Workers, Labor Take Center Stage At ABA Antitrust Meeting

By **Henry Hauser, Shylah Alfonso and Tommy Tobin** (April 3, 2023)

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The American Bar Association's 2023 antitrust spring meeting, held in Washington, D.C. in March, had a heavy emphasis on upstream markets affecting employees and talent.

Government officials, judges, academics, and the private bar discussed and debated cutting-edge competition issues affecting workers and labor markets, including criminal enforcement, amicus efforts, public engagement, and rulemaking.

Prosecutors sent a clear message that they view no-solicitation, no-poach and no-hire agreements as criminal violations, even in the face of several jury trial setbacks.

The U.S. Department of Justice Antitrust Division is also keen to pursue its upstream agenda through merger cases and amicus briefs.

For its part, the Federal Trade Commission is engaging in rulemaking to ban most noncompete agreements across the entire economy.

Criminal Enforcement at the Forefront

Delivering on its promise to pursue matters that affect job mobility and terms of employment, the Antitrust Division has been busy investigating and litigating criminal no-poach cases, no-hire cases and wage-fixing cases.

At the Department of Justice agency update session, Deputy Assistant Attorney General Manish Kumar stated that these cases "are about protecting the economic freedom of individuals to sell their labor into a competitive market and therefore earn a livelihood."

Addressing both successful and unsuccessful litigation results, Kumar avowed that these cases are "worthy, and we are going to continue to bring them."

No-poach restraints involve agreements between firms not to recruit or solicit each other's workers. Relatedly, no-hire cases are associated with concerted action over the ultimate hiring of an applicant away from another company.

Finally, wage-fixing is analogous to the downstream price-fixing of a product or service but instead targets workers' pay or benefits.

The Antitrust Division has taken the position that each of these labor market restraints is a criminal violation of Section 1 of the Sherman Antitrust Act. The results thus far have been mixed, with several setbacks.

In the Antitrust Division's first litigated wage-fixing trial — United States v. Jindal in the U.S. District Court for the Eastern District of Texas in 2020 — the government charged two executives of a physical therapy staffing company with allegedly conspiring to restrain

competition by agreeing to fix prices by lowering pay rates to physical therapists in the Dallas-Fort Worth area.

The jury found both defendants not guilty of fixing wages under Section 1 and not guilty of conspiring to defraud under Title 18 of the U.S. Code, Section 371.

However, defendant Neeraj Jindal was found guilty of obstructing proceedings under Title 18 of the U.S. Code, Section 1505, based on withholding information from an FTC investigation and texting and calling subjects of the investigation with the goal of influencing their cooperation with the government.

The antitrust acquittal was a blow to the Antitrust Division's criminal program, especially for cases involving labor markets.

Framing the result in a positive light, the agency emphasized the court's order denying defendants' motion to dismiss from November 2021, which held that "price-fixing agreements — even among buyers in the labor market — have been per se illegal for years" because when "the price of labor is lowered, or wages are suppressed, fewer people take jobs, which always or almost always tends to restrict competition and decrease output."

The motion to dismiss ruling is an important reminder that courts are receptive to analyzing wage-fixing under the per se framework. Unlike rule of reason cases where plaintiffs must show anti-competitive effects, such effects are presumed in per se cases.

The Antitrust Division suffered its second loss in U.S. v. DaVita Inc. in the U.S. District Court for the District of Colorado, which resulted in the acquittal of DaVita and its longtime former CEO Kent Thiry on all charges relating to an alleged no-poach agreement for senior-level employees.

In March, a third loss ensued when a federal jury in Portland, Maine, acquitted four home health care executives on charges that they suppressed wages and limited job mobility for essential health care workers during the early days of the COVID-19 pandemic.

In that case, the defense successfully argued that conversations between the defendants did not rise to the level of an agreement sufficient to support a violation of Section 1. In this context, an agreement means a conscious commitment to a common scheme designed to achieve an unlawful objective.

Under Section 1, an agreement can be shown through either direct or circumstantial evidence. But it is important to recognize that, in criminal cases, the government bears the burden of proving beyond a reasonable doubt that the agreement was in fact reached.

As these cases show, it can be difficult to convince a jury that this standard has been met.

The degree of difficulty may be even greater when the government is unable to present testimony from cooperating witnesses that have not themselves been immunized, which was the case in the prosecutions discussed above.

During the "All Bark, No Bite? Antitrust Under Biden" session, moderated by article co-author Shylah Alfonso, Renata Hesse of Sullivan & Cromwell LLP noted that this can be a "challenging area for criminal enforcement" and emphasized the importance of case selection given the nature of this conduct, geographic dynamics, and relatively smaller size of the defendants.

The division scored its first criminal plea in labor market case U.S. v. VDA OC LLC in the U.S. District Court for the District of Nevada in March, when a health care staffing company was sentenced for "entering into and engaging in a conspiracy with a competitor to allocate employee nurses and to fix the wages of those nurses" in Clark County, Nevada.[1]

According to the plea agreement, the volume of commerce was less than $250,000. This case demonstrates that the Department of Justice is prepared to bring cases regardless of the defendant's size or the volume of commerce at issue.

The rest of 2023 will be busy for the Antitrust Division's criminal sections, with the U.S. v. Patel trial now underway in the the U.S. District Court for the District of Connecticut, which alleges a conspiracy to "deprive aerospace workers of the ability to plan their own careers and earn competitive pay."[2]

Several more labor market cases are set for trial later this year. Whether the Antitrust Division learns from its early losses and adjusts its investigation or litigation strategy remains to be seen.

Amicus Operarius: Friend of the Worker

At the Department of Justice agency update session, Deputy Assistant Attorney General Maggie Goodlander extolled the value and importance of the Antitrust Division's amicus program.

Federal enforcers have pursued their labor market agenda through amicus briefs, including two cases involving franchise agreements before the U.S. Court of Appeals for the Seventh Circuit.

In Deslandes v. McDonald's USA LLC in March, the agencies argued that horizontal employee-allocation provisions in franchise agreements are per se unlawful unless the defendants prove the restraint is subordinate and collateral to a separate, legitimate collaboration and reasonably necessary to achieving a pro-competitive objective of the collaboration.

Enforcers argued that franchise agreements can involve horizontal restraints because some franchisors enter into franchise agreements and run their company-owned restaurants.

This approach is consistent with the U.S. Court of Appeals for the Eleventh Circuit's holding in another fast-food antitrust case, Arrington v. Burger King Worldwide Inc. in March.

In that case, the Eleventh Circuit determined that Burger King competes for employees against its separate and independent franchise restaurants.

The mere participation of a vertically related firm, according to the government, does not render the conduct vertical. In other words, the franchise agreement does not immunize an otherwise unlawful horizontal agreement.

Mergers and Workers

Issues affecting labor are also making their way into merger review and litigation.

The Antitrust Division's successful challenge to the proposed $2.2 billion merger of Penguin Random House and Simon & Schuster, for example, alleged that the deal would "likely result in substantial harm to authors of anticipated top-selling books" and reduce author income.[3] U.S. District Judge Florence Pan for the District of Columbia agreed.

In accord, at the Department of Justice agency ipdate session, Deputy Assistant Attorney General Andrew J. Forman remarked that, as a labor monopsony case, this matter advanced the law in several important respects.

The Department of Justice's challenge to this merger underscores its appetite for pursuing upstream theories of harm and conduct that affect workers and creators.

During the "All Bark, No Bite? Antitrust Under Biden" session, Ian Conner of Latham & Watkins LLP indicated that the "agencies are looking much more at labor effects in mergers."

Matt Stoller of the American Economic Liberties Project highlighted a litany of recent merger investigations and challenges that similarly featured labor-side theories.

Noncompetes

FTC rulemaking on noncompete agreements was another major topic.

Back in July 2021, President Joe Biden's executive order on competition encouraged the FTC to exercise its "statutory rulemaking authority ... to curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility."

In January, the agency issued a draft regulation that would prohibit most noncompetes across the entire economy.

The FTC has received more than 20,000 public comments so far and is accepting additional submissions through April 19.

J. Michael Lee of JPMorgan Chase noted during the "All Bark, No Bite? Antitrust Under Biden" session that regulating noncompete agreements is not an entirely new concept and that many states, including California and Washington, already do so.

He also discussed the other tools that employers can use to protect their business interests, such as nondisclosure agreements and trade secret laws.

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[1] https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-

conspiring-suppress-wages-school-nurses.

[2] https://www.justice.gov/opa/pr/six-aerospace-executives-and-managers-indicted-leading-roles-labor-market-conspiracy-limited.

[3] https://www.justice.gov/opa/press-release/file/1445916/download.