have confirmed that these prosecutions are fraught with problems. First, confronted with its longstanding policy of criminally prosecuting only *per se* violations of antitrust law — limited to price-fixing, bid-rigging, and market allocation schemes because they are so "manifestly anticompetitive" as to lack "any redeeming virtue" — DOJ has aggressively sought to include a new breed of cases as *per se* illegal. The repeated acquittals suggest that juries don't agree with this packaging. Second, as much as DOJ has sought to avoid it in these prosecutions, there is a range of legitimate business reasons for a variety of labor market agreements — despite DOJ's unsuccessful efforts to sell such agreements as all cut from the same "manifestly anticompetitive" cloth. Indeed, companies regularly enter into labor-related agreements for pro-competitive reasons that include negotiating business collaborations such as a divestiture or consulting project, protecting confidential information, and fostering employee development. In pursuing these cases criminally, DOJ has sought to force juries to ignore these potential pro-competitive effects. Third, DOJ's efforts to treat these labor agreements as suddenly *per se* illegal in criminal prosecutions has raised serious constitutional concerns about foundational rules of fair notice, due process, and the fundamental right to mount a defense.

This area of the law is rapidly evolving, and there are other no-poach cases still pending. DOJ's next criminal no-poach case, *U.S.* v. *Patel*, begins jury selection in less than a week. Although DOJ's string of trial losses suggests its aggressive approach to antitrust enforcement has not persuaded jurors, DOJ successfully secured a plea agreement by a healthcare staffing company for allocating employees and fixing wages. It is therefore increasingly important for clients to seek counsel to ensure their hiring and compensation arrangements are both as clear as possible and consistent with the law.

Ilene Knable Gotts
David B. Anders
Kevin S. Schwartz
Yolanda Bustillo