Trade Secrets and Restrictive Covenants
Labor and Employment

DOJ Continues Push Against Non-Competes, Non-Solicitations, and Other Post Employment Restrictions

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Aggressive Attacks on Employers' Post-Employment Restrictions Continue

Employers beware. The Department of Justice's attack on employee restrictions has gotten a new boost in a no-poach antitrust case alleging that competitors agreed not to recruit or hire the other's employees. The Department is using this win to try to leverage other prosecutions.

In light of the increased activism by the federal government and its state counterparts in attacking no-poaches and non-competes, employers should review their restrictions on employees to ensure that they are narrowly drawn and used only in necessary circumstances. Employers also should consider using other mechanisms to protect their confidential and proprietary information and trade secrets.

Federal District Court of Colorado Judge Rules on Per Se Designation for No-Poach Agreements

Recently, in one of the government's first criminal no-poach cases that involved DaVita, Inc., the court denied the defendant's motion to dismiss, holding that employers are sufficiently on notice that no-poach agreements are *per se* illegal under the Sherman Antitrust Act: "Defendants had ample notice that entering a naked agreement to allocate the market would expose them to criminal liability, however they did it."[1] The case is one of several recent Department of Justice prosecutions brought in an attempt to attack no-poach agreements—and arose from an increasing effort by the Department to aggressively investigate and prosecute alleged employment-related antitrust violations.[2] This ruling is important because the Department of Justice has a policy that limits its criminal antitrust prosecutions to behavior that is *per se* illegal.[3]

The Department of Justice Seeks to Leverage the *DaVita* Ruling in Additional No-Poach Cases

The Justice Department is seeking to use its *DaVita* win in its other criminal no-poach cases. In those cases, the defendants—healthcare companies Surgical Care Affiliates, LLC, and VDA OC, LLC—also had argued that the Department has not sufficiently demonstrated that no-poach agreements are *per se* illegal under the Sherman Act so as to justify criminal enforcement.[4] In those cases, the Department of Justice previously had sought to use the recent decision of an Eastern District of Texas court—*US v. Jindal*[5]— to bolster its argument on *per se* designation. In *Jindal*, the court denied the defendant's motion to dismiss and found that, despite a lack of criminal prosecution in the area, wage-fixing has been sufficiently shown to be *per se* illegal so as to put defendants on notice and warrant criminal prosecution by the Department of Justice.[6]

In the cases against Surgical Care Affiliates and VDA, the Department of Justice claimed that, like in *Jindal*, labor market allocation agreements have long been *per se* violations even if the behavior has not been prosecuted until recently.[7] The healthcare defendants objected to the application of *Jindal*, arguing that the wage-fixing behavior in that case was inapposite to the no-poach allegations at hand. The *DaVita* ruling, however, is more difficult to distinguish.[8] Motions to dismiss are currently pending in

both cases, and it remains to be seen whether these courts will follow *DaVita* on the *per se* designation issue.

Potential Impact on Employers

Regardless of how the courts rule in these cases, employers should remain cautious when dealing with potential no-poach agreements and other employee restrictions, such as non-competes. If other courts follow *DaVita* and the Department of Justice continues to win favorable rulings, employers and executives can expect the Department of Justice to continue its aggressive approach of criminal cases for no-poach agreements between competitors in the labor market.

And even if the Department of Justice does not prevail on its *per se* violation argument, it is likely that the attack on employee restrictions at both the federal and state level will continue.[9]

Employers' Options to Protect Legitimate Business Interests

As we have counseled in the past, and in light of the continued activism by the federal and state governments, businesses should take stock of their existing restrictive covenants with employees and any agreements they may have with competitors that could be considered violative of antitrust laws. We encourage employers to evaluate whether they should advise such agreements considering current enforcement trends.

As an example, employers should consider whether non-competes and other restrictive covenants can be narrowed to apply only to senior-level employees or others with access to the organization's most confidential information. In addition, when such employees depart, companies should immediately investigate whether any confidential information was taken. If such evidence surfaces, employers should take prompt action, including potentially pursuing appropriate claims for theft of trade secrets or confidential information.

Moreover, if an employer seeks to enforce a restrictive covenant, it should consider engaging experienced counsel early in the dispute resolution process. Even the best-intentioned restrictive covenants could end up with an employer on the wrong side of litigation.

In addition, when seeking to enforce a restrictive covenant in employment agreements, corporations often engage with the former employee's new employer. Those interactions can quickly come under antitrust scrutiny if the new employer and old employer agree to something that the government contends violates the antitrust laws, such as a no-poach agreement.

Finally, employers should seriously consider using solutions beyond restrictive covenants to protect their business interests. Carefully drafted confidentiality agreements can provide companies with sufficient protection regarding departing employees. Relatedly, companies should make sure they have robust audit processes in place to address departing employees who have access to particularly sensitive information. These proactive steps can assist companies in making sure that the company's competitive information does not follow the employee to his or her new employer.[10]

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[1] *United States v. DaVita Inc.*, No. 21-cr-00229 (D. Colo. Jan. 28, 2022), ECF No. 132.
[2] Over the past decade, no-poach agreements have come under increasing federal scrutiny. In 2016, the Department of Justice announced an initiative to aggressively investigate and target employers who enter into no-poach agreements for violations of federal antitrust law. The Department of Justice renewed this position in April 2020 through a joint statement with the Federal Trade Commission, which announced a commitment to criminally prosecute employers who enter wage-fixing or no-poach agreements. In January 2021, the Department of Justice filed its first two criminal cases against healthcare organizations, including DaVita, Inc., alleging that no-poach agreements violate antitrust laws. The Department of Justice has since filed additional criminal cases, including a December 2021 indictment against executives in the aerospace engineering industry and a February 2022 indictment against managers of home healthcare agencies in Maine.
[3] U.S. DEP'T OF JUST., Just. Manual § 7-1.100 (2020).
[4] *United States v. Hee, et al.*, No. 2-21CR00098-RFB0BNW (D. Nev. Mar. 30, 2021), ECF No. 63; *United States v. Surgical Care Affiliates, LLC*, No. 3-21CR0011-L (N.D. Tex. Jan. 5, 2021), ECF No. 71.
[5] *US v. Jindal et al.*, No. 4-20CR358 (E.D. Tex. Dec. 9, 2020), ECF No. 35.
[6] *See Hee* at ECF No. 63; *Surgical Care Affiliates, LLC* at ECF No. 71.
[7] *Surgical Care Affiliates, LLC* at ECF No. 71.
[8] *Hee* at ECF No. 64; *Surgical Care Affiliates, LLC* at ECF No. 81.
[9] *See also* Client Alert: FTC May Wade into Enforceability of Non-Compete Agreements (Jan. 16, 2020) https://jenner.com/library/publications/19503; Client Alert: Employers Take Note: State AGs Urge FTC to Step up Scrutiny of Employee Restrictions (Aug. 1, 2019) https://jenner.com/library/publications/19184; Client Alert: Biden Administration Announces Plans to Curtail Non-compete Agreements for Workers (July 12, 2021) https://jenner.com/library/publications/21119; Client Alert: The Biden White House Ramps up Antitrust Enforcement and Reform (July 20, 2021) https://jenner.com/library/publications/21136.
[10] Please find guidance for protecting confidential information in our July 12, 2021 client alert: Biden Administration Announces Plans to Curtail Non-Compete Agreements for Workers