

Trade Secrets and Restrictive Covenants

Latest Decisions in Criminal No-Poach and Civil Non-Compete Cases Indicate Continuing Scrutiny of Restrictive Covenants

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Parties in Criminal No-Poach Case Reach Pre-Trial Resolution

Recently, the parties in *United States v. Hee* notified District Court Judge Boulware of the District of Nevada that they reached a preliminary plea deal.^[1] The case involves healthcare staffing company, VDA, and its former regional manager, Ryan Hee. In March 2021, VDA and Hee were indicted for conspiracy in restraint of trade in violation of the Sherman Act.^[2] Specifically, the Department of Justice alleged defendants conspired with competitors not to recruit or hire one another's employees and to refrain from raising wages.^[3]

Hee is part of a recent trend of criminal prosecutions targeting wage suppression and no-poach agreements. The potential plea deal comes on the heels of two recent acquittals in criminal antitrust prosecutions, *United States v. DaVita* and *United States v. Jindal*, which involved similar allegations. As we explain in recent client alerts, unique factors may have contributed to the government's trial losses in *Davita and Jindal*.^[4] Should the *Hee* agreement be finalized and end in guilty pleas from the defendants, this would mark the Department of Justice's first win in employment-related antitrust prosecutions.^[5]

Seventh Circuit Affirms Denial of Preliminary Injunction That Would Enforce Non-Competition and Non-Solicitation Clauses Against Former Employees

Separately, shortly after the *Hee* plea was announced, the Seventh Circuit Court of Appeals in *DM Trans, LLC v. Lindsey Scott, et al* affirmed a Northern District of Illinois court's refusal to grant a preliminary injunction that would have enforced non-competition and non-solicitation obligations on a logistic company's former employees.^[6] The district court found that the plaintiff company would be unlikely to succeed on the merits of its claims. The court opined that the non-competition and non-solicitation agreements would likely be found unenforceable under applicable Texas laws "due to the lack of consideration" from the employer and because defendant employees would be "heavily harmed" by an injunction.^[7] The district court explained that because the plaintiff company offered benefits already promised to and accepted by the employees in exchange for signing the agreements, the furnishment of such benefits would not suffice as consideration for the unrelated restrictive covenants.^[8] The Seventh Circuit agreed with the district court and affirmed the denial of a preliminary injunction. In evaluating the balance of harms between the plaintiff employer and defendant employees, the court noted that the district court was "well within its discretion to consider and weigh the deleterious effects that an injunction...would impose on the defendant employees."^[9] The Seventh Circuit's language in *DM Trans* marks continuing judicial skepticism toward enforcing broad restrictive covenants against former employees.

Employers Should Remain Cautious When Entering Into and Enforcing Restrictive Covenants

Employers can take steps to mitigate risks related to restrictive covenants. First, as illustrated by *DM Trans*, non-solicitation and non-competition agreements should be drafted in light of relevant state law. For example, some states are more likely to enforce restrictive covenants that are entered into in return

for meaningful consideration. Second, as illustrated by *Hee*, employers should be wary of any entering into any agreements with competitors that could run afoul of federal and state antitrust laws. This includes agreements not to hire or recruit one another's employees. Further, when seeking to enforce restrictive covenants, we encourage businesses to tread carefully, particularly if doing so involves engaging with the former employee's new employer. Doing so reduces the risk of allegations of an anti-competitive conspiracy between competitors.^[10]

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- [1] *United States v. Hee*, No. 2:21-cr-00098-RFB-BNW, ECF No. 92 at 2 (D. Nev. June 24, 2022) (“The parties are currently in the process of negotiating this case and have reached a preliminary resolution as to both defendants that now needs to be confirmed in writing.”).
- [2] *United States v. Hee*, No. 2:21-cr-00098-RFB-BNW, ECF No. 1 (D. Nev. Mar. 30, 2021).
- [3] *Id.* at 4 (D. Nev. Mar. 26, 2021) (Defendants “knowingly entered into and engaged in a conspiracy to suppress and eliminate competition for the services of nurses by agreeing to allocate nurses and to fix the wages of those nurses.”).
- [4] See Department of Justice Prosecutions in Employment-Related Antitrust Suits Fall Flat in *Davita, Inc. and Jindal* (Apr. 27, 2022), <https://jenner.com/library/publications/21770>; DOJ Continues to Push Against Non-Competes, Non-Solicitations, and Other Post-Employment Restrictions (Mar. 1, 2022), <https://jenner.com/library/publications/21633>.
- [5] Bryan Koenig, “No-Poach Case Nears Plea In Would-Be 1st DOJ,” *LAW 360* (June 27, 2022), https://www.law360.com/competition/articles/1506370/no-poach-case-nears-plea-in-would-be-1st-doj-win?nl_pk=cf0430c5-9e28-4f44-be9d-7809592564a8&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2022-06-28.
- [6] *DM Trans, LLC v. Lindsey Scott, et al*, No. 21-3101, ECF No. 50 (7th Cir. June 28, 2022).
- [7] *DM Trans, LLC v. Lindsey Scott, et al*, No. 1:21-cv-03634, ECF No. 72 at 25, 34 (N.D. Ill. Oct. 26, 2021).
- [8] *Id.* at 21.
- [9] *DM Trans, LLC v. Lindsey Scott, et al*, No. 21-3101, ECF No. 50 at 23 (7th Cir. June 28, 2022).
- [10] See also FTC May Wade into Enforceability of Non-Compete Agreements (Jan. 16, 2020), <https://jenner.com/library/publications/19503>; Employers Take Note: State AGs Urge FTC to Step up Scrutiny of Employee Restrictions (Aug. 1, 2019), <https://jenner.com/library/publications/19184>; Biden Administration Announces Plans to Curtail Non-compete Agreements for Workers (July 12, 2021), <https://jenner.com/library/publications/21119>; The Biden White House Ramps up Antitrust Enforcement and Reform (July 20, 2021), <https://jenner.com/library/publications/21136>.
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