THE "NO-POACH" APPROACH: UPDATE ON THE ANTITRUST AGENCIES' ENFORCEMENT OF EMPLOYMENT AGREEMENTS

BY DEE BANSAL, JACQUELINE GRISE, BEATRIZ MEJIA & JULIA BRINTON[1]




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By Dee Bansal, Jacqueline Grise, Beatriz Mejia & Julia Brinton

Antitrust enforcement of conduct in labor markets has continued to ramp up over the past decade, with particularly intense scrutiny on "no-poach" agreements — agreements between or among employers of different companies not to recruit or solicit each other's employees. The DOJ has committed to protect competition in labor markets, and President Biden has also signaled that competition in the labor market would be a priority for his administration. Consistent with these priorities, we have seen a significant increase in the number of investigations, criminal indictments, and private lawsuits based on alleged no-poach agreements. In this article, we summarize the legal landscape and highlight key trends. Specifically, we discuss DOJ's recent criminal indictments, DOJ's latest statements on its position regarding the legal standard applied to franchisee/franchisor agreements, the question of whether criminal prosecutions present a "due process" issue, and international developments. Against this backdrop, companies and employees should continue to avoid conduct that may raise red flags and should consider implementing a robust antitrust compliance policy, including antitrust training for employees, and engaging antitrust counsel to review current non-solicitation provisions and non-compete clauses.

I. INTRODUCTION

Antitrust enforcement of conduct in labor markets has continued to ramp up over the past decade, with particularly intense scrutiny on agreements between or among employers of different companies not to recruit or solicit employees of the other, often called "no-poach" agreements.

President Biden signaled that competition in the labor market would be a priority for his administration, issuing an executive order in July 2021 entitled, "Promoting Competition in the American Economy," which includes 72 initiatives by more than a dozen federal agencies in an aim to address competition issues across the economy.[2] In furtherance of one such initiative, the Department of Justice ("DOJ") and Department of Labor signed a Memorandum of Understanding on March 10, 2022, putting into writing commitments by both agencies to exchange information to assist with investigations into possible antitrust violations in labor markets.[3]

Consistent with these priorities, we have seen a significant increase in the number of investigations, criminal indictments, and private litigation based on alleged no-poach agreements. Below, we summarize the legal landscape and recent developments and highlight key trends. Specifically, after an introduction to the legal standard and how antitrust laws apply to employment agreements, we discuss DOJ's recent criminal indictments, DOJ's latest statements on its position regarding the legal standard applied to franchisee/franchisor agreements, the question of whether criminal prosecutions present a "due process" issue, and international developments.

II. ANTITRUST ISSUES ASSOCIATED WITH NO-POACH AGREEMENTS

A. Types of Agreements Subject to Antitrust Enforcement in the Employment Context

This article is focused on no-poach agreements, but we will start by providing an overview of the types of agreements that are generally subject to antitrust scrutiny in the labor context.

Agreements subject to antitrust scrutiny may be between or among employers of different companies or may be between an employer and its employees.[4]

Agreements between employers typically raise more antitrust risk and include: (i) *wage-fixing* agreements, which are a form of price fixing, and include agreements to set salaries at a certain level; (ii) *no-poach* or *non-solicit* agreements, which are agreements not to recruit another company's employees; and (iii) *no-hire* agreements, which are agreements not to hire another company's employees.

Critically, in analyzing such agreements under the antitrust laws, the term "competitor" includes *any* firm that competes to hire the same employees, regardless of whether the firm makes similar products or provides similar services.[5] This broad definition of "competitor" distinguishes the competitive analysis from the analysis applied in other antitrust contexts where the focus is more on current, future, or potential competition for goods sold and services offered.

As a result, firms may be subject to antitrust liability for entering into certain agreements with firms in different industries (e.g. entertainment and high-tech), if the agreement concerns the same types of employees (e.g. software engineers).

2 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

3 Press Release, *Departments of Justice and Labor Strengthen Partnership to Protect Workers* (Mar. 10, 2022).

4 An agreement between an employer and its employees that may raise antitrust risk is a *non-compete* agreement, which is an agreement that limits the ability of an employee to join or start a competing firm after a job separation.

5 See Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals*, at 2 (Oct. 2016), https://www.justice.gov/atr/file/903511/download ("From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.").

B. Antitrust Laws Applied to Agreements in the Employment Context

The relevant antitrust laws that apply to no-poach and other employment agreements are Section 1 of the Sherman Antitrust Act ("Sherman Act"), which prohibits contracts that unreasonably restrain trade,[6] and Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices.[7]

Under the Sherman Act, there are two fundamental standards of review: (i) the "per se" standard, which applies to certain acts or agreements that are deemed so harmful to competition with no significant countervailing procompetitive benefit that illegality is presumed; and (ii) the "rule of reason," which applies to all other conduct and agreements and pursuant to which the factfinder weighs the procompetitive benefits of the restraint against its potential harm to competition to determine the overall competitive effect.[8]

The Supreme Court has stated that the rule of reason is "presumptively" applied and there is a "reluctance" to adopt the *per se* standard.[9] Historically, agreements between competitors (i.e. "horizontal" agreements) to engage in hard core conduct, such as price fixing, market allocating, or bid rigging are treated as *per se* illegal, while other conduct, including "vertical" agreements, (i.e. between two firms at different levels in the chain of distribution) and ancillary restraints i.e. those that are "reasonably necessary" to a separate, legitimate, procompetitive integration are subject to the rule of reason.[10]

Depending on the circumstances, no-poach agreements may be analyzed under either the per se or rule of reason standard. Whether the *per se* or rule or reason standard applies has significant implications for the outcome of an enforcement action or litigation. If an agreement is found to be a "naked" no-poach agreement, meaning there is no purpose for the agreement other than to restrict competition, the per se standard applies. As such, neither the court nor the DOJ or Federal Trade Commission (collectively, the "Antitrust Agencies") will consider any proposed justifications for the agreement; it is illegal on its face. If, however, the rule of reason standard applies, such as if a non-solicitation provision is found to be ancillary to a larger agreement, then the factfinder will consider the business justifications for the restraint.

The penalties for violating the antitrust laws are severe and apply at both the company and the individual level. For *per se* criminal violations, companies face a maximum fine of up to $100 million or twice the gross gain or gross loss suffered, while an individual may be fined up to $1 million or face a ten-year prison sentence.[11] For civil matters, the DOJ or plaintiffs may seek treble (three times) damages against companies.[12] This is in addition to reputational damage, the potential for required changes to business practices and oversight monitoring as a result of a government consent decree, and significant time and effort to defend against an investigation and/or lawsuit.

III. RECENT NO-POACH TRENDS

Below we highlight four recent trends relating to no-poach agreements: (1) criminal indictments alleging no-poach agreements are broadening beyond the healthcare industry; (2) the apparent reversal in position by DOJ with respect to the legal standard applied to franchisee/franchisor no-poach agreements; (3) whether DOJ's decision to prosecute no-poach agreements criminally presents a due process issue; and (4) the international expansion of investigating no-poach agreements.

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6 15 U.S.C. § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

7 15 U.S.C. § 45(a)(1). "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

8 There is also a third standard of review, called the "quick look," which is a truncated rule of reason analysis and may be applied when "the great likelihood of anticompetitive effects can easily be ascertained." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770, 779 (1999).

9 *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

10 *NCAA v. Bd. of Regents*, 468 U.S. 85, 100-03 (1984).

11 18 U.S.C. § 3571.

12 15 U.S.C. § 15(a) (". . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained").

A. Recent Criminal Indictments Indicate Intent to Prosecute No-Poach Agreements Beyond Healthcare Industry

The Antitrust Agencies first took the position that DOJ would criminally prosecute no-poach agreements in 2016, when the Antitrust Agencies issued joint guidance, "*Antitrust Guidance for Human Resource Professionals*,"[13] regarding the application of the federal antitrust laws to hiring practices and certain employment agreements.[14] The Antitrust Agencies warned the business community: "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."[15]

The first wave of criminal indictments focused on the healthcare industry,[16] but recent indictments show DOJ is not limiting its criminal enforcement to healthcare and will be probing hiring practices in other labor markets. Attorney General Merrick Garland recently said, "we continue to aggressively prosecute antitrust violations that undermine competition in labor markets or otherwise harm workers – no matter the industry, no matter the company, no matter the individual."[17]

For example, in December 2021, DOJ indicted six aerospace-industry executives and managers for allegedly engaging in a conspiracy to "suppress competition . . . by agreeing to restrict the hiring and recruiting of engineers and other skilled-labor employees."[18] The individuals worked for Pratt & Whitney, part of Raytheon Technologies Corp., QuEST Global Services NA Inc., Belcan Engineering Group, Cyient Inc., and Parametric Solutions Inc., all aerospace companies.

To support its allegations of the conspiracy not to poach each other's employees, DOJ's indictment includes several examples of communications among the executives and managers regarding the alleged agreement:[19]

- One participant emailed Company A's hiring contact, explaining, "I checked with [Company B], They absolutely do not want to release [the employee]. Please do not extend offer to him. [Company A] has committed to [Company B] that we will not hire any more of their employees this year."

- Upon hearing that one of the companies had made an employment offer to one of its engineers, a participant stated by email, "[Company C] is not allowed to poach any of our employees and I will plan to block this immediately."

- The participant then emailed another participant, "I am very concerned that [Company C] believes they can hire any of our employees….Could you please stop this person from being hired by [Company C]?"

- One participant wrote an email to a manager participant at another company, "[w]e must not poach each other['s] partner['s] employee[s]. Please communicate to [Company C] HR not to hire or interview or hire active employees working on [Company A] work."

Within days of DOJ announcing its December 2021 indictment, two class action lawsuits were filed against Raytheon, Belcan, Cyient, Parametric, and QuEST, alleging a conspiracy among the aerospace engineering firms to not solicit, recruit, hire without prior approval, or otherwise compete for employees of the other firms, including engineers.[20] The complaints mirror many of the allegations in DOJ's indictments, and both cases are pending.

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13 Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

14 Press Release, *DOJ Criminally Prosecutes First No-Poach Agreement on Heels of First Criminal Wage-Fixing Indictment* (Jan. 12, 2021), https://www.cooley.com/news/insight/2021/2021-01-12-doj-criminally-prosecutes-first-no-poach-agreement.

15 *Id.*

16 Press Release, *Health Care Company Indicted for Labor Market Collusion* (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion; Press Release, *Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses* (Mar. 30, 2021), https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses; Press Release, *DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry* (July 15, 2021), https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care.

17 Attorney General Merrick B. Garland Delivers Remarks at the White House Roundtable on the State of Labor Market Competition in the U.S. Economy (Mar. 7, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-white-house-roundtable-state-labor.

18 Indictment, https://www.justice.gov/opa/press-release/file/1457091/download.

19 *Id.* at 5-6.

20 *Granata v. Pratt & Whitney, et al.*, Class Action Complaint, No. 3:21-cv-01657 (Conn., Dec. 14, 2021); *Conroy et al. v. Agilis Engineering, Inc., et al.*, Consolidated Class Action Complaint, No. 3:21-cv-01659 (Conn., Dec. 14, 2021).

The goal of protecting labor markets has manifested in the merger space, too, most recently in the book publishing industry. The DOJ filed a complaint in federal court to block Penguin Random House's proposed $2.2 billion acquisition of Simon & Schuster, alleging in part that the combination of the world's largest book publisher with the fourth-largest U.S. book publisher would "likely result in authors earning less for their books [and] likely lead to fewer authors being able to make a living from writing…"[21]

B. Per Se or Rule of Reason? Recent DOJ Statement Suggests Position Reversal on Franchisee/Franchisor Agreements

The change in administration has prompted DOJ to seemingly change its view on the appropriate legal standard to apply in evaluating no-poach agreements in the franchise context.

A few years ago, state Attorneys General conducted investigations concerning no-poach agreements in the franchise industry, including, for example, a 2018 investigation into the use of no-poach agreements by many national fast-food franchises.[22] As a result of this investigation and later settlement, several major fast-food chains agreed to stop using no-poach agreements.[23]

As follow-on civil litigation brought by former employees proceeded against these companies, DOJ filed statements of interest in March 2019, clarifying that no-poach agreements between a franchisor and franchisee typically merit the rule of reason analysis because, even though they compete for labor, the vertical relationship between the parties and the potential that franchise-based no-poach agreements are ancillary to legitimate business interests.[24]

In response, the Washington Attorney General filed their own statement of interest, asserting: "to the extent a franchise agreement restricts solicitation and hiring among franchisees and a corporate-owned store — which is indisputably a horizontal competitor of a franchisee for labor — the agreement must properly be analyzed as a per se restraint."[25]

It appears DOJ is now trying to move away from its prior stance and adopt a stricter view of no-poach restraints used by franchises. In February 2022, in *Deslandes v. McDonald's USA, LLC*, the DOJ sought to file a statement of interest in a lawsuit by former McDonald's managers about the company's prior policy[26] that restricted the hiring or soliciting of employees from other franchises.[27] McDonald's, in its motion for summary judgment, cited to one of DOJ's earlier statements of interest that said, "most franchisor-franchisee restraints are subject to the rule of reason."[28] In DOJ's motion for leave to file its statement of interest, DOJ claimed that the "Statement of Interest in Stigar, however, does not fully and accurately reflect the United States' current views."[29] The motion did not provide details about the government's current views.

In response, McDonald's argued DOJ's motion was "untimely," coming "four-and-a-half years after this case began," and the judge agreed, denying DOJ's motion, though the judge did "note that there's a change in [DOJ's] position."[30] While the case remains pending, it appears the DOJ may no longer believe the rule of reason standard should be used in evaluating no-poach agreements in the franchise industry.

C. Due Process Concerns with Criminal Prosecutions?

The recent wave of criminal indictments for alleged no-poach agreements has prompted defendants to raise a due process question — can DOJ prosecute no-poach agreements criminally in the absence of federal precedent by the courts? As noted, historically, *per se* treatment and

21 Complaint, *United States v. ViacomCBS, Inc.*, et al., No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021), https://www.justice.gov/opa/press-release/file/1445916/download.

22 Press Release, *AG Racine Announces Four Fast Food Chains to End Use Of No-Poach Agreements* (Mar. 13, 2019), https://oag.dc.gov/release/ag-racine-announces-four-fast-food-chains-end-use.

23 *Id.*

24 Dep't of Justice, No-Poach Approach (Sept. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

25 Amicus Curiae Brief at 6-7, *Stigar v. Dough Dough, Inc.*, No. 18-CV-244 (E.D. Wash. Mar. 11, 2019), ECF No. 36, https://storage.courtlistener.com/recap/gov.uscourts.waed.82231/gov.uscourts.waed.82231.36.0.pdf.

26 See Memorandum Opinion & Order at 2, *Deslandes et al. v. McDonald's USA, LLC, et al.*, No. 1:17-cv-04857 (N.D. Ill. July 28, 2021) for the text of the former policy.

27 Complaint, *Deslandes et al. v. McDonald's USA, LLC, et al.*, No. 1:17-cv-04857 (N.D. Ill. June 28, 2017).

28 Corrected Statement of Interest, *Stigar v. Dough Dough, Inc, et al.*, No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 8, 2019).

29 Mot. for Leave to File Statement of Interest, *Deslandes v. McDonald's USA, LLC, et al.*, No. 1:17-xcv-04857 (E.D. Ill. Feb. 17, 2022).

30 Defendants' Opposition to United States' Motion for Leave to File Statement of Interest, *Deslandes v. McDonald's USA, LLC, et al.*, No. 1:17-xcv-04857 (E.D. Ill. Feb. 18, 2022).

criminal prosecutions under the Sherman Act have been limited to "hard core" cartel conduct — price-fixing, market allocation, and bid rigging — virtually all other conduct is subject to the rule of reason standard. And, before 2016, there was no indication that the DOJ aimed to treat "naked" no-poach agreements criminally.

The due process issue was raised in DOJ's first no-poach criminal indictment, in *United States v. Surgical Care Affiliates (SCA)*. In the criminal indictment filed in January 2021, DOJ alleged that SCA and others "engaged in a conspiracy to suppress competition between them for the services of senior-level employees by agreeing not to solicit each other's senior-level employees," which DOJ characterized as "*per se* unlawful."[31]

In response, SCA filed a motion to dismiss the indictment, arguing in part that because there is no federal precedent that no-poach agreements are inherently illegal, "[f]undamental principles of due process and fair notice bar this prosecution."[32] SCA asserted that the plain language of the Sherman Act does not provide the necessary notice because it "does not, in clear and categorical terms, precisely identify the conduct which it proscribes."[33] In that case, "established judicial construction may supply the fair notice that the text lacks. But imposing criminal liability in the absence of judicial decisions plainly marking out conduct as categorically forbidden cannot be squared with due process."[34] It is thus the courts, and not the Antitrust Agencies, that typically define *per se* illegal conduct, according to SCA, and the "government cannot just announce a *per se* prohibition on a new category of market practices."[35]

In response, DOJ argued that the "the Supreme Court has long made clear that the Sherman Act applies equally to all industries and markets….[t]hus, agreements among buyers in a labor market not to solicit each other's employees are treated no differently than agreements among sellers in a product market not to solicit each other's customers."[36] The DOJ also argued that the text of Section 1 of the Sherman Act makes clear that violators may be charged criminally, and "judicial interpretations provide fair notice of the conduct that is prohibited."[37]

While the case against SCA remains pending, DOJ secured a significant win in a related case that may make the due process argument moot. In *United States v. DaVita Inc.*, DOJ alleges that SCA, DaVita, and one other as-yet-unnamed company, all owners of outpatient medical facilities, engaged in a *per se* unlawful conspiracy by agreeing not to solicit each other's employees.[38]

On January 28, 2022, in considering the *DaVita* defendants' motion to dismiss, Colorado District Court Judge Jackson ruled that naked horizontal non-solicitation agreements that allocate the market, i.e. those that are not ancillary to a legitimate procompetitive business purpose and have "no purpose except stifling competition," are *per se* violations of the Sherman Act.[39] Judge Jackson found that naked no-poach agreements belong to an existing category of *per se* treatment — market allocation — because, as alleged, the defendants agreed to "allocate senior-level employees by not soliciting each other's senior level employees." Such allegations, Judge Jackson ruled, made clear that "the agreement entered was a horizontal market allocation agreement carried out by non-solicitation."[40] As a result, Judge Jackson found that defendants had "ample notice" that entering into a naked agreement to allocate the market of employees would subject them to criminal liability.[41]

However, Judge Jackson made clear that his holding is "much more limited than the government's argument [that *all* non-solicitation agreements and *all* no-hire agreements are horizontal market allocation agreements and thus per se unreasonable]"; instead, "if naked non-solicitation agreements allocate the market, they are per se unreasonable."[42] Thus, rather than holding that all no-poach agreements are per se

31 Indictment, *United States v. Surgical Care Affiliates LLC*, No. 3:2021-cr-00011 (N.D. Tex. Jan. 5, 2021).

32 Mot. to Dismiss, *United States v. Surgical Care Affiliates LLC*, No. 3:2021-cr-00011 (N.D. Tex. Mar. 26, 2021), ECF No. 38 ("SCA MTD").

33 *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 439 (1978).

34 SCA MTD at 16.

35 *Id.* at 17.

36 Opp. to Defs' Mot. to Dismiss at 1, *U.S. v. Surgical Care Affiliates, LLC, et al.*, No. 3:21-cr-00011-L (Apr. 30, 2021).

37 *Id.*

38 Indictment, *U.S. v. DaVita Inc. et al.*, No: 1:21-cr-00229-RBJ (D. Colo. July 14, 2021).

39 Order Denying Motion to *Dismiss, U.S. v. DaVita, Inc. et al.*, Case No. 1:21-cr-00229-RBJ, ECF No. 132 (D. Colo. Jan. 28, 2022).

40 *Id.* at 6.

41 *Id.* at 17.

42 *Id.* at 15-16.

illegal, Judge Jackson found that, as alleged in this particular case, DOJ had sufficiently alleged the defendants allocated the market via the no-poach agreements, which is a *per se* violation of the Sherman Act.

The DOJ has since filed notices of supplemental authority in other pending cases about Judge Jackson's ruling, asserting that with Judge Jackson's opinion, "the argument that no federal court has held a no-poach agreement to be a per se criminal violation under the Sherman Act is foreclosed."[43]

The defendants have noted that it is rare for a motion to dismiss an indictment to be granted, downplaying Judge Jackson's ruling. It is also possible another court could come out differently on the due process issue or on how to characterize no-poach agreements under the Sherman Act. Moreover, on April 15, 2022, the jury voted to acquit the defendants on all counts, and this acquittal came only one day after another acquittal relating to alleged wage-fixing in a case in Texas.[44] While the recent acquittals are clear setbacks for the DOJ, a DOJ official said: "In no way should the verdict today be taken as a referendum on the Antitrust Division's commitment to prosecuting labor market collusion, or on our ability to prove these crimes at trial."[45] Assistant Attorney General Jonathan Kanter, head of DOJ's Antitrust Division, echoed that sentiment, saying, "We're going to continue to bring the cases — we're not backing down."[46] With other cases pending, including one case set for trial in July and another in January 2023, it remains to be seen how other courts will treat the due process issue, and whether juries will continue to side with the defense.

D. No-Poach Issues Continue to Expand Internationally

The heightened antitrust scrutiny of no-poach agreements is increasingly a worldwide phenomenon, with many jurisdictions piggy-backing on the Antitrust Agencies' enforcement of no-poach agreements.

- **Canada**. In February 2022, Canada's Minister of Innovation, Science, and Industry announced that the Canadian government is considering significant amendments to Canada's Competition Act. In connection with this review, the Competition Bureau published a paper, *Examining the Canadian* Competition Act *in the Digital Era*, which sets forth recommendations for reform, including that "no-poaching and wage-fixing agreements are examples of harmful buy-side conspiracies that should be subject to the criminal provisions of the Act."[47] No amendments have been made as of the date of publication of this article.

- **European Unio**n. In October 2021, Margrethe Vestager, Executive Vice-President and Commissioner for Competition of the European Commission, spoke about no-poach agreements in the context of cartel enforcement.[48] Ms. Vestager noted that in industries where "the key to success" is hiring employees with the "right skills," "a promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market." As of the date of publication of this article, no investigations have been launched.

The national competition authorities of individual EU member states have also opened their own investigations into alleged no-poach agreements, e.g. **Hungary** (fined a recruitment association €2.8 million in January 2021 for membership rules that set minimum prices for their services and prevented them from recruiting each other's employees[49]), **Poland** (opened investigation in April 2021 into potential collusion among basketball clubs to set terms of player contracts and reduce player salaries[50]), and **Portugal** (sent a statement of objections to the Portuguese Professional Football League and 31 football teams for their alleged use of no-hire agreements[51]).

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43 Notice of Supplemental Authority, *United States v. Hee*, et al., 2:21-cr-00098 (D. Nev. Feb. 3, 2022).

44 Verdict, *United States v. DaVita Inc., et al.*, No. 1:21-cr-00229 (D. Colo. Apr. 15, 2022); Verdict, *United States v. Neeraj Jindal, et al.*, No. 4:20-cr-00358-ALM-KPJ (E.D. Tex. Apr. 14, 2022).

45 https://news.bloomberglaw.com/daily-labor-report/jindal-found-guilty-in-dojs-first-criminal-wage-fixing-case.

46 https://www.reuters.com/legal/litigation/after-doj-antitrust-losses-employment-trials-defense-lawyers-urge-rethink-2022-04-22/.

47 https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html.

48 Speech by EVP M. Vestager at the Italian Antitrust Association Annual Conference – "A new era of cartel enforcement" (Oct. 22, 2021), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en.

49 Hungary fines recruitment association for price-fixing and no-poach agreements (Jan. 7. 2021), https://globalcompetitionreview.com/price-fixing/hungary-fines-recruitment-association-price-fixing-and-no-poach-agreements.

50 The President of UOKiK brings charges of limiting competition against basketball clubs (Apr. 12, 2021), https://uokik.gov.pl/news.php?news_id=17405.

51 https://www.competitionpolicyinternational.com/portugal-regulator-issues-1st-statement-of-objections-in-the-labor-market/.

- **Peru**. In February 2022, in its first ever no-poach investigation, Peru's competition authority launched an investigation into six construction companies for allegedly agreeing not to hire each other's employees.[52]

IV. CONCLUSION: EXPECT MORE CRIMINAL ENFORCEMENT AND AGGRESSIVE TREATMENT OF EMPLOYMENT AGREEMENTS UNDER ANTITRUST LAWS

Over a year has passed since DOJ announced its first criminal indictment relating to no-poach agreements. Since that time, grand juries across several states have returned additional criminal indictments, private class action litigation has been initiated relating to such indictments, the DOJ has defeated a motion to dismiss, and President Biden and other administration officials have emphasized the importance of preserving competition in America's labor markets.

In short, antitrust scrutiny of no-poach agreements has intensified and will continue to do so. Companies should implement a robust antitrust compliance policy,[53] including antitrust training for employees, and engage antitrust counsel to review current non-solicitation provisions and non-compete clauses to help mitigate their antitrust risk and to try to keep out of the Antitrust Agencies' crosshairs.

52 https://globalcompetitionreview.com/no-poach-agreements/peru-probes-construction-companies-over-no-poach-agreements.

53 The DOJ announced in July 2019 that it will consider the existence of a corporation's compliance program at both the charging and sentencing stages in criminal investigations, which includes the potential for reduced fines. *See* Press Release, *Antitrust Division Announces New Policy to Incentivize Corporate Compliance* (July 2019), https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

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