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What's Next For Labor Enforcement After DOJ Punts Case?

By **Bryan Koenig**

Law360 (November 27, 2023, 5:45 PM EST) -- The future of U.S. Department of Justice criminal prosecutions against "no-poach" deals between rival employers appears troubled after the DOJ dropped its last still-pending public case following a series of high-profile losses, in one of two cases Antitrust Division prosecutors quietly abandoned in a single week.

The first to go was the nearly 3-year-old non-solicitation case against UnitedHealth's Surgical Care Affiliates, which was dropped Nov. 13 with the only stated reason being "the conservation of this court's time and resources." Three days later, prosecutors gave that same reason for abandoning a case accusing a pharmaceutical marketing executive of taking part in a sweeping scheme to fix the price of generic drugs.

Neither abandonment, a rare move in itself, came with any formal acknowledgment other than the DOJ's stipulated dismissals. The two dismissals came in areas where the DOJ has had radically different levels of success. In the price-fixing area, antitrust enforcers have a long history of criminal enforcement and a strong record of success, though muddled somewhat in recent years, whereas the DOJ is new to criminal enforcement in the labor arena and has yet to convince a single jury to convict on any of the labor-side criminal charges that only started appearing in late 2020.

Although the abandonments were disclosed in quick succession, the proximity of the moves appears coincidental. Little change is expected in the DOJ's approach to price-fixing cases, but onlookers have been left guessing as they take stock of what is next for labor-side criminal enforcement.

The department's Antitrust Division declined comment for this story.

"After a string of acquittals and no convictions, the division appears to be throwing in the towel," said Eric Grannon, a White & Case LLP partner and former counsel with the Antitrust Division.

Like many on the defense bar, Grannon criticized the DOJ decision to pursue criminal prosecutions against alleged deals to restrict hiring and recruitment between different employers, first signaled by joint DOJ and Federal Trade Commission guidance issued in 2016.

"Practitioners have for a while now been calling for the government to broadly and honestly reassess its labor market prosecution strategy," said Daniel K. Oakes, an Axinn Veltrop & Harkrider LLP partner.

Calling the prosecution policy "misguided from the beginning," Grannon argued that courts and not the

department decide what amounts to an automatic, or per se, antitrust violation, which is the only standard under which the DOJ pursues criminal charges, typically for price-fixing, market allocation and bid-rigging.

"While speaking loudly and failing to convict, the division's stick to leverage pleas in this area has withered to a twig," Grannon said.

While the Surgical Care Affiliates case was the last publicly pending criminal no-poach case, new ones are likely to follow. Antitrust Division leadership has repeatedly touted a heavy volume of grand jury investigations and officials have continued to call labor-side criminal cases righteous.

"We are just as committed as ever to, when appropriate, using our congressionally given authority to prosecute criminal violations of the Sherman Act in labor markets. Stopping people and companies from agreeing to suppress wages or limit the opportunities of employees is fundamental to ensuring that labor markets are free markets," the head of the Antitrust Division, Assistant Attorney General Jonathan Kanter, said in September.

"There has been a continuous chorus of supporting the labor market prosecutions and standing behind them, no matter what the results were," said McDermott Will & Emery LLP partner Justin P. Murphy, a defense attorney from the DOJ's failed no-poach prosecution against Surgical Care Affiliates' alleged co-conspirator, kidney dialysis company DaVita and its former CEO.

The Antitrust Division's top criminal enforcement official, Deputy Assistant Attorney General Manish Kumar, argued earlier this year that no-poach prosecutions "are extremely important cases," even as the DOJ struggles to convince juries. Kumar said at the time that those losses, each the product of its own circumstances, present "a limited amount of data, and it's a little bit hard to extrapolate."

"We're certainly learning from this," Kumar said of the criminal section's losses.

Antitrust attorneys say the DOJ is likely to try applying lessons learned from its losses.

"Manish has more experience than his predecessor did in building and going to jury trial with antitrust cases," said Lisa Phelan, global co-chair of Morrison Foerster LLP's antitrust practice and a former chief of the Antitrust Division's National Criminal Enforcement Section. "In doing that closer look, he may have concluded that the lessons to be learned from recent losses would teach that some of the already indicted cases would not be winnable at trial, as they suffered from the same problems/weaknesses/fact patterns as the recent losses."

Whatever the DOJ may have learned, prosecutors decided last week that it needed to drop the charges against Surgical Care Affiliates LLC and SCAI Holdings LLC first filed in January 2021, which had remained in limbo as other cases moved forward.

In the interim, DOJ Antitrust Division prosecutors have failed to win a single jury conviction on any of the no-poach or wage-fixing criminal charges the agency began filing in late 2020.

Division leadership has continually argued that despite the ultimate losses, courts at least have allowed the no-poach prosecutions to proceed. Attorneys, however, say that's the wrong litmus test because defendants' motions to dismiss are generally easy to beat.

What really matters is the outcome in the courtroom, they say.

"The juries have spoken. The courts have spoken," said Michael Weinstein, chair of Cole Schotz PC's white collar criminal defense & government investigations practice and an attorney for one of the defendants in the generic-drugs case.

Defense bar attorneys argue the no-poach cases are a far cry from more traditional price-fixing and market allocation cases that courts have deemed per se anticompetitive after long experience.

Despite the recent abandonment, the DOJ's generic-drugs price-fixing enforcement, entwined with a massive civil multidistrict litigation that's still ongoing, has seen more success. The DOJ forced multiple major drugmakers into settlements worth hundreds of millions of dollars.

The newly dropped prosecution, against former pharmaceuticals executive Ara Aprahamian, represented the last still-pending generic-drugs case other than a handful of defendants awaiting sentencing.

It's unclear how much to read from the timing of the Surgical Care Affiliates and Aprahamian dismissals, given DOJ rules to evaluate and continuously reevaluate every case on its individual merits.

The DOJ's only wins in the no-poach cases so far have been a conviction for lying to investigators and a pair of plea deals. Another, separate wage-fixing case, over Las Vegas home health agency nurses, is currently set for trial next year.

"They might be looking more critically at the fact patterns they want to pursue," Carsten Reichel, a Norton Rose Fulbright partner and former Antitrust Division prosecutor, said of future cases.

Perhaps the biggest lesson came in April when U.S. District Judge Victor A. Bolden threw out no-poach charges against six aerospace and staffing company bosses, including Mahesh Patel, a former director for global engineering sourcing with Raytheon Technologies Corp.'s Pratt & Whitney division. The ruling cast a heavy pall over future no-poach prosecutions because it affirmed that courts are increasingly skeptical of these cases.

Judge Bolden ruled that no reasonable juror could convict based on the evidence presented by prosecutors and threw out the charges under Federal Rule of Criminal Procedure 29. It was the first such acquittal under Rule 29 for antitrust charges in more than 20 years.

Part of the problem in the no-poach cases, according to Marc A. Weinstein of Hughes Hubbard & Reed LLP, an attorney for a defendant in the Patel case, is that the targeted non-solicitation deals typically only bar direct efforts to recruit workers while not barring staff from applying.

"It doesn't mean that people can't move," he said.

"At trial, as the facts came out, these 'no proactive solicitation' agreements actually in practice still allowed many employees to move between the companies. Thus, the harm seemed minimal, and judges and juries struggled to see the conduct as clearly impacting competition," said Phelan.

Perhaps more importantly for future labor-side prosecutions, Judge Bolden imposed a high bar on what constitutes per se anti-competitive conduct. Instead of simply showing that a no-poach agreement

existed, Judge Bolden said per se charges would only be appropriate if the restriction on hiring was "meaningful."

Defense bar observers speculate that Judge Bolden's ruling, and heady jury instructions in the failed prosecution against DaVita, requiring the showing of anticompetitive intent, may have forced a reevaluation as prosecutors faced the possibility of developing more case law detrimental not only to future no-poach criminal cases but to criminal antitrust cases more broadly.

"DOJ saw some wins on motions to dismiss, but application of the per se rule at trial seemed to betray courts' reluctance to hold that mere evidence of a no-poach agreement is enough to meet that high bar," said Amy Vegari, a partner with Patterson Belknap Webb & Tyler LLP. "For example, in United States v. DaVita, the trial court instructed the jury that the government needed to prove that defendants entered into a non-solicitation agreement with the intent to allocate the market, and the jury voted to acquit."

The cases, according to McDermott's Murphy, "have put some extremely challenging legal precedent at the feet of the Antitrust Division when or if it tries to bring another labor case down the road."

Those impacts, Murphy said, are before getting to potential risks to pursuing cases as per se violations, instead of the harder-to-prove rule of reason standard that allows defendants to try and justify their conduct as on balance not harmful to competition. As a matter of policy, the DOJ only pursues criminal cases under the per se standard.

"They're chipping away at their bread and butter cases that don't even touch labor," Murphy said.

As the DOJ looks to the future, Axinn's Oakes predicted it will continue to pursue wage-fixing cases often seen as more directly comparable to price-fixing conspiracies.

"But it gets tougher with no-poach and non-solicit cases after Patel, particularly if the alleged agreement did not significantly affect the market or the alleged conspirators continued hiring from each other despite the agreement," Oakes said. "The government will need to carefully select its cases."

--Additional reporting by Khadrice Rollins and Matthew Perlman. Editing by Michael Watanabe.
