The Evolution of DOJ's Views on No-Poach Litigation

BY JAMES H. MUTCHNIK, DR. JOHN H. JOHNSON IV, AND CHARLES FIELDS

EVEN THOUGH THE SHERMAN ACT outlaws "every contract, combination, or conspiracy in restraint of trade," the courts and the antitrust agencies recognize that "the Sherman Act does not prohibit *every* restraint of trade, only those that are *unreasonable*."[1] Per se treatment of antitrust violations is, in principal, therefore reserved for the most egregious types of conduct that have no redeeming procompetitive benefits.[2] In its 2016 Antitrust Guidance for Human Resource Professionals, the Department of Justice highlighted that naked "no-poach" agreements would be subject to criminal prosecution. Since then, the DOJ has attempted to broaden the scope of its criminal enforcement, including no-poach agreements that may have vertical characteristics and may be ancillary to legitimate and procompetitive collaborations between labor market competitors. In this article, we map the DOJ's evolving position over time and discuss both the legal and economic reasons why it is improper to presume that all such agreements should be treated under a per se standard as de facto market allocation. We also discuss the outcome and consequences of the DOJ's first two attempts to criminally prosecute no-poach conduct.

Background on Per Se vs. Rule of Reason

From the early days of the Sherman Act, courts and scholars all took the view that the Sherman Act did not strictly describe what conduct was prohibited (or even criminal) and had a common law element to it that was created, specified, and limited by the judiciary: "The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes."[3] To address the lack of specificity and incredible scope of the Sherman Act, the Supreme Court realized that there had to be some limiting principle, which initially evolved into a restriction that prevented only unreasonable restraints.[4] The view that unreasonable restrains were the only ones to be condemned evolved into what became the "rule of reason."[5]

Of course, determining whether all conduct was "reasonable" had benefits and drawbacks. The benefit was that not every contract or restraint was condemned. The detriment was that an assessment of whether each alleged violation was "reasonable" was burdensome. To counteract this burden, the Court determined that there should be certain categories of conduct that are so inherently pernicious as to merit per se condemnation under the Sherman Act.[6] Ultimately, the Court created the per se doctrine in *United States v. Socony–Vacuum Oil Co.*,[7] to condemn certain types of conduct without consideration of market power: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[8]

The Court then faced the issue of deciding whether and when to invoke the per se rule and when it must resort to a rule of reason analysis. "[C]onsiderable experience" with the conduct became an important factor in the determination.[9] Facial appearance and whether the conduct would "always or almost always restrict competition and decrease output" were other key factors.[10] The modern Court has limited application of the per se rule to a narrow set of categories.[11] The categories deemed worthy by the courts of per se treatment are: (1) price fixing, which includes various flavors such as traditional price fixing, bid rigging, setting minimum prices or maximum prices, and setting credit terms; (2) market allocations where competitors divide geographic areas, customers, or other components of a market between them to limit competition; and (3) some concerted refusals to deal or group boycotts. The modern trend has been to limit, rather than expand, the categories of conduct that are subject to the per se rule.[12]

Historically, only conduct deemed per se unlawful has been subject to criminal persecution under the Sherman

James H. Mutchnik is a Partner at Kirkland & Ellis, LLP. John H. Johnson IV and Charles Fields are Partners at Edgeworth Economics, LLC. Dr. Johnson served as an economic expert in Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1110–11 (9th Cir. 2021). The authors thank Taylor Rothman and Taylor Imperiale for their valuable contributions to this article.

Act. The DOJ has historically exercised prosecutorial discretion to only challenge collusive conduct as per se illegal, focusing on horizontal agreements.[13] The DOJ has made clear time and time again that it only brings criminal prosecutions in the context of per se conduct.[14] As stated in the DOJ Justice Manual:

> When it comes to enforcement, the Division's policy, in general, is to proceed by criminal investigation and prosecution in cases involving horizontal, 'per se' unlawful agreements such as price fixing, bid rigging, and market allocation.[15]

The 2016 Antitrust Guidelines for HR Professionals

In October 2016, the US Department of Justice and Federal Trade Commission issued their Antitrust Guidance for Human Resource Professionals ("2016 Guidance")[16] in which they stated:

> Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel activity.[17]

Over the past decade, the DOJ has included an array of different conduct related to the recruitment and hiring of employees under the broad definition of no-poach agreements, including agreements not to cold call, solicit, recruit, hire, or hire without prior approval.

However, non-competes, non-solicits, and no-hire agreements are very different and have different effects and implications. Non-compete agreements are vertical agreements between an employer and employee preventing the employee from working for the employer's competitors after the employee has terminated employment, usually for a set period of time. There is not an agreement between competing employers. Non-solicit agreements are agreements between employers not to solicit (i.e., contact or recruit) each other's employees. Such an agreement does not prevent employees from reaching out to competing employers to seek employment or prevent them from accepting employment with the competing employers. No-hire agreements are agreements between employers that they will not hire each other's employees. Even if the employee initiates the outreach to the competing employer, they cannot hire the employee under the no-hire agreement.

While the DOJ had brought several civil per se cases prior to issuing the 2016 Guidance, given its history and commitment to only prosecute established per se violations of the Sherman Act, this announcement caught the antitrust community by surprise. More importantly, the 2016 Guidance had various failings:

1. Because no prior case had ever held no-poach agreements to be per se unlawful, the DOJ opted for an end around by using the 2016 Guidance to attempt to give credibility to its criminal prosecutions.
2. The DOJ did not allow the courts to develop "considerable experience with the type of restraint at issue," nor did it yield to the prescription that "a departure from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[18]
3. The DOJ did not mention, discuss, or even dismiss as pretextual the procompetitive justifications proffered to support rule of reason analysis for such agreements.[19]
4. Neither DOJ nor the FTC sought commentary from the public, which would have created an opportunity for the agencies to explore the procompetitive effects of different no-poach agreements offered by commentators.

Employment non-solicitation agreements have never been deemed per se violations of the Sherman Act. The DOJ's decision to prosecute them as such does not make them per se violations. And Courts simply do not have the "considerable experience" required to deem no-poach agreements broadly as per se unlawful, nor can they "predict with confidence that [no-poach agreements] would be invalidated in all or almost all instances under the rule of reason."[20] The few cases that have ruled on the issue have not found that such agreements are per se violations.[21] Even the 2016 Guidance itself implicitly recognizes that proceeding criminally was new ground.[22] Moreover, the DOJ does not get to create new criminal prohibitions simply by unilaterally declaring conduct per se illegal under the Sherman Act—let alone do so through non-binding policy guidance that cannot be preemptively tested in court. To hold that a defendant is precluded from even trying to demonstrate that an agreement never before held to be per se illegal does not actually run afoul of the Sherman Act would deprive the defendant not just of fair notice, but of its more fundamental opportunity to mount a defense, as noted in U.S. v. Aiyer discussed below.

Unique Nature of Labor Markets

Antitrust regulators have long acknowledged that "[i]n order to compete in modern markets, competitors sometimes need to collaborate."[23] Labor markets, in part because of the unique nature of the product as an input, often involve collaborations between competitors. For example:

1. Two pharmaceutical companies are together engaged in cutting edge research to develop a COVID vaccine. A common input in the R&D effort to support the collaboration are the skilled research scientists from both companies. In this context, the pharmaceutical companies are horizontal competitors for both the highly skilled labor they hire, and potentially in many other product markets. But, certain "agreements" might be in place to prevent one company from hiring another companies' skilled scientists during the duration of the project.
2. The owner of a construction firm sells her firm to a competitor firm. As part of the sale, the prior owner of

the construction firm agrees to not hire any of her existing employees. Again, the firms are horizontal competitors in the provision of construction services, and for various types of labor.

3. Several temporary staffing agencies provide accounting personnel to businesses. To sometimes meet the demand of their clients, these agencies collaborate with each other to exchange talent to meet specific needs for end clients. As part of that exchange, the companies agree to not hire away their competitors' accountants.
4. A mid-size company requires IT personnel to supplement a recent surge in business growth. Although the mid-size company already had an extensive IT department, they contract with an IT service provider to get more help on a long-term basis. As a part of the contract, the mid-size company agrees to not hire any IT service providers permanently. These two firms are horizontal competitors in the labor market for IT technicians, and are also in a vertical relationship.
5. A government contractor signs a teaming agreement with a sub-contractor for a specific large-scale project. The teaming agreement includes non-solicitation provisions to prevent either side from poaching each other's employees during the duration of the project.

Labor markets (a type of "input" market) are "matching markets" where both the employee (the "seller" of labor) and employer (the "buyer") must match in their preferences—neither party can choose the other on their own. While pay is an important part of the matching process, it is rarely the only factor. Employees have a range of differentiating factors—education, experience, skill sets, and qualifications. Employers have a range of needs—different requirements for different jobs, and different willingness to pay depending on the relative importance and ease with which they can find additional talent. These idiosyncratic needs often result in frictions in the search and matching process—it takes time and effort for a candidate to find a job, or for an employer to fill an opening. After a match is established between the employer and employee, a negotiation on the terms of employment, including compensation and benefits, occurs. The transaction is typically not one-time, but sustained—leading to a multi-year relationship where both parties are making investments in the relationship through training and skill development.

Labor markets can also be less concentrated than product markets, with both employees and employers having a range of possible matches across different industries, occupations, and geographic locations. For example, many employees can find similar occupations in different industries than the one in which their current employer operates.[24] Other employees are qualified to choose between many different occupations based on the education, experience, and training that they have gained. And still others may be willing to relocate elsewhere in the country, or even the world, for the right opportunity.

These unique aspects of labor markets become relevant when considering the potential effects of any no-poach agreement on the employees at issue. Whether any agreement could have a potential effect on wages would be determined by an assessment of the labor market power gained by the employers at issue, typically measured using labor supply elasticity, and whether those employers use that market power to suppress wages below the market rate. Because agreements to allocate the market for labor can and do have inherent procompetitive benefits to both employers and employees, traditional market allocation cases are not sufficiently analogous to condemn labor market allocation agreements as *per se* illegal.

Economic Justifications for Labor Collaborations and No-Poach Agreements

For decades, courts have consistently ruled that, in the context of a business collaboration, a no-poach arrangement must be analyzed under the rule of reason. Examples of courts rejecting the per se rule for no-poach agreements in the context of business collaborations include: agency or outsource arrangements,[25] "no-switching" agreements,[26] conduct within a firm or corporate family,[27] franchise relationships,[28] corporate transactions,[29] and employer-employer covenants not to compete in a variety of contexts.[30] And for decades, the DOJ has agreed with this well-settled law and the reasons why no-poach agreements in the context of business collaborations are not naked restraints subject to the per se rule, but, rather, ancillary restraints to be judged under the rule of reason.

Indeed, until recently, the unique nature of labor markets and the need for exceptions to a per se rule was explicitly recognized by the DOJ. As DOJ began its pursuit of these cases, it explained that the Division will only pursue prosecutions of no-poach agreements if they are "naked" and are not ancillary to legitimate joint ventures.[31] For example, in 2011, DOJ settled a civil Sherman Act case against Lucasfilm Ltd. by entry of a judgment that, at first blush, contains a blanket prohibition against no-poach agreements:

> The Defendant is enjoined from attempting to enter into, entering into, maintaining or enforcing any agreement with any other person to in any way refrain from, requesting that any person in any way refrain from, or pressuring any person in any way to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person.[32]

However, the judgment contains a series of carve outs, and the conduct that was expressly permitted is perhaps more informative than the conduct that was prohibited. One category of carve outs involved those "reasonably necessary" for contracts with "consultants or recipients of consulting services."[33] In these types of service provision relationships, there is a great deal of exposure both to business practices and talent, by both parties. In this case, no-poaching agreements protect both parties from the risk of appropriation of talent (and the business practices and trade secrets they hold). Absent such protections, it is easy to imagine the difficulty in developing a productive advisory relationship. Similarly, without certain protections for consulting firms, it would be easy for poaching to go in the opposite direction—imagine a particularly skilled consultant with extensive knowledge in an industry who is discovered by a client while engaged. The no-poach provides protection to the consulting firm for its talent.

A similar rationale applies to a second category of no-poach agreements exempted in the Lucasfilm final judgment—those "reasonably necessary" for contracts with "outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers." Here, the business that each of these types of firms practice is the identification of and provision of labor. Without these no-poach provisions, any employer who utilizes one of these services to get talent on a temporary basis could not only poach talent, but poach the very best talent amongst the pool provided. This creates obvious adverse incentives—the risk to a staffing business of having their talent poached after investing time, resources, and infrastructure to identify and train employees represents not only the loss of their investment, but also the inability to serve other clients if their best talent has been hired away.

Yet another set of carve outs in the Lucasfilm final judgment included no-poach agreements amongst horizontal competitors that were "reasonably necessary" for "the function of a legitimate collaboration agreement, such as joint development, technology integration, joint ventures, joint projects (including teaming agreements), and the shared use of facilities." This broad category touches on two types of horizontal agreements that antitrust practitioners acknowledge require an assessment of procompetitive benefits versus potential anticompetitive costs. Joint ventures allow for expansion into new markets, funding expensive innovation efforts, and lowering costs.[34] These investments may not occur without the ability of competitors to collaborate and pool resources, but they are not per se illegal because of their potential for "expanding output, reducing price, or enhancing quality, service, or innovation."[35] The rationale for protecting human capital assets in a joint venture relates to the ability to protect a firm's investment in talent, to allow each firm to fully commit to the joint ventures goals, and to foster the very collaboration that is at the heart of the efficiency gains.[36]

Until recently, the DOJ has also consistently emphasized that it would not seek to prosecute as criminal offenses no-poach agreements that are ancillary to a legitimate business collaboration for these procompetitive and efficiency-producing reasons. For a restraint to qualify as "ancillary," it must be "subordinate and collateral to a separate legitimate transaction" and "reasonably necessary" to achieving that transaction's "procompetitive purpose."[37] The ancillary restraints doctrine has a long judicial history, in part credited back to Supreme Court Justice (and former US President) William Howard Taft, who explained the rationale as "necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."[38]

Several years ago, for no-poach claims asserted in the context of franchises, DOJ repeatedly confirmed that, "the per se rule does not apply to all no-hire and no-solicitation agreements."[39] The DOJ was crystal clear: "If a no-poach agreement is reasonably necessary to a separate, legitimate business transaction or collaboration among the employers, it is not per se unlawful as a naked restraint, but instead judged under the rule of reason."[40] And senior DOJ officials have also made speeches reiterating that the rule of reason would apply to no-poach agreements in the context of business collaborations. For instance, in May 2018 former DAAG Andrew Finch explained that the Division will not "bring criminal charges against agreements between competitors that are ancillary to joint ventures or other legitimate collaborations. Those have been, and will continue to be, analyzed under the rule of reason, consistent with the civil doctrine of ancillary restraints."[41] DAAG Michael Murray reiterated this position in March 2019, saying: "Even a horizontal restraint is not subject to the per se rule if it is 'subordinate and collateral to a separate, legitimate transaction,' and reasonably necessary to 'make the main transaction more effective in accomplishing its purpose.'"[42] DOJ now takes the position that ancillarity is an affirmative defense to a claim that a no-poach agreement runs afoul of the Sherman Act:

> [T]he Indictment alleges a naked, horizontal conspiracy . . . and contains no allegation of any legitimate business collaboration that would give rise to an ancillary restraints defense. If Defendants intend to raise such a defense, it will require a factual showing that may not be determined on a motion to dismiss.[43]

Thus, the DOJ's position has evolved from confirming that it would never prosecute a case involving an ancillary restraint to explaining that it now views ancillarity as an affirmative defense that can only be raised at trial, and which will not enable a defendant to obtain a dismissal at the motion to dismiss stage.

Economics of Ancillarity

A recent civil case, *Aya Healthcare Services vs. AMN Healthcare*,[44] is an instructive illustration of the economic rationales behind an ancillary restraint in a labor context. Aya and AMN both specialize in healthcare staffing, identifying and facilitating the provision of medical personnel to their end clients, hospitals and healthcare systems. At issue in this case were travel nurses, who are sourced from around the country to fill short-to-medium term gaps in hospital staffing. In addition, AMN also serves as what is called a managed service provider, which means they are hired by hospitals to manage their temporary employees.

In practice, staffing companies often pool resources to utilize each other's supply of travel nurses to meet demand for their end clients. For example, if a hospital in Seattle requires a certain influx of travel nurses, one staffing company may or may not be able to meet the demand with their own pool of nurses. By collaborating with other staffing companies, they can best serve their clients and meet the demand for travel nurses from whichever company has them available. As part of these collaboration agreements, there are various non-solicitation provisions which prevent a subcontracting staffing company (referred to as an associate vendor or "AV") from poaching another's travel nurses after they were identified and staffed on a project. Aya alleged the non-solicitation agreements, amongst other conduct, were a per se violation of the antitrust laws.

Both the District Court and the Ninth Circuit affirmed that, although Aya and AMN were horizontal competitors for travel nurses, the non-solicitation was ancillary to a legitimate business arrangement:

> The non-solicitation agreement is necessary to achieving that end because it ensures that AMN will not lose its personnel during the collaboration. As the district court noted, AMN may want to "guard[] its investments and establish[] AV relationships with only those agencies that agree, inter alia, not to abuse the relationship by proactively raiding AMN's employees, AVs, and customers."[45]

The procompetitive efficiency on its face is straightforward—hospitals and healthcare systems benefit from collaboration among staffing companies in order to fill short-to-medium term needs that no single staffing company could meet..

The First Criminal No-Poach Cases

Despite the warnings in the 2016 Guidance, it took more than four years for the DOJ to bring its first criminal no-poach case. Even then, in its first no-poach case since the 2016 Guidance, the DOJ sought civil enforcement rather than criminal enforcement.[46] It took until 2021 for the DOJ to bring its first criminal no-poach indictment in the outpatient healthcare employees market, in *United States of America v. Surgical Care Affiliates, LLC, et al.*[47] After that, the DOJ brought a spate of several more criminal cases involving labor markets, in *United States v. DaVita Inc., et al.*[48] (outpatient healthcare employees), *United States v. Manahe*[49] (personal support specialists), *United States v. Patel*[50] (aerospace), and in *United States v. Jindal, et al.*[51] (wage-fixing of healthcare staffing industry).

The DOJ's campaign to expand Sherman Act liability under Section 1 to the labor market, and specifically to include so called no-poach agreements faced serious setbacks in the first of these cases to proceed to trial. In *Jindal*, the DOJ's first ever criminal wage-fixing prosecution, a federal jury in Texas acquitted the former owner and the former clinical director of a healthcare staffing company of all substantive antitrust charges.[52] A day later, in *United States v. DaVita, Inc. et al.*, a federal jury in Colorado acquitted a national healthcare provider and its former CEO on charges they engaged in per se illegal market allocation through "no-poach" agreements.[53] There were significant legal implications beyond the juries' verdicts, though, which will serve as important precedent in future no-poach cases.

Indeed, the victories for the defense started at the motion to dismiss stage. In *Jindal*, while the court denied the defendants' motion to dismiss, the court clearly stated that the DOJ may criminally prosecute parties to an allegedly unlawful agreement *only* when the type of agreement at issue "have been per se illegal for years."[54] Similarly, while the *DaVita* court denied the defendants' motion to dismiss, the court (1) rejected the DOJ's theory that employee non-solicitation agreements are by definition per se unlawful market-allocation restraints, (2) concluded that even no-hire agreements do not automatically trigger per se condemnation, and (3) ruled that, to obtain a Sherman Act conviction based on a non-solicitation/no-hire agreement, the DOJ must prove (a) that the specific agreement alleged is in fact an agreement to "allocate the market," *and* (b) that the "main purpose" of the agreement was to "stifl[e] competition."[55]

At trial, the courts in both *DaVita* and *Jindal* adopted more stringent elements of what is necessary to prove a per se offense, highlighting the concept of intent. The *DaVita* court required the DOJ to prove more than the mere existence of an agreement and the defendants' participation in a conspiracy. Importantly, the court required the DOJ to prove intent—that "defendants entered into an agreement *with the purpose of allocating the market*."[56] This was supported by the jury instructions the court gave in this case. In one, the court instructed that the jury "may not find that a conspiracy to allocate the market for the employees existed unless you find that the alleged agreements and understandings ***sought to end meaningful competition*** for the services of the affected employees."[57] The jury asked about this definition, inquiring about what "meaningful competition" means. The court instructed in its response that "meaningful competition" essentially is another way of saying "significant competition" or "competition of consequence."[58] In another key jury instruction, the court instructed the jury that "***evidence of lack of harm or procompetitive benefits might be relevant*** to determining whether defendants entered into an agreement with the purpose of allocating the market."[59]

Similarly, in *Jindal*, the court delivered the following instruction to the jury on the element of conspiracy for the Sherman Act Section 1 count:

> A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. . . . The government must prove, beyond a reasonable doubt, that the members of the conspiracy came to a mutual understanding to accomplish or try to accomplish a goal or unlawful objective. That is, the evidence must show that they had a conscious commitment to a common scheme designed to achieve an unlawful objective. You must find that there was a meeting of the minds as to the objective of the conspiracy. However, the government is not required to provide that the

defendant knew his actions were illegal or that he specifically intended to restrain trade or violate the law.[60]

Antitrust intent as an element of a per se Sherman Act Section 1 offense is not unique to no-poach cases. In *U.S. v. Aiyer*,[61] the Second Circuit elaborated on the circumstances in which a criminal defendant may "legally and factually" challenge each of the elements of an "alleged per se charge in full accord with due process."[62] While the Court ultimately affirmed the district court's conviction of a former JP Morgan Chase trader for his participation in a Sherman Act conspiracy to fix prices and rig bids in connection with his trading activity in the foreign currency exchange market, it also highlighted that a defendant is permitted (i) "to challenge the application of the per se rule to his offense conduct by arguing to the jury that such conduct fell within one of the exceptions to the per se rule," such as the ancillary restraint doctrine or furthering permissible joint venture activity; (ii) "to present some competitive effects evidence on the intent element by cross-examining witnesses regarding the actual effects of the co-conspirators' trading activity"; and (iii) "to ensure that the government's proof met the correct legal standard for a per se violation by challenging the district court's jury instruction with respect to the elements."[63] As to the element of intent, the Second Circuit expressly accepted that "evidence of the lack of an effect on price during a conspiracy could be relevant on the issue of intent."[64]

The focus on intent in *DaVita* and *Jindal*, and by extension the purpose of the conspiracy, permitted defense counsel to argue to the jury that the object of any agreement or arrangement was driven by market-based intentions and other competitive aims, not an improper purpose to fix wages or allocate markets. Although the *DaVita* court allowed the case to go to the jury on a "*per se*" standard, ultimately the court—through its jury instructions—did not agree with the DOJ that a typical *per se* approach was appropriate. Indeed, evidence and economic expert testimony about strategic business reasons for alleged non-solicitation agreements, the existence of employee movement, the lack of effect, and the lack of harm were all permitted and considered. The court allowed the jury to consider that "evidence of lack of harm or procompetitive benefits might be relevant to determining whether defendants entered into an agreement with the purpose of allocating the market."[65] The court also instructed that to find defendants guilty beyond a reasonable doubt, the jury must find that the defendants sought to "end meaningful competition"[66] through the non-solicit agreements.

Conclusion

So far, while the DOJ's novel and aggressive stance on expanding Sherman Act criminal violations to how companies protect their investments in their human resources has thus far passed muster at the motion to dismiss stage, it has failed with juries.[67] Despite these setbacks, DOJ has not given any indication that it intends to stop criminally prosecuting no-poach conduct. To the contrary, it plans to continue its "aggressive antitrust enforcement" in labor market cases.[68]

As DOJ continues its efforts, several factors will likely be of interest in these cases in the future. One threshold question for the parties will be whether any no poach agreement exists in the first place. While a potential agreement need not necessarily be in written format to be in violation of the Sherman Act, the DOJ will still need to prove the existence of an agreement between two or more competitors. This step alone requires an understanding of what was allegedly agreed to and how any potential agreements were carried out. And while companies competing for labor may appear to have parallel recruiting or hiring practices, that alone is not evidence of an agreement.

Parties should also assess whether any potential agreement was vertical or horizonal in nature, and whether the agreement is ancillary to other legitimate business collaborations. Despite the DOJ's apparently evolving position, a no-poach agreement that is ancillary to another, procompetitive business arrangement is lawful. In some cases, no-poach agreements can protect investments in training and skill development and allow companies to better serve their clients.

Another important factor will be understanding the specific nature of the alleged conduct and how that conduct relates to relevant labor markets. As described above, a no-poach agreement is not necessarily the same as a market allocation agreement. In market allocation agreements, competitors divide geographic areas, customers, or other components of a market between them specifically to limit competition. But it is not clear that no-poach agreements divide labor markets this way. In many labor markets employees can choose between numerous other employers (and vice versa for employers). Understanding the nature of the specific labor markets at issue can help determine whether the alleged no-poach agreement may have had a potential effect on wages.

Finally, in both *DaVita* and *Jindal*, the courts adopted more stringent elements of what is necessary to prove a per se offense, requiring the DOJ to prove intent to allocate a market or end competition for labor. Therefore, assessing whether the evidence shows that the intent behind any agreement was driven instead by market-based intentions and other competitive aims, could be a critical factor in future cases. ■

---

1 See, for example, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws

2 A history of the per se standard of antitrust criminality is provided in Roxann E. Henry, *Per Se Antitrust Presumptions in Criminal Cases*, 2021 Colum. Bus. L. Rev. 114.

3 *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978)). *See also* Philip E. Areeda & Herbert Hovenkamp, 3A Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 301a (3d ed. 2007).

4 United States v. Addyston Pipe & Steel Co., 85 F. 271, 278 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

5 Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) (introducing the "rule of reason" to Sherman Act jurisprudence).

6 United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927).

7 310 U.S. 150 (1940).

8 *Id.*, 310 U.S. at 223.

9 United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.").

10 Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 20 (1979) ("[W]hether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'").

11 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("Resort to per se rules is confined to restraints, like those mentioned, 'that would always or almost always tend to restrict competition and decrease output.' To justify a per se prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack . . . any redeeming virtue.").

12 *See* Cont'l TV., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 55 (1977) (holding vertical territorial restrictions were no long per se unlawful because per se conduct applies only to "conduct that is manifestly anticompetitive," and then pointing the fact that "[e]conomists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers"); *Leegin*, 551 U.S. at 889 (holding minimum resale price maintenance no longer per se unlawful because "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance,").

13 *See* Joseph C. Gallo et al, Criminal Penalties Under the Sherman Act: A Study of Law and Economics, 16 Res. L. & Econ. 25, 29-30 (1994) (of the 1,522 Sherman Act criminal prosecutions between 1955 and 1993, 1,452 were per se horizontal, three were monopolization claims, 33 were exclusionary practice claims, and four were vertical claims).

14 David Costello et. al., Antitrust Violations, 53 Am. Crim. L. Rev. 939, 940 (2016) ("As a general rule, the Antitrust Division will only seek criminal indictments for clearly intentional violations, such as price fixing or bid rigging.").

15 U.S. Dep't. of Justice, Archived Antitrust Resource Manual, https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement ("Per Se Rule: Price fixing, bid rigging and market allocation are among the group of antitrust offenses that are considered 'per se' unreasonable restraints of trade.").

16 Federal Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidance for Human Resources Professionals (Oct. 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

17 *Id.*, at 4.

18 *Leegin Creative Leather Prods., Inc.*, 551 U.S. at 899.

19 *See, e.g.*, Timothy J. Muris & Brady P. P. Cummins, *Tools of Reason: Truncation Through Judicial Experience and Economic Learning*, Antitrust, Summer 2014 at 46, 48–49.

20 *See Leegin*, 551 U.S. at 886.

21 In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1122–23 (N.D. Cal. 2012); Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1110–11 (9th Cir. 2021).

22 *See* 2016 Guidance, 3-4 ("The DOJ filed a *civil enforcement* action against the Arizona Hospital & Healthcare Association for acting on behalf of most hospitals in Arizona to set a uniform bill rate schedule that the hospitals would pay for temporary and per diem nurses. . . . And in the past few years, the DOJ brought three *civil enforcement* actions against technology companies…that entered into 'no poach' agreements with competitors.") (emphasis added).

23 Federal Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors, 1 (April 2000), https://www.ftc.gov/system/files/documents/public_statements/300481/000407ftcdojguidelines.pdf.

24 Suresh Naidu, Eric Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 *Harv. L. Rev.* 537, 573 (2018).

25 *E.g.*, Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1109 (9th Cir. 2021) (no-poach agreement in context of an employee outsourcing arrangement was an ancillary restraint subject to the rule of reason under the Sherman Act).

26 *E.g.*, Nichols v. Spencer Int'l Press, 371 F.2d 332, 337 (7th Cir. 1967) (no-switching agreement challenged under the Sherman Act should be analyzed for reasonableness); Ulrich v. Moody's Corp., 2014 WL 12776746, at *26 (S.D.N.Y. Mar. 31, 2014), *report and recommendation adopted as modified on other grounds* ("'No-hire' or 'no-switching' agreements," have been traditionally "viewed as a subset of covenants not to compete, and for such allegations courts have used the rule of reason rather than the per se rule to determine whether or not a plaintiff has sufficiently alleged a cause of action under section 1 of the Sherman Act.").

27 *E.g.*, *Bogan*, 166 F.3d at 515 (agreement among insurance company's General Agents not to recruit and hire each other's District or Sales agents without the consent of the agent's current General Agent did "not fit into any of the established per se categories" and therefore was not subject to per se rule); Thomsen v. W. Elec. Co., Inc., 680 F.2d 1263, 1266-67 (9th Cir. 1982) (no-hire agreement among companies in same corporate family did not violate Sherman Act).

28 *E.g.*, Williams v. I.B. Fischer Nev., 999 F.2d 445, 447-48 (9th Cir. 1993) (holding that a no-switching agreement that prohibited a restaurant manager from moving between different franchisees within the franchise was not per se unlawful under the Sherman Act); Deslandes v. McDonald's USA, LLC, 2018 WL 3015955, *20 (N.D. Ill. (June 25, 2018) ("Because the restraint alleged in plaintiff's complaint is ancillary to an agreement with a procompetitive effect, the restraint alleged in plaintiff's complaint cannot be unlawful per se"); Ogden v. Little Caesar Enters., 393 F.Supp.3d 622, 635 (E.D. Mich. 2019) (stating that "the franchise agreements here allegedly were part of an overall scheme of 'legitimate collaboration' between franchisees operating under the umbrella of the same brand" and holding that plaintiff failed to plead facts showing "that the franchise agreements' no-poaching provisions are unreasonable per se").

29 *E.g.*, Eichorn v. AT & T Corp., 248 F.3d 131, 143 (3d Cir. 2001), as amended (June 12, 2001) (finding "no support within the relevant case law" for labeling a no-hire agreement as per se unlawful in the context of the sale/acquisition of a business, and "hold[ing] the no-hire agreement here is more appropriately analyzed under the rule of reason"); *see also*; Coleman v. Gen. Elec. Co., 643 F. Supp. 1229, 1243 (E.D. Tenn. 1986) (rejecting per se rule for no-hire agreement in connection with the sale of a manufacturing facility and finding it was reasonable under the rule of reason), *aff'd*, 822 F.2d 59 (6th Cir. 1987); Cesnik v. Chrysler Corp., 490 F. Supp. 859, 864-868 (M.D. Tenn. 1980) (rejecting per se rule for no-hire agreement in sale of assets and finding it was reasonable under the rule of reason); *see also* Final Judgment, United States v. Adobe Systems, Inc., et al., No. 1:10-cv-01629-RBW, ECF No. 17, p. 4 (D.D.C. Mar. 18, 2011) ("Nothing in Section IV shall prohibit the Defendant . . . from attempting to enter into, entering into, maintaining or enforcing a no direct solicitation provision . . . [that] is reasonably necessary for mergers or acquisitions, consummated or unconsummated, investments, or divestitures, including due diligence related thereto"). Note that the FTC has recently challenged no-poach provisions in proposed mergers on the issue of the reasonableness of the scope of the provision. *See e.g.,* Complaint, Axon Enterprises Inc. and Safariland, LLC, FTC Docket No. D9389 (alleging 10-year provisions are "longer than reasonably necessary.").

30 *E.g.*, Haines v. VeriMed Healthcare Network, LLC, 613 F. Supp. 2d 1133, 1137-38 (E.D. Mo. 2009) (per se rule did not apply to a no-hire agreement between a firm and its client that precluded the client from hiring the firm's employee; agreement was reasonable under the rule of reason); Hanger v. Berkely Grp., Inc., No 5:13-cv-113 2015 WL 349255, at 1-2 (W.D. Va. May 28, 2015) (finding defendants' settlement that obligated each company to honor the other's non-competition agreement with its employees was reasonable under the rule of reason).

31 2016 Guidance, pp. 3-4.

[32] Proposed Final Judgment, United States v. Lucasfilm Ltd., 1:10-cv-02220-RBW, Dkt. 6-1 (D.D.C. May 9, 2011), https://www.justice.gov/atr/case-document/file/501626/download.

[33] Included in this allowed category were auditors, who would also have access to a great deal of highly sensitive business information.

[34] Federal Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors, 1 (April 2000).

[35] *Id.*, p. 8.

[36] There were several other carve outs in the Lucasfilm Final Judgement, including no-solicitation agreements "contained within existing and future employment or severance agreements with the Defendant's employees"; reasonably necessary for mergers or acquisitions, consummated or unconsummated, investments, or divestitures, including due diligence related thereto; and "reasonably necessary for the settlement or compromise of legal disputes."

[37] *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1110–11 (9th Cir. 2021); see also 2016 Guidance, pp. 3, 8.

[38] Gregory J. Werden, The Ancillary Restraints Doctrine after Dagher, 8 SEDONA CONF. J. 17 (2007).

[39] Corrected Statement of Interest, *Stigar v. Dough, Inc*., No. 2:18-cv-00244-SAB, Dkt. 34 at 11-12 (E.D. Wash. Mar. 8, 2019).

[40] Statement of Interest of the United States of America, *Seamen v. Duke University*, No. 1:15-cv-462, ECF No. 325 at 24 (M.D.N.C. Mar. 7, 2019).

[41] Andrew Finch, Principal Deputy Assistant Att'y Gen., Remarks at the ABA Antitrust in Asia Conference (May 31, 2018) available at https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-remarks-aba-antitrust.

[42] Michael Murray, Deputy Assistant Att'y Gen., Remarks at Santa Clara University (March 1, 2019), at 10 available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-murray-delivers-remarks-santa-clara-university.

[43] United States Opp'n to Defs.' Mot. to Dismiss, *United States v. Surgical Care Affiliates, LLC*, No. 3:21-cr-00011-L (N.D. Tex. Apr. 30, 2021), ECF No. 44, at 18-19.

[44] 9 F.4th 1102 (9th Cir. 2021).

[45] *Id.*, 9 F.4th at 1110–11.

[46] *See* Complaint, United States v. Knorr-Bremse AG, No. 1:18-cv-00747 (D.D.C. Apr. 3, 2018).

[47] No. 3-21-cr-0011-L, Dkt. 1 (N.D. Tex. Jan. 5, 2021).

[48] No. 21-cr-00229-RBJ, Dkt. 1 (D. Colo. July 14, 2021).

[49] No. 2:22-cr-00013-JAW, Dkt. 1 (D. Maine Jan. 27, 2022).

[50] No. 3:21-cr-00220-VAB, Dkt. 20 (D. Conn. Dec. 15, 2021).

[51] No. 4:20-cr-00358-ALM-KPJ, Dkt. 1 (E.D. Tex. Dec. 9, 2020).

[52] No. 4:20-cr-00358-ALM-KPJ, Dkt. 112 (E.D. Tex. April 14, 2022).

[53] No. 21-cr-00229-RBJ, Dkt. 264 (D. Colo. April 15, 2022).

[54] No. 4:20-cr-00358-ALM-KPJ, Dkt. 56 (E.D. Tex. Nov. 29, 2021).

[55] No. 21-cr-00229-RBJ, Dkt. 132 (D. Colo. Jan. 28, 2022).

[56] No. 21-cr-00229-RBJ, Dkt. 254 at 22 (D. Colo. April 13, 2022) (emphasis added).

[57] No. 21-cr-00229-RBJ, Dkt. 254 at 20 (D. Colo. April 13, 2022) (emphasis added).

[58] No. 21-cr-00229-RBJ, Dkt. 257-1 (D. Colo. April 14, 2022)

[59] No. 21-cr-00229-RBJ, Dkt. 254 at 21-22 (D. Colo. April 13, 2022) (emphasis added).

[60] No. 4:20-cr-00358-ALM-KPJ, Dkt. 111 at 13 (E.D. Tex. April 14, 2022).

[61] 20-3594-cr (2d Cir. May 2, 2022)

[62] *Id.*,

[63] *Id.*,

[64] *Id.*,

[65] No. 21-cr-00229-RBJ, Dkt. 254 at 21-22 (D. Colo. April 13, 2022).

[66] No. 21-cr-00229-RBJ, Dkt. 254 at 20 (D. Colo. April 13, 2022).

[67] See generally, *US v. DaVita, Inc. and Kent Thiry*, 21-cr-00229; *US v. Jindal*, 20-cr-00358.

[68] Richard A. Powers, Deputy Assistant Att'y Gen., Remarks at the University of Southern California Global Competition Thought Leadership Conference (June 3, 2022) available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-keynote-university-southern.