Standing up to aggressive antitrust prosecutions a “rational and winning strategy”

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Two recent jury verdicts should give employers the confidence to fight criminal prosecutions of alleged anti-competitive practices brought by the US Department of Justice.

In 2016, the DoJ’s Antitrust Division and Federal Trade Commission announced a focus on prosecuting “naked” no-poach and wage-fixing agreements that amount to labour market manipulation under the Sherman Antitrust Act.

Building on this pledge last month, the division signed a memorandum of understanding with the Department of Labor aimed at protecting workers from employer collusion.

However, separate jury verdicts in Texas and Colorado have since dealt a significant blow to the division’s enforcement strategy.

On 15 April, Denver-based healthcare company DaVita and its former CEO, Kent Thiry, were acquitted on three counts each of conspiracy in restraint of trade.

The DoJ alleged that between 2012 and 2017, the defendants entered into “gentlemen’s agreements” with competitor firms not to recruit each other’s employees.

DaVita’s defence team persuaded the jury that, while there were indeed agreements between healthcare companies not to actively solicit senior staff, these did not amount to “naked” no-poach agreements and there was no intent to restrict market competition.

The day before the DaVita verdict, a jury in the Eastern District of Texas found two defendants in a separate cases not guilty of criminal wage-fixing.

Neeraj Jindal, the owner of a therapist staffing firm, and co-defendant John Rodgers, a contracted physical

therapist, were found not guilty on five counts of agreeing with another staffing company through text messages to fix pay rates for therapists and their assistants.

While the DoJ has expressed disappointment with the result it has taken solace in the finding by US District Judge Amos Mazzant III that "price-fixing agreements – even among buyers in the labour market – have been per se illegal for years".

Denying the defendants' motion to dismiss the case in November 2021, the court observed: "When the price of labour is lowered, or wages are suppressed, fewer people take jobs, which always or almost always tends to restrict competition and decrease output."

The DaVita and Jindal cases were the first-of-their-kind criminal indictments into no-poach and wage fixing brought by the DoJ.

Corporate defendants face fines of $100m per violation of the Sherman Act and the prospect of class action lawsuits. Individual defendants face fines of up to $1m and ten years in jail.

Sceptical juries

Notwithstanding the recent verdicts, companies cannot breathe easy just yet, according to Colin Kass, co-chair of Proskauer's antitrust group. "Two losses could just be a statistical fluke. And, the DoJ will continue to pursue these, both civilly and criminally.

"For companies that do get caught up in a no-poaching investigation, these jury verdicts show defendants can win these cases. It also suggests that juries are sceptical that no-poaching agreements should be criminal offences, despite what the DoJ may think. So, standing up to overly aggressive prosecutors may be a rational, or even a winning, strategy."

Following the losses, now should be time for some self-reflection and retrenchment at the DoJ, added Kass. "They need to focus on identifying and developing the most compelling case they can, notch a win, and build a foundation for future enforcement.

"If they don't, they will soon find themselves out of the business of criminally prosecuting these types of arrangement, relegating this type of activity to the same (civil) rules that apply to the vast majority of non-hardcore offences."

Obstructing investigations

With inter-agency cooperation increasing under the Biden administration, employers should also consider their actions once an investigation has been launched.

While federal prosecutors failed to make their case of alleged wage-fixing during Jindal's eight-day trial, they did secure the conviction of the company's owner for obstructing the FTC's 2017 investigation.

Jindal now faces a maximum penalty of five years in prison and a $250,000 fine.

"Lying to federal agencies is a crime, plain and simple," said Assistant Attorney General Jonathan Kanter of the DoJ's Antitrust Division.

"When obstruction affects the federal government's investigations into labour market collusion and impedes our ability to protect workers, we will use all the tools available to prosecute all of these crimes to the full extent of the law."

Luis Quesada, assistant director of the FBI's criminal investigative division, added: "Wage fixing causes

tremendous harm to countless hardworking Americans.

"The FBI will continue to work closely with our law enforcement partners to uncover this type of corruption and bring to justice anyone who is responsible or who obstructs our investigations into this conduct."

Holly Vedova, director of the FTC's bureau of competition, said the verdict should serve as a warning to companies and their top executives that contemplate obstructing her agency's investigations.

She added: "The FTC will continue to work closely with the DoJ and will not hesitate to refer companies and executives for criminal prosecution for obstructing FTC investigations and threatening the agency's ability to protect competition and American consumers."