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In Antitrust Cases, Recent DOJ Losses Don't Tell the Whole Story

By Jennifer Fischell and Thomas Schubert
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Many of the Biden Administration's antitrust enforcement actions have involved attempts to regulate anticompetitive conduct in labor markets by means of the antitrust laws. Recently, for example, DOJ has criminally prosecuted defendants for allegedly engaging in wage-fixing and using "no-poach" agreements to restrict competition. And it has successfully blocked a proposed merger using a novel, labor-centric theory. Biden's FTC, meanwhile, has proposed a rule restricting the use of noncompete agreements.

But some recent labor-market enforcement attempts have floundered: High-profile criminal prosecutions keep resulting in acquittals. So the question becomes: "What do those losses mean for labor-side antitrust law?"

Less than you might think. Although some commentators have wondered whether the acquittals mean DOJ will stop prosecuting labor-side antitrust cases, criminal prosecutions are only a small piece of the Administration's antitrust agenda. And even in cases where defendants have been acquitted, the government has won on significant legal issues along the way. Such wins—combined with other antitrust-revitalization initiatives—may well be pushing both civil and criminal antitrust law in exactly the direction, if not quite the distance, the Biden Administration hopes to move it.

Courtesy photos

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DOJ Pursues Novel Criminal Antitrust Theories—and Keeps Losing

DOJ has long prosecuted criminal violations of the antitrust laws—its authority goes back to the passage of the Sherman Act in 1890. But it does not criminally prosecute each and every antitrust violation. Under DOJ Antitrust Division policy, the DOJ typically "reserves criminal prosecution" under Section 1 of the Sherman Act—which forbids anti-trust conspiracies—for types of anti-competitive

agreements that have been deemed inherently ("per se") unlawful. That category has traditionally included agreements to fix prices, rig bids, and divide markets among competitors.

For over a century, DOJ did not claim that agreements to fix wages or stop poaching other firms' employees warranted the "per se" label. There were some civil suits about labor-side anticompetitive conduct, but relevant precedent about how to understand these agreements was hard to come by. It remained unclear, for example, whether, and under what conditions, labor-market restrictions like no-poach agreements were per se unreasonable or subject to more lenient antitrust scrutiny (the "rule of reason"). Unlike per se analysis, the rule of reason requires the government or the private plaintiff to prove how the agreement has actually harmed competition under strict legal standards.

DOJ's criminal prosecutions of labor-side antitrust violations began in that uncertain context. In December 2020, DOJ first indicted an employer for wage-fixing, arguing that the relevant conduct was per se unreasonable. Since then, DOJ—further emboldened by a 2021 executive order by President Biden concerning competition—has brought a string of indictments based on wage-fixing or no-poach agreements. For example, in *United States v. DaVita Inc.*, DOJ charged a dialysis company and its former CEO for conspiring with competitors to allocate the labor market by agreeing not to solicit each other's employees. In *United States v. Patel*, a Raytheon manager and the executives of several outsourcing suppliers were charged for a similar scheme to restrict the hiring and recruiting of engineers between firms. Yet more labor-side antitrust prosecutions, initiated in 2021, 2022, and 2023, involved employers in the healthcare field.

As DOJ would soon learn, however, with novelty comes risk. DOJ has obtained exactly ***one*** conviction in these cases (a guilty plea), while more than a dozen individual defendants have gone free. Juries acquitted defendants of all antitrust charges in DOJ's first criminal wage-fixing case, in *DaVita*, and in other healthcare prosecutions. And just a few months ago, the judge in *Patel* granted a motion for acquittal before closing arguments. Other cases remain pending.

Even Failed Prosecutions Can Advance Labor-Side Antitrust Initiatives

It is easy to overstate the importance of such acquittals for the future of labor-side antitrust enforcement. They are certainly high-profile, but they do not spell doom for labor-side antitrust law—or even send a strong message about whether future prosecutions will be successful. DOJ, civil plaintiffs, and even other agencies can still turn DOJ's past losses into future wins.

To understand why, we have to look beyond the jury verdict and judgment line to the broader impact of each prosecution. In seeking criminal penalties, the government asserted—for the first time in the criminal context—that at least some agreements aimed at limiting workers' mobility and fixing their pay should be deemed unreasonable per se under the Sherman Act. The defendants disagreed. But the courts in *DaVita*, *Patel*, and other cases decisively rejected the defendants' motions, accepting DOJ's basic "per se" theory. Although those cases later resulted in acquittals on their specific facts, they may offer doctrinal support in future DOJ prosecutions.

The decisions also have force beyond the criminal context. Antitrust rules are no different in the civil context than they are in criminal prosecutions. But the burden of proof is very different: To obtain a conviction, DOJ must prove its case beyond

a reasonable doubt. Civil plaintiffs, by contrast, need only win by a preponderance of the evidence. Labor-side antitrust plaintiffs can thus rely on DOJ's doctrinal victories in *DaVita*, *Patel*, and similar cases to draft their complaints and defend against motions to dismiss. They can rely on criminal decisions to argue that antitrust law adopts the same no-tolerance approach to wage fixing as traditional price fixing. And they can find guidance regarding which types of no-poach agreements qualify as per se unreasonable restraints.

That guidance is especially important because, even now, there is scant legal authority about anticompetitive activity in labor markets. Antitrust law has traditionally focused more on product-related restraints than labor-related restraints, reflecting an overriding concern with harm to consumers. Each decision upholding the DOJ's theory of labor-side restraints is thus a new arrow in a labor-side plaintiff's (and DOJ's) quiver.

Indeed, civil plaintiffs have already begun piggybacking on DOJ's legal wins—sometimes with DOJ's help. DOJ has filed several "statements of interest" in support of workers in private antitrust cases, advancing the same legal theory it has advanced in its prosecutions. And civil plaintiffs have started benefiting from DOJ's criminal-side wins. For example, the victims of the alleged schemes in *DaVita* and *Patel* filed their own civil lawsuits and faced motions to dismiss. In both follow-on cases—*DaVita* became *In re Outpatient Medical Center Employee Antitrust Litigation*, and *Patel* became *Borozny v. Raytheon Technologies Corp.*—the district court relied on the predecessor criminal case to deny the motion to dismiss and concluded that the plaintiffs had adequately alleged a per se violation.

Labor-side prosecutions may also advance other aspects of the Biden Administration's labor-side agenda outside the courtroom. In January, for example, the Federal Trade Commission proposed a rule banning noncompete agreements in employment contracts. The agency's notice cited three of the DOJ's recent dismissal-stage victories.

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Even in the face of losses, the Biden Administration has still obtained key legal victories with broader ramifications in the labor-side antitrust space. Doctrinal gaps between labor-side and product-side antitrust are beginning to close, as each new case helps flesh out the law. Courts have signaled that they are willing, under the right circumstances, to treat wage-fixing and no-poach agreements as unreasonable per se. And civil suits are proceeding with the advantages of those developments. All that is to say: Halfway through Biden's term, despite some setbacks, labor-side antitrust appears alive and well.

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