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Client Alert: The Department of Justice Fails to Persuade Jury in Most Recent No-Poach Prosecution Defeat

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The DOJ Loses Jury Trial on No-Poach Conspiracy Charges.

In the wake of the Federal Trade Commission's attack on non-competes,[1] the Department of Justice (DOJ) lost its most recent fight in its related battle against no-poach agreements. Last week, in *United States v. Manahe et al.*, a federal jury in the United States District Court for the District of Maine acquitted four defendants of conspiring to fix their employees' wages in restraint of trade.[2] Prosecutors accused owners of separate home health care agencies of agreeing to not hire each other's employed caretakers and to not raise their wages above $16 per hour in a purported attempt to preserve profits.[3] After a two-week trial, the jury handed down "not guilty" verdicts on all counts.[4]

While Prosecutors Won on the Law, They Were Foiled by the Facts.

The prosecutors in *Manahe* secured a favorable interpretation of the antitrust laws, but still failed to demonstrate that the defendants actually entered into an agreement in violation of those laws. Specifically, they convinced the court to treat no-poach agreements as *per se* violations of the Sherman Act.[5] This meant that as long as the jury found the defendants entered into a no-poach agreement, they could convict without finding that the agreement had anticompetitive effects.[6] Accordingly, the jury was instructed to find the defendants guilty if they were convinced, beyond a reasonable doubt, that the defendants actually entered into an agreement to fix wages and to not hire each other's employees.[7]

The prosecution presented evidence that the defendants communicated via WhatsApp, Zoom, and in-person meetings about their plans to fix wages and not hire each other's employees, and even drafted an agreement to that end.[8] Yet, as defense counsel pointed out, the defendants had never actually signed that agreement, nor did they act in accordance with its terms, often paying higher wages than the agreements would have dictated.[9] These evidentiary shortcomings allowed the defendants to prevail.

Manahe **Marks the Third Acquittal of Employment-Related Antitrust Defendants.**

This is the DOJ's third loss in its recent push to criminally prosecute employment-related antitrust violations. Last year, juries in *United States v. DaVita Inc.*—another no-poach case—and *United States v. Jindal*—a wage-fixing case—acquitted defendants accused of similar misconduct to that charged in *Manahe*.[10] In fact, the DOJ's only recent win was achieved via plea deal.[11] The DOJ's recent enforcement efforts have yet to successfully convict no-poach or wage-fixing defendants in front of a jury.

In all three acquittals thus far, prosecutors could not convince juries to convict under expansive interpretations of the antitrust laws. In *Manahe* and *Jindal*, these failures stemmed from weak prosecutorial evidence, with the unsigned agreement in *Manahe* and the government's star witness reversing on the stand in *Jindal*.[12] In *DaVita Inc.*, the DOJ's loss may have had more to do with jury instructions that veered away from *per se* liability than the evidence.[13] The import of these impediments—and whether the government may win over juries with cases not bridled by them—remains to be seen.

The DOJ's Campaign Against No-Poaches Continues this Month.

Despite its track record, the DOJ's fight against no-poach and wage fixing agreements continues with another case beginning trial this week and expecting to go into May.[14] Regardless of the outcome, the DOJ is sure to persist in its aggressive attempt to secure criminal convictions for no-poach agreements. In parallel, the FTC will continue its crusade against non-competes, through both its proposed rule and its increasingly zealous enforcement strategy.[15] Even with the DOJ's recent losses, it is important for employers to note that these cases have mostly failed on the facts and that no-poach agreements are still largely considered *per se* violations of federal antitrust laws. Companies should continue avoiding entering into agreements with competitors to fix wages or to not hire one another's employees.

Footnotes

[1] The FTC Proposes Ban on Non-Competes (Jan. 6, 2023), https://www.jenner.com/en/news-insights/publications/client-alert-the-ftc-proposes-ban-on-non-competes; FTC Director's Comments Continue the Concern and Confusion about Proposed Non-Compete Ban (Jan. 12, 2023), https://www.jenner.com/en/news-insights/publications/client-alert-ftc-spokesperson-tries-to-offer-clarity-but-creates-some-confusion-in-qanda-on-proposed-rule-banning-non-competes; Stakeholders Speak Out During Webinar on FTC's Proposed Rule Banning Noncompetes (Mar. 6, 2023), https://www.jenner.com/en/news-insights/publications/client-alert-stakeholders-speak-out-during-webinar-on-ftcs-proposed-rule-banning-noncompetes.

[2] Cara Salvatore, "Home Health Execs Acquitted in Latest DOJ Antitrust Loss," Law360 (Mar. 22, 2023), https://www.law360.com/health/articles/1586974?nl_pk=e528abe3-aa8a-430a-9727-c47dbd1f0c81&utm_source=newsletter&utm_medium=email&utm_campaign=health&utm_content=2023-03-23&nlsidx=0&nlaidx=0.

[3] *United States v. Manahe, et al.*, No. 2:22-cr-00013, ECF No. 1 at 6 (D. Me. Jan. 27, 2022).

[4] Cara Salvatore, "Home Health Execs Acquitted in Latest DOJ Antitrust Loss," Law360 (Mar. 22, 2023), https://www.law360.com/health/articles/1586974?nl_pk=e528abe3-aa8a-430a-9727-c47dbd1f0c81&utm_source=newsletter&utm_medium=email&utm_campaign=health&utm_content=2023-03-23&nlsidx=0&nlaidx=0.

[5] *United States v. Manahe, et al.*, No. 2:22-cr-00013, ECF No. 182 at 11–12 (D. Me. Feb. 27, 2023).

[6] *Id.* at 12.

[7] *See United States v. Manahe, et al.*, No. 2:22-cr-00013, ECF No. 150 at 16 (D. Me. Jan. 18, 2023); *United States v. Manahe, et al.*, No. 2:22-cr-00013, ECF No. 154 at 14 (D. Me. Jan. 23, 2023).

[8] Cara Salvatore, "Home Health Execs Acquitted in Latest DOJ Antitrust Loss," Law360 (Mar. 22, 2023), https://www.law360.com/health/articles/1586974?nl_pk=e528abe3-aa8a-430a-9727-c47dbd1f0c81&utm_source=newsletter&utm_medium=email&utm_campaign=health&utm_content=2023-03-23&nlsidx=0&nlaidx=0.

[9] Bryan Koenig, "Juries Not Buying DOJ Antitrust Labor Push as Losses Mount," Law360 (Mar. 23, 2023), https://www.law360.com/competition/articles/1588981?nl_pk=cf0430c5-9e28-4f44-be9d-7809592564a8&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-03-24&nlsidx=0&nlaidx=0.

[10] Department of Justice Prosecutions in Employment-Related Antitrust Suits Fall Flat in *Davita Inc.* and *Jindal* (Apr. 27, 2022), https://www.jenner.com/a/web/9fKCeZkCgzc8LW5KkZND2N/4k1Xm6/DOJ_Prosecutions_in_Employment-Related_Antitrust_Suits_Fall_Flat.pdf.

[11] *See* Latest Decisions in Criminal No-Poach and Civil Non-Compete Cases Indicate Continuing Scrutiny of Restrictive Covenants (July 12, 2022), https://www.jenner.com/a/web/vKhfT5AMDGDBhdeqPHu84h/4k1Xmi/Latest_Decisions_Criminal_No-Poach_Civil_Non-Compete_Cases.pdf; *United States v. Hee, et al.*, No. 2:21-cr-00098-RFB-BNW, ECF No. 106 (D. Nev. Oct. 27, 2022).

[12] Latest Decisions in Criminal No-Poach and Civil Non-Compete Cases Indicate Continuing Scrutiny of Restrictive Covenants (July 12, 2022), https://www.jenner.com/a/web/vKhfT5AMDGDBhdeqPHu84h/4k1Xmi/Latest_Decisions_Criminal_No-Poach_Civil_Non-Compete_Cases.pdf.

[13] *Id.*

[14] Dave Michaels, "Aerospace Executives Go to Trial Over Alleged No-Poach Deals," The Wall Street Journal (Mar. 26, 2023), https://www.wsj.com/articles/aerospace-executives-go-to-trial-over-alleged-no-poach-deals-e9555fda.

[15] *See, e.g.,* "FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers," Federal Trade Commission (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers; "FTC Takes Action Against Another Company That Imposed Harmful Noncompete Restrictions on Its Workers," Federal Trade Commission (Mar. 15, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-takes-action-against-another-company-imposed-harmful-noncompete-restrictions-its-workers?utm_source=govdelivery.

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