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Restrictive Covenants: Enforceability Challenges and Other Options to Protect Business Interests


Andrew Vail, Jason Bradford, Casey Jedele, and Lauren Benigeri


Agenda


- What are Restrictive Covenants?
- Why Restrictive Covenants?
- Shifting Landscape
- Recommendations
- Questions

What are Restrictive Covenants?



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- 1. Non-disclosure**
 - 2. Non-competition**
 - 3. Non-solicitation**

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Variations on Non-Competes

- Industry or Competitor
- Type of work
- Geographic scope
- Temporal scope

“[The covenant] prohibits [Employee] from providing services to or affiliating with entities who never competed with [Company A] and with whom [Employee] never interacted. This restriction is overbroad and unreasonable.”

Forum US, Inc. v. Musselwhite, 2020 WL 4331442, at *25 (Tex. App. Jul. 28, 2020)

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Variations on Non-Solicits

- Employee roles
- Service-provider relationships
- Geographic scope
- Temporal scope
- Solicited vs. Unsolicited Business

“Under the plain language of the non-solicitation provision at issue . . . [Employee] is prohibited from accepting certain unsolicited business. This prohibition is a restraint on the exercise of trade.”

Miller v. Honkamp Krueger Financial Services, Inc. et al., 9 F.4th 1011, 1017 (8th Cir. 2021)

No-poach or Anti-raiding



HORIZONTAL
AGREEMENTS



VERTICAL
AGREEMENTS



Why Restrictive Covenants?

Confidential Information

“The Court finds that the agreement as to non-solicitation of [Company B’s] employees . . . serves [Company B’s] legitimate business interest in protecting confidential information”

Adecco USA, INC. v. Staffworks, Inc., 2021 U.S. Dist. LEXIS 117445, at *23 (NDNY June 23, 2021)



The fall out can be catastrophic...



“[Defendant] does not challenge the enforceability of the confidentiality requirements, nor should he, given they reasonably seek to protect [Company C’s] trade secrets”

Perficient, Inc. v. Munley, 2021 U.S. Dist. LEXIS 72506, at *22–23 (E.D. Mo. Apr. 15, 2021)



JENNER & BLOCK

PRACTICE SERIES

UNDERSTANDING AND LITIGATING TRADE SECRETS

*An Outline for Analyzing the Statutory and
Common Law of Trade Secrets in Illinois*

DEBBIE L. BERMAN
APRIL A. OTTERBERG
MIRIAM J. WAYNE

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Workforce stability, employer reputation & client relationships

“Because it appears that the covenant restricting the solicitation of [Company D’s] employees was reasonably calculated to protect [Company D’s] interest in maintaining a stable work force, we find that this portion of the restrictive covenant was enforceable and not void”

Arpac Corp. v. Murray, 226 Ill.App.3d 65, 76 (Ill. App. Ct. 2d Dist. 1992)



Shifting Landscape

“There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal”

United States v. Topco Assocs., 405 U.S. 596, 607 (1972)

Price fixing: outputs *and* inputs



Executive Order on Promoting Competition in the American Economy

JULY 09, 2021 • PRESIDENTIAL ACTIONS

JENNER & BLOCK

July 12, 2021

Labor and Employment Trade Secrets and Restrictive Covenants Biden Administration Announces Plans to Curtail Non-Compete Agreements for Workers

By: [Debbie L. Berman](#), [Jason M. Bradford](#), [Margaret M. Hlousek](#), [Joseph J. Torres](#), and [Andrew W. Vail](#)

On Friday, July 9, 2021, President Biden signed a sweeping Executive Order with the stated purpose of seeking to increase competition in the American economy and counter corporate consolidation.^[1] The Executive Order is a further signal that the Biden administration intends to take an aggressive view of federal antitrust laws, with the intent of increasing competition in the labor market. Specifically, the Executive Order directs the Federal Trade Commission to issue rules curtailing the "use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."^[2] As we discuss below, the new Executive Order is an extension of the existing trend of enforcement against other restrictive agreements like anti-poaching agreements. Employers should consider what actions they should take to prepare for possible regulatory changes.

The Biden Administration Indicates Antitrust Enforcement in the Labor Market is a Top Priority

In light of the widespread proliferation of restrictive covenants in employment contracts, the Executive Order's provisions relating to non-compete agreements will affect many employers. According to the White House, approximately half of employers enter non-compete agreements with at least some of their workers.^[3] A 2019 study from the Economic Policy Institute (EPI) estimated that between 36 million and 60 million workers are subject to non-compete agreements.^[4] Moreover, the EPI found evidence that use of such agreements is growing.^[5]

The White House takes the position that non-compete agreements are a barrier for workers to change jobs to better-paying options.^[6] The government contends that banning or limiting non-compete agreements will make it easier for workers to change jobs and obtain higher wages.^[7]

NON-COMPETE CLAUSES IN THE WORKPLACE

Examining Antitrust and Consumer Protection Issues



Federal Trade Commission
January 9, 2020
8:30 am to 5:30 pm

www.ftc.gov/noncompetes | [#NonCompetesFTC](https://twitter.com/NonCompetesFTC)

April 27, 2022

DOJ Antitrust Division Suffers Back-to-Back Trial Defeats In Wage Fixing And “No Poach” Cases

Jonathan Braunstein

Seyfarth Shaw LLP

+ Follow Contact

Last week, the United States Department of Justice (“DOJ”) Antitrust Division suffered back-to-back trial defeats in its recent enforcement initiative under the Sherman Act to stop employers from using allegedly anticompetitive practices to suppress wages and employee mobility. In the first case, the DOJ’s criminal wage-fixing prosecution ended with not guilty verdicts. In the second, a national healthcare provider and its former CEO were acquitted of charges involving allegedly illegal “no-poach” agreements.

On Thursday, April 14, 2022, in *United States v. Jindal*, a Texas federal jury returned a near total loss to the DOJ, finding the former owner and the former director of a physical therapist staffing company not guilty of orchestrating a wage-fixing scheme. The DOJ had alleged in the indictment, filed in December, that the defendants conspired with competing companies providing physical therapy services to suppress the wages of physical therapists and assistants by providing each other non-public information about the rates paid to those physical therapists and assistants; and paying physical therapists at collusive and noncompetitive rates.

According to legal news outlets, during the six-day trial prosecutors argued that the defendants had worked together to reach out to the owners

THE NATIONAL LAW REVIEW

Despite Defense Verdicts in Healthcare Wage-Fixing Suits, Feds Remain Resolute

Tuesday, May 3, 2022

Cases generated case law that will aid antitrust enforcers and private plaintiffs in future actions.

Antitrust law enforcers at the Department of Justice and Federal Trade Commission remain dedicated to increasing competition in several rapidly consolidating industries, including healthcare and labor markets. Despite two losses handed to them by juries in Texas and Colorado in favor of defendant executives, they vowed to continue their accountability crackdown. They also remain committed to exploring ways to combat the harmful effects of over-concentration on patients, workers, and the markets themselves – this includes a renewed focus on vertical integration, which has already had some impact in the technology sector. (A giant chipmaker recently scrubbed its proposed multi-billion-dollar purchase of a key producer in the chip supply chain in the face of antitrust scrutiny.)

Jury Verdicts

On April 14, 2022, following an eight-day trial in Texas, the jury found the former owner, Neraj Jindel, and the former clinical director of a physical therapist staffing company, not guilty of orchestrating a scheme to fix rates and wages paid to therapists for in-home therapy. But the jury did find Jindel guilty of obstructing a 2017 FTC investigation into the alleged scheme. The obstruction finding comes with a statutory maximum penalty of five years in prison and a \$250,000 fine. Jindel is awaiting sentencing (*United States v. Jindal, et al.*, No. 4:20-CR-358, E.D. Texas, Sherman Div.).

DaVita, Ex-CEO Acquitted In Antitrust No-Poach Trial

By [Cara Salvatore](#) · 

DaVita Inc. (April 15, 2022, 6:24 PM EDT) -- A Colorado federal jury on Friday acquitted DaVita Inc. of its former chief executive on all counts of conspiring with three other companies to suppress competition in the market for employees, handing the U.S. Department of Justice a second consecutive high-profile loss in its crackdown on employment-related antitrust crimes.

The verdict came just a day after a federal jury in Texas rejected most charges against the former CEO and former clinical director of a physical therapist staffing company in the DOJ's first-ever criminal wage-fixing case.

In the DaVita case, the jury found that the kidney dialysis company and its former CEO Kent Thiry conspired to turn the once financially distressed company into an outpatient-care powerhouse over the course of decades — did not coerce three companies run by DaVita alumni — Surgical Care Associates, Radiology Partners and Hazel Health — to stay away from his workforce.

Over the week and a half, the jury heard from insiders at SCA and Radiology Partners. Many testified under immunity or leniency agreements.

The case was an early test of the DOJ's theory that striking such deals can be a "per se" violation of the Sherman Act regardless of their effects.

Judge R. Brooke Jackson had denied the defendants' earlier motion to dismiss on the grounds that the alleged scheme constituted a horizontal market allocation and could conceivably be a per se antitrust violation.

The court was stuck with that finding and denied the defendants' motions for judgment of acquittal based on a Sixth Circuit decision.

The court was stuck with that finding and denied the defendants' motions for judgment of acquittal based on a Sixth Circuit decision. In closing arguments Wednesday the prosecutors argued the agreements were real by all, and that it didn't matter whether they worked perfectly in practice.

The defense said the three companies' executives wanted to "mollify" Thiry and keep him in the company. They argued Thiry's intent in his dealings with the others was never malevolent, but simply to know about possible departures so that he could, in fact, compete for

STATE OF NEW YORK

933

2021-2022 Regular Sessions

IN SENATE

(Prefiled)

January 6, 2021

Introduced by Sen. GIANARIS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to actions or practices that establish or maintain a monopoly or restraint of trade, and in relation to authorizing a class action lawsuit in the state anti-trust law

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. This act shall be known and may be cited as the "Twenty-
2 First Century Anti-Trust Act".
3 § 2. Legislative findings. The legislature hereby finds and declares
4 that there is great concern for the growing accumulation of power in the
5 hands of large corporations. While technological advances have improved
6 society, these
7 aspects of our
8 governments ide
9 after decades
10 and federal gov
11 cartels, monop
12 is time to upd
13 large corporat
14 the state. The
15 actions which

State of California

BUSINESS AND PROFESSIONS CODE

Section 16600

16600. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

(Added by Stats. 1941, Ch. 526.)

EMPLOYMENT
(820 ILCS 90/) Illinois Freedom to Work Act.

(820 ILCS 90/1)

Sec. 1. Short title. This Act may be cited as the Illinois Freedom to Work Act. (Source: P.A. 99-860, eff. 1-1-17.)

(820 ILCS 90/5)

Sec. 5. Definitions. In this Act:

"Adequate consideration" means (1) the employee worked for the employer for at least 2 years after the employee signed an agreement containing a covenant not to compete or a covenant not to solicit or (2) the employer otherwise provided consideration adequate to support an agreement to not compete or to not solicit, which consideration can consist of a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves.

"Covenant not to compete" means an agreement between an employer and an employee that is entered into after the effective date of this amendatory Act of the 102nd General Assembly that restricts the employee from performing:


- (1) any work for another employer for a specified period of time;
(2) any work in a specified geographical area; or
(3) work for another employer that is similar to employee's work for the employer included as a party to the agreement.


"Covenant not to compete" also means an agreement between an employer and an employee, entered into after the effective date of this amendatory Act of the 102nd General Assembly, that by its terms imposes adverse financial consequences on the former employee if the employee engages in competitive activities after termination of the employee's employment with the employer.


"Covenant not to compete" does not include (1) a covenant not to solicit, (2) a confidentiality agreement or covenant, (3) a covenant or agreement prohibiting use or disclosure of trade secrets or inventions, (4) invention assignment agreements or agreements, (5) a covenant or agreement entered into by a person purchasing or selling the goodwill of a business or otherwise transferring or disposing of an ownership interest, (6) clauses or provisions of a notice of termination of employment, during which notice the employee remains employed by the employer and receives compensation, or (7) agreements by which the employee agrees not to reapply for employment to the same employer after termination of the employee.



Recommendations

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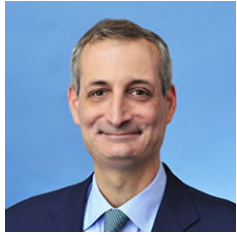


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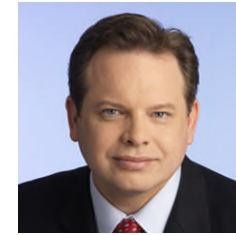
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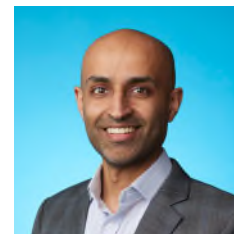
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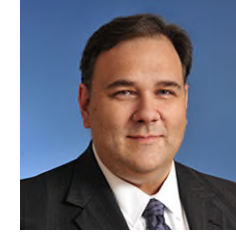
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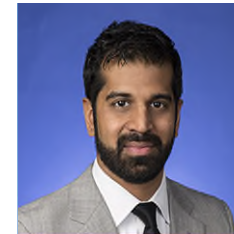
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