

Client Alert: Acquittal of Aerospace Employees Marks the Department of Justice's Fourth, and Most Damaging, Criminal No-Poach Loss

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United States District Court Acquits all Defendants in *US v. Patel*

On April 28, 2023, the United States District Court for the District of Connecticut acquitted the defendants in *US v. Patel* of the charges of conspiring to allocate the labor market in violation of the Sherman Antitrust Act through the use of no-poach agreements. This ruling comes despite the fact that the Court declined to dismiss the charges last year. This is an important ruling because the court rejected the government's position that no-poach agreements are *per se* violations of the federal antitrust laws. The decision continues a trend of losses for the government in this area.

Patel is one of several recent criminal prosecutions brought by the DOJ's Antitrust Division targeting employers that allegedly entered into no-poach agreements in violation of the Sherman Act.^[1] The 2021 *Patel* indictment alleged that the defendants, six aerospace and staffing company employees, had entered into a conspiracy to suppress competition by agreeing to "restrict the hiring and recruiting of engineers and other skilled-labor employees between and among [the defendants' companies]."^[2] Specifically, the government alleged that defendants stepped in to "block" the hiring of their employees by other companies.^[3]

The *Patel* court followed the Colorado District Court's rulings in *United States v. DaVita Inc.*, holding that to receive *per se* treatment, the government must prove that the alleged agreement was a market allocation that restricted competition in the labor market to a "meaningful extent".^[4]

After hearing evidence on whether the agreements at issue met this definition, the *Patel* court sided with the defendants and held that, "as a matter of law, this case does not involve a market allocation under the *per se* rule."^[5] In its opinion, the court drew heavily from the Second Circuit's decision in *Bogan v. Nw. Mut. Life Ins. Co.* and the *DaVita Inc.* case, which involved similar allegations of employers' anticompetitive conduct. The court noted that the agreement in question "had so many

exceptions,” including where engineers had already separated from their prior employer “that it could not be said to meaningfully allocate the labor market of engineers.” Therefore, the *per se* rule did not apply.^[6]

Rejection of the *Per Se* Rule Calls DOJ’s No-Poach Prosecutions into Question

The Connecticut District Court’s decision in *Patel* is not only the DOJ’s fourth loss in criminal no-poach prosecutions, but it also represents a significant blow to the government’s legal position in these prosecutions. The DOJ has consistently taken the position that no poach agreements are themselves *per se* violations of the federal antitrust laws. Notably, as a matter of policy, the DOJ currently only prosecutes criminal antitrust cases that receive *per se* treatment.

Accordingly, the outcome of *Patel*, along with decisions in earlier cases like *DaVita*,^[7] are casting doubt on the DOJ’s strategy and calling its enthusiasm for prosecuting this type of conduct into question. As recently as March of this year, the head of the DOJ’s Antitrust Division described its work to curb alleged employer antitrust violations as “righteous.”^[8] But with their focus on market allocation, these recent decisions indicate that the government may not be able secure convictions simply by proving that a no-poach agreement exists, but must instead go further and establish that the restraint is not ancillary to a legitimate pro-competitive business objective.

Employers Should Remain Vigilant in Assessing Potential Liability

Despite the DOJ’s losses, employers should remain cautious when engaging in conduct that may limit employee mobility. The *Patel* court expressly left open the possibility that a no-poach agreement without exceptions could be considered a *per se* market allocation agreement. Accordingly, employers still should avoid discussing hiring practices with other companies and tread carefully in this area. These acquittals do not suggest a “green light” for the alleged behavior in *Patel*, but instead offer future defendants a body of law to draw from and, perhaps, more leverage, when defending these types of allegations.

To keep up with recent trends related to no-poach litigation, non-compete disputes, and other topics related to restrictive covenants, see Jenner & Block’s Trade Secret and Restrictive Covenants Library.^[9]

Footnotes

[1] *United States v. Patel*, et al., No. 3:21-cr-220, ECF No. 599 (Apr. 28, 2023, D. Conn.).

[2] *Patel*, ECF 20 at 4.

[3] *Id.* at 6.

[4] *Patel*, ECF 257 at 17, 21.

[5] *Patel*, ECF 599 at 11.

[6] *Id.* at 17.

[7] For additional commentary on *DaVita*, see *Department of Justice Prosecutions in Employment Related Antitrust Suits Fall Flat* (April 27, 2022) <https://www.jenner.com/en/news-insights/publications/client-alert-department-of-justice-prosecutions-in-employment-related-antitrust-suits-fall-flat-in-davita-inc-and-jindal>.

[8] Bryan Koenig, *DOJ Antitrust Head Calls No-Poach Prosecutions 'Righteous'*, Law360 (March 3, 2023) <https://www.law360.com/articles/1592488>.

[9] *See, e.g.*; The Department of Justice Fails to Persuade Jury in Most Recent No-Poach Prosecution Defeat (March 29, 2023), <https://www.jenner.com/en/news-insights/publications/client-alert-the-department-of-justice-fails-to-persuade-jury-in-most-recent-no-poach-prosecution-defeat>; Stakeholders Speak Out During Webinar on FTC's Proposed Rule Banning Noncompetes (March 6, 2023) <https://www.jenner.com/en/news-insights/publications/client-alert-stakeholders-speak-out-during-webinar-on-ftcs-proposed-rule-banning-noncompetes>; The FTC Proposes Ban on Non-Competes (January 6, 2023) <https://www.jenner.com/en/news-insights/publications/client-alert-the-ftc-proposes-ban-on-non-competes>; Latest Decisions in Criminal No-Poach and Civil Non-Compete Cases Indicate Continuing Scrutiny of Restrictive Covenants (July 12, 2022), <https://www.jenner.com/library/publications/21903>; DOJ Continues to Push Against Non-Competes, Non-Solicitations, and Other Post-Employment Restrictions (Mar. 1, 2022), <https://www.jenner.com/library/publications/21633>.

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