

ANTITRUST LAW SOURCE PODCAST

WITH JAY LEVINE

Episode 53: Government is cracking down on antitrust issues in labor markets

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Intro: Welcome to Porter Wright's Antitrust Law Source.

Jay: Good morning, afternoon or evening, depending on when you're listening to this is Jay Levine, of Porter Wright, and I am the host of the Antitrust Law Source podcast and the editor of its blog. Recently, I had a podcast where I discussed some of the highlights of what has been happening in the antitrust world over the past few months. And someone asked me if I could do a podcast on the recent DOJ loss, if you will, over its criminal prosecution of a no poach agreement. And I thought, okay, that would be wonderful. And I want to expand it a little bit into generally talking about how the antitrust laws of late are dealing with labor and wage issues.

So let's stand back for a second and remember, the main antitrust statute is the Sherman Act. Section one of the Sherman Act regulates bilateral conduct, essentially agreements and restraint of trade. It makes it illegal for two economic actors to get together and quote unquote conspire agree, collude whatever adjective you want to use or verb you want to use in restraint of trade. That's section one.

Section two generally regulates unilateral activity, monopolization, and attempted monopolization. It also regulates conspiracies to monopolize, but by and large, its enforcement really deals with unilateral conduct.

Now, when we talk about section one, when we talk about these agreements and restraint of trade, the antitrust laws, kind of group them into two categories. So most of the offenses in section one are analyzed under what's called the Rule of Reason. And the Rule of Reason is just a fancy moniker for a reasonableness test. And what it does is it says, Okay, we have this agreement to do whatever. And what we want to first find out is, does this agreement have or is likely to have an anti-competitive effect? Now, what an anti-competitive effect means these days? It's generally understood to mean will it result in price increases, quality, decreases, less choice, less innovation - those kinds of things. So that's sort of what you first will get.

And then the question is, if there is some sort of anti-competitive effect, is it balanced out by some pro-competitive benefit? Are we bringing to the market, some new toys, some new invention? Are we collaborating between companies that have complementary strengths? Or they're creating something new? Or is it going to expand the market in some ways? And if that's true, then the factfinder, the judge, or the jury essentially has to weigh the two to determine whether the agreement and the restraints are ultimately anti-competitive, pro-competitive or competitively neutral.

If they're anti-competitive, there's a Section One violation. And in the other two choices, there is no Section One problem. So that's for the vast majority of conduct that is analyzed under Section One of the Sherman Act. For a few activities, though, we don't do this balancing test. The question is, whether you did it, and if you did it, we just say it's per se illegal. We don't even get into whether it had an actual anti-competitive effect, or what the potential legitimate reasons are. And these are offenses that are, quote, unquote, so pernicious as to stifle competition almost all the time, such that it doesn't really pay for the judiciary to conduct such an elaborate inquiry.

Now, what are these kinds of activities, they are what you might sort of think of, they are price fixing, bid rigging, market allocation, those are the customer allocation. Those are the big kind of per se categories. Now, what happens when there is an agreement that with respect to labor, to wages to workers, is that per se, or is that rule of reason? Now, the Justice Department the and the Federal Trade Commission, at least since 2016, under the Trump administration, were taking the position that naked no poach, no solicitation, wage fixing agreements are per se unlawful and could be criminally prosecuted.

Now, let's define a couple of those terms. No, poach just means an agreement between two competitors. You don't take my employees and I won't take yours. No solicitation same, you don't come and approach mine, I won't come and approach yours. And wage fixing is as it sounds, that two competitors agree we're only going to pay certain types of employees X or within a range and things like that.

Now, you may or may not know this, Sherman Act is by and large, a civil statute, meaning that it deals with non-criminal offenses, however, it can be used to prosecute criminally, any type of offense. Now, the DOJ has long taken the position that or at least used discretion to only criminally prosecute, the most hardcore per se cases out now - bid rigging, price fixing those kinds of things. They have never traditionally gone after agreements that affect labor and wages. But in 2016, the Trump administration said, per se offenses that these naked agreements that relate to a suppression of competition for workers is per se, and can't be criminally prosecute.

Well, fast forward and now under the Biden administration, DOJ is making good on that. And it is, in fact, criminally prosecuting companies that have these types of agreements. And I believe, as I sit here today, there are about six criminal cases relating to suppressing wages. And the argument really is what is the difference between whether two companies collude on the price of a good, or whether it's colluding on the price of a workers wage, or bid rigging, so to speak on wages, or out now suppressing competition for wages? What should be the difference between a labor market and a good market at some level? That makes sense. But again, when you talk about criminal prosecution, the penalties are so much severe that one does have to take a pause and say, Is this really the type of thing we want to go after criminally?

But that question has been answered in the Biden administration, and in fact, they definitely are. So earlier this year, a federal district court had refused to dismiss an indictment regarding a no poach agreement between DAVITA, the national dialysis clinic chain, and other health care companies, where the indictment alleged that they essentially had agreed DAVITA had three agreements with three separate other health care companies not to poach or solicit each other's employees. So fast forward on April 15, earlier this month, the jury acquitted DAVITA and the other companies and in fact only found that one staffing director was guilty of obstruction, but in terms of the offense of guilty of violate criminally violating the antitrust laws, the jury acquitted all of the companies which was a pretty interesting development.

So it's interesting, because it's both. The fact that DOJ is bringing these types of cases is incredibly noteworthy. But it's also noteworthy that the jury found that there wasn't enough evidence. Remember the standard in criminal, we've all watched television, the standard in the criminal case is beyond a reasonable doubt. Was there an agreement to you know, when you need mens rea here to violate and to suppress wages and to violate the antitrust laws beyond a reasonable doubt? Was there enough evidence and the jury obviously felt that there was not possibly more interesting, the day before that a Texas jury acquitted to healthcare staffing, executives, of fixing prices with its competitors, of rates paid to physical therapists and physical therapist assistants in the Dallas area. DOJ is claiming that even though it lost that case, there was an acquittal, that that case was in fact, a victory because of a pretrial ruling, where the judge essentially said that just because this is the first time the government has prosecuted for this type of offense does not mean that the conduct at issue has not been illegal until now. This refers to the argument that you've never prosecuted these things criminally before, why are you now, the judge went on to say rather, as these cases indicate, price fixing agreements, even among buyers in the labor market, have been per se illegal for years.

So you know, DOJ is claiming that as a victory and with that as a foundation, the ability to bring criminal cases for agreements that deal with no solicitation, no poaching and the like. After the acquittals, DOJ said that in no way do the verdicts reflect a referendum on the antitrust division's commitment to protecting the labor market and to prosecuting labor market collusion. So they seem, at least in their narratives, and in their public speech, undaunted by the trial losses, and these other cases clearly are going to go forward.

They're taking a hard stance that these kinds of agreements that affect labor are per se illegal. And they are in fact filing statements of interest in cases that don't involve the government, taking that position. In February of this year, DOJ filed a statement of interest in a case concerning anesthesiologists and non-compete provisions in their employment agreements. Now, the interesting thing here was, the employment agreements were between the anesthesiologist and the contractor who sells the anesthesiology services to the hospital system.

Now, generally, vertical agreements are not per se. And if they're not going to be per se, generally, they are not going to be the basis of a criminal indictment in a criminal prosecution. But what is interesting here is DOJ found that these non competes in the anesthesiologists employment agreements were actually horizontal because what they said is at the time, these anesthesiologist signed the employment agreements with the contractor, the contractor and they were horizontal competitors, because the anesthesiologist could have sold their services to the hospital directly. So in that sense, they were competing with the contractor who essentially is a middleman who contracts with anesthesiologists and resells their services to the hospital. And because that was a horizontal agreement, the non-competes, DOJ felt were per se illegal. Once they're per se illegal, one has to wonder whether DOJ will take the next step at some point, and even use that as the foundation for a criminal indictment. Hasn't happened yet in this context, but we'll have to see.

The other thing that is of note, this didn't happen in the in the Trump administration, but it's happening all over in the Biden administration, is where effects on labor are being the focus of merger investigations. In November of 2021, DOJ filed a suit to block Penguin Random House's acquisition of Simon and Schuster. Why? Not because they're going to raise prices on books, which would be the downstream product, but rather because they will suppress wages paid to the authors in this context are the analogous workers. And because they felt that that merger will have a suppressing effect on wages, then they think that the merger is anti-competitive, and

have sued. And they're using this kind of rubric in any if not all, merger investigations well, where now they were trying to figure out, will the merger be good for workers or not?

Now you've heard me talk time and again over the last few podcasts and articles that the labor market is a serious focus for the Biden administration antitrust enforces both at the federal trade commission and at DOJ. And DOJ is taking it further and in fact, using their criminal enforcement abilities to go after these agreements that affect labor markets, no poach, no solicitation, which seem to be a lot softer than out now wage price fixing.

So what does this mean for companies? Obviously, if you're going to have agreements with your workers, with anybody else, concerning staffing, concerning how you hire, concerning who you hire, concerning who you go after, it is incumbent upon you to seek the advice of antitrust counsel. It is very hard to navigate this world. The enforcement rules are changing. People are trying to change the antitrust laws and you really got to be attuned to the almost daily changes that are happening and understand the mindset of the antitrust enforcers.

Now, good or bad, I mean, you know, there are people who think this is a great thing. People think this is a horrible thing. I'm here just to tell you that it is something you need to be worried about and labor lawyers who advise clients on hiring practices and the like, and you know, usually they're focused only on kind of discriminatory practices, but that's not all they need to worry about. They need to worry about whether your hiring practices, where they're coming from and do they have some sort of suppressing effect on workers, generally your own workers or other workers. And if your client is part of a trade association where they discuss hiring practices in the light, people used to be a lot more sanguine about kind of those discussions. And I think we got to be a lot less sanguine, and a lot more vigilant these days about those discussions, and what the outcome of those discussions are on what we're going to be seeing. And what is the potential evidence in a future case. I mean, it's not just civil cases are being brought there criminal cases being brought.

Criminal cases. I mean, that is a big deal. We're talking prison time for the individuals, we're talking loads of money for the company, we're talking about bad press, you know, loss of goodwill. I mean, that happens in civil cases, but it gets ramped up in criminal prosecutions. And so I really do think that in house labor counsel, outside labor counsel really need to think long and hard about their clients hiring practices, and whether they have any sort of agreements, explicit, or implicit or winking nods with anybody else as to kind of the type of people they go after. And this is not just C suite executives, we're talking about run of the mill, your blue collar workers, everywhere from the foot soldiers all the way up to the top. And in fact, it's the foot soldiers that I think the antitrust division worries most about, because let's face it, people at the C suite have a certain amount of bargaining power and can protect themselves. But you know, these agreements were that limit the movement of your restaurant worker or grocery workers, or any of your kind of frontline, foot soldier, blue collar workers, I mean, that is going to get some serious attention. Need to think long and hard about what your hiring practices are and what agreements you may or may not have with anybody else in the industry.

So that's in a nutshell, what's going on. I mean, there are more cases, we'll be talking about this more in the future, right now, DOJ is 0-2, but I wouldn't necessarily take great comfort from that. Because while I do think they need to reevaluate, maybe how they litigate these cases, and maybe how many of these cases they bring at one time because their resources are being greatly taxed. My suspicion is, this is not going to put a dent in their order for investigating and prosecuting these types of cases. So whether you win or lose, going through one of these cases, is not something you want your client to experience. So gotta be careful out there.

I hope you've enjoyed this episode of the antitrust law Source podcast. My name is Jay Levine. My email is the letter J L E V I N E at Porter wright.com porterwright.com. You can find me at LinkedIn and Twitter. It's at jlevine I'd love to hear any feedback, positive, negative, anything and if there are subjects you'd like to hear about in the future, please do let us know and we will do our best to accommodate you. So for now, this is Jay Levine. Have a great day. Bye bye.

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