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Antitrust Division Dealt Another Setback in No-Poach Prosecutions



On April 28, 2023, a federal court in Connecticut dismissed the United States Department of Justice ("DOJ") Antitrust Division's latest—and largest—criminal anti-poach case brought to trial.

After a 15-day jury trial in *United States v. Patel*—but *before* the jury could deliberate—U.S. District Judge Victor A. Bolden granted the defendants' joint motion for acquittal, finding that based on the evidence presented by the prosecutors, no reasonable juror could convict the six accused aerospace and staffing company executives of engaging in criminally anti-competitive behavior.

The acquittal marks the latest trial defeat for the DOJ, which began in 2020 to prosecute similar no-poach and wage-fixing deals under Section 1 of the Sherman Act but has yet to secure a jury conviction on these charges.

The Antitrust Division [charged](#) the *Patel* defendants in December 2021 with engaging in a long-running conspiracy to suppress competition and prevent labor costs from rising by agreeing not to recruit away from one another engineers and other skilled laborers working on aerospace projects. The defendants initially moved to dismiss the indictment, but the court denied that motion on the ground that the DOJ successfully alleged a per se conspiracy to restrict hiring and to allocate (or divide) labor markets to minimize competition—a theory of automatic liability typically reserved for the most obvious anti-competitive conduct. The case then proceeded to a jury trial in March 2023. After the government rested, the district court found that, even assuming defendants had agreed to restrict hiring, the prosecution had failed to establish per se anti-competitive conduct. Specifically, the evidence revealed that "the alleged agreement itself had so many exceptions that it could not be said to meaningfully allocate the labor market" and that "hiring among the relevant companies was commonplace" notwithstanding the agreement. Accordingly, the court granted the executives' motion for acquittal before the case reached the jury.

The acquittal in *Patel* is the DOJ's fourth failure to convict executives or business owners accused of engaging in per se anti-competitive conduct by using no-poach or wage-fixing agreements to restrain labor costs. In March

2023, a jury in Maine [acquitted](#) four home health agencies of allegedly conspiring to suppress caretakers' wages during the pandemic. In April 2022, a Colorado jury [acquitted](#) a former kidney dialysis company executive of charges that he conspired with a competitor to not solicit each other's senior-level employees. Less than a week earlier, a Texas jury [acquitted](#) an outpatient surgical facilities operator of allegedly conspiring with other healthcare companies to fix the wages of physical therapist assistants, although the jury did convict the owner of obstructing the government's investigation.

While the Antitrust Division has struggled at trial, not all criminal labor-side antitrust prosecutions have been unsuccessful. In October 2022, a health care staffing company [pleaded guilty](#) in Nevada federal court to charges over an alleged scheme to suppress the wages of nurses working in Las Vegas schools. Three months later, the manager of the health care staffing company [agreed](#) to a deferred prosecution and 180 hours of community service for agreeing to fix the wages of the aforementioned nurses.

The outcome in *Patel*, however, highlights the risks of trying criminal anti-poach and wage-fixing cases and adds to a growing body of case law that could hamper future prosecutions. The DOJ, as a matter of [practice](#), pursues criminal antitrust cases under the standard of per se or automatic liability, and, at a minimum, the *Patel* decision imposes a high bar on what constitutes per se anti-competitive conduct.

Despite its recent trial setbacks, however, the Antitrust Division appears to remain committed to prosecuting anticompetitive conduct affecting U.S. labor markets. For example, the DOJ is scheduled to go to trial next year against a health care staffing executive accused of conspiring with others to fix the wages of Las Vegas nurses. In addition, the DOJ has filed a number of [statements of interest](#) supporting the Antitrust Division's position that per se violations of the antitrust laws can occur when employers agree with each other to enter into no-poach and non-solicitation agreements or to fix or suppress wages or benefits. In light of the government's continued focus on no-poach and wage-fixing agreements, which carry significant penalties—including fines up to \$100 million for corporate defendants and jail time for individual defendants —employers attempting to restrict hiring or contain labor costs should continue to tread cautiously.

Authors

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