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DOJ Fails to Convict in No-Poach/Wage Fixing Case

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The Department of Justice (DOJ) Antitrust Division recently suffered another setback in its most recent effort to secure criminal convictions for labor-side violations of Section 1 of the Sherman Act. Having finally secured a successful criminal conviction, which came by way of plea deal and deferred prosecution agreement, the DOJ proceeded to trial in Maine against four home health executives who the government alleged had conspired to enter into a no-poach agreement and fix wages paid to home health aides. After a two-week trial, the jury acquitted all four of the defendants, marking the third time the DOJ has failed to convince a jury to convict defendants for alleged Section 1 violations in the labor market.

U.S.A. v. Faysal Kalayaf Manahe, Yaser Aali, Ammar Alkinani, and Quasim Saesah

On January 27, 2022, a federal grand jury in the District of Maine issued a nine-page indictment, charging Faysal Kalayaf Manahe, Yaser Aali, Ammar Alkinani, and Quasim Saesah (defendants) with one count of engaging in a conspiracy to violate Section 1 of the Sherman Act.[1] Per the indictment, the defendants entered into an agreement to fix the wages paid to personal support specialists (PSS) employed by their respective home health agencies by agreeing not to hire each other's workers and to fix their wages to $15 or $16 a hour.[2] The alleged two-month conspiracy was supposedly carried out through various virtual and in-person meetings, and both encrypted and nonencrypted messaging apps.[3] The DOJ alleged the defendants' agreement constituted a *per se* violation of Section 1.[4]

Motion to Dismiss

In May 2022, defendant Faysal Kalayaf Manahe filed a motion to dismiss the indictment,[5] which was joined by the other defendants.[6] The defendants asserted multiple arguments for why the indictment should be dismissed, including that the indictment failed to state a *per se* violation of Section 1, and the alleged agreement reached by the defendants was an ancillary restraint subject to the rule of reason that was not pled in the indictment.[7]

The DOJ opposed the motion to dismiss, arguing the alleged no-poach agreement was a classic example of a horizontal restraint of trade, long held to violate Section 1.[8] It further argued that there was no reason to create an exception to the *per se* rule for no-poach agreements, and the defendants' ancillary-restraint argument lacked merit.[9]

Ultimately, the district court denied the defendants' motion. The court reasoned that the indictment adequately

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alleged a *per se* illegal horizontal conspiracy.[10] The court noted that the defendants were correct "that they have a valid defense to the *per se* rule if they can show that any restraint resulting from the alleged agreement was ancillary to efficiency-enhancing economic activity." However, the court ruled that the defendants had the burden of making a factual showing to support that argument at trial, and therefore, denied the motion to dismiss.[11]

Jury Acquits

Following a two-week trial, on March 22, 2023, the jury acquitted all four of the defendants.[12] Despite the introduction of evidence in the form of messages and recorded meetings that revealed the defendants discussed an agreement to pay all PSS workers $15 or $16 an hour, it appears the prosecution failed to convince the jury that an agreement was ever actually reached or acted upon by any of the defendants. Part of the prosecution's difficulty likely stemmed from the fact that in practice, the defendants never reduced the PSS workers' wages — they actually paid them $18 or $19 an hour. Further, while the alleged agreement was reduced to writing, the writing was never signed by any of the defendants. Notably, the defendants — all of whom were immigrants from Iraq — argued that in their culture, the only way to confirm an agreement is to sign a formal written contract.

This third acquittal may also indicate a more fundamental challenge the DOJ is facing: convincing juries that people should face jail time for agreeing not to solicit and hire competitors' employees. The DOJ's record appears to support this theory. To date, the DOJ is zero-for-three in securing a criminal conviction from a jury for a violation of Section 1 related to a no-poach agreement.[13] The DOJ's sole conviction in this arena was against VDA OC LLC and came via a plea deal.[14] Notably, even that conviction was not a complete success as its prosecution against VDA's former Manager Ryan Hee resulted in a deferred prosecution agreement and not a criminal conviction.[15]

Conclusion

Businesses should not expect this most recent loss to slow down the DOJ's enforcement actions. Despite the DOJ's difficulty in securing jury convictions, the guilty plea by VDA and the Biden administration's stated policy of trying to protect employees from what it perceives to be unreasonable restraints suggest that the DOJ will continue to indict businesses and individuals for alleged Section 1 violations involving no-poach agreements or wage fixing. Accordingly, clients should be careful when seeking to limit the movement of their employees in agreement with competitors or discussing their employees' pay with competitors.

Related Cases Worth Watching

Opening arguments have begun in *U.S. v. Mahesh Patel, Robert Harvey, Harpreet Wasan, Steven Houghtaling, Tom Edwards, and Gary Prus.*[16]There, the defendants are each charged with one count of conspiracy in restraint of trade in violation of Section 1. The government alleges that each of the defendants, who managed or otherwise controlled the hiring decisions at various unnamed companies, entered into a no-poach agreement regarding their employed aerospace engineers.[17] Notably, the court recently denied the DOJ's motion *in limine*, seeking to prevent the defendants from arguing the procompetitive benefits of the alleged agreement.[18] While the court agreed that such evidence could not be used to argue that the agreement had procompetitive benefits because the DOJ alleged a *per se* violation, the court ultimately ruled that the evidence could be used to rebut the allegations that the defendants "joined the charged conspiracy, whether the conspiracy existed as alleged, and

whether defendants had the requisite intent to join the conspiracy."[19] Time will tell if this ruling will further hinder the DOJ's attempt to convince a jury to deliver the DOJ its first Section 1 conviction following a trial.

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[1] *U.S.A. v. Faysal Kalayaf Manahe, Yaser Aali, Ammar Alkinani, and Quasim Saesah*, ECF 1, 2:22-cr-00013-JAW (D. Me. Jan. 27, 2022).

[2] *Id.* at ¶¶ 1-18.

[3] *Id.* at 17.

[4] *Id.* at 15.

[5] ECF. 79, 2:22-cr-00013-JAW (D. Me. May 31, 2022).

[6] ECF. 77, 2:22-cr-00013-JAW (D. Me. May 31, 2022); ECF. 81, 2:22-cr-00013-JAW (D. Me. June 1, 2022); ECF. 82, 2:22-cr-00013-JAW (D. Me. June 6, 2022).

[7] ECF. 79, 2:22-cr-00013-JAW, at 1-2 (D. Me. May 31, 2022). The defendants also argued that the application of the *per se* rule against criminal defendants was unconstitutional because it instructed juries that certain facts presumptively established an element of a crime and because it renders the Sherman Act unconstitutionally vague.

[8] ECF. 89, 2:22-cr-00013-JAW, at 4-7 (D. Me. June 21, 2022).

[9] *Id.* at 7-16.

[10] ECF. 112, 2:22-cr-00013-JAW, at 13 (D. Me. Aug. 8, 2022).

[11] *Id.* at 13-14; The court also rejected the defendants constitutionality challenges. *Id.* at 22.

[12] ECF. 247, 2:22-cr-00013-JAW (D. Me. Mar. 22, 2023).

[13] "DOJ Evolves Its Strategy of Increased Criminalization of Employment Restrictions Under Antitrust Laws," *Troutman Pepper*, December 13, 2022.

[14] *Id.*

[15] *Id.*

[16] 3:21-cr-00220-VAB (D. Conn. 2021).

[17] ECF. 257, 3:21-cr-00220-VAB, 2-5 (D. Conn. Dec. 2, 2022).

[18] ECF. 457, 3:21-cr-00220-VAB, 13-18 (D. Conn. Mar. 27, 2023).

[19] *Id.*

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