Updates
May 15, 2023
Judge Tosses Aerospace No-Poach Prosecution in Rare Rule 29 Order

On April 29, 2023, the U.S. Department of Justice (DOJ), Antitrust Division (Antitrust Division), suffered another defeat in its ongoing efforts to criminally prosecute conduct affecting workers' compensation and job mobility. Unlike the Antitrust Division's prior litigated losses in labor market cases, *USA v. Mahesh Patel, et al.* (D. Conn.) never reached the jury because U.S. District Judge Victor A. Bolden granted the defendants' motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure.

Motions for acquittal are often made but very rarely granted due to defendants' "heavy burden" to establish that evidence of the alleged crime "is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt."

30,000-Foot View of the Aerospace Case

The Antitrust Division's case centered around an alleged agreement between the defendants "to suppress competition by allocating employees in the aerospace industry working on projects." Specifically, the indictment states that the defendants reached a *per se* unlawful agreement to "restrict the hiring and recruiting of engineers and other skilled-labor employees between and among" certain companies. According to the Antitrust Division, this agreement involved both "not hiring" employees of those companies and "not proactively contacting, interviewing, and otherwise recruiting potential applicants."

In an order denying the defendants' motion to dismiss the indictment on June 29, 2022, Judge Bolden held that the alleged no-poach agreement was subject to *per se* treatment because it was "properly pled as a market allocation." However, in a subsequent passage that foreshadowed the recent Rule 29 order, he went on to note

that "not all no poach agreements are market allocations subject to *per se* treatment and therefore, determining whether a no poach agreement is a market allocation is highly fact specific."

The significance of *per se* liability cannot be overstated. First, anticompetitive effects are presumed in *per se* cases, whereas plaintiffs bear the burden of proving such effects under the rule-of-reason framework. This is no easy task. Second, pro-competitive effects are not taken into consideration in *per se* cases. The rule-of-reason analysis, by contrast, affords significant weight to pro-competitive effects. Justifying potentially anticompetitive conduct by establishing pro-competitive effects (e.g., lower prices, higher output, greater innovation, enhanced consumer appeal, or preventing economic freeriding) provides an important avenue for antitrust defendants to avoid liability.

Rule 29 Motions: Often Filed but Rarely Granted

Immediately after the government rested its case-in-chief at trial, the defendants jointly moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. Under this provision, a court is required to enter a judgment of acquittal when the government's "evidence is insufficient to sustain a conviction." Successful Rule 29 motions are few and far between. This is because, as the U.S. Court of Appeals for the Second Circuit cautioned in *United States v. Jackson*, "courts must be careful to avoid usurping the role of the jury." Channeling this admonition, the court emphasized in *United States v. Heras* that judges "may not usurp the role of the jury by substituting its own determination of the weight of the evidence." In other words, it is generally the prerogative of the jury—not the judge—to assess witness credibility and resolve conflicting testimony in close cases. Prior to the aerospace prosecution, Antitrust Division had not lost a Rule 29 in several decades. According to a submission from former Chief Judge James F. Holderman of the U.S. District Court for the Northern District of Illinois to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, less than 0.5% of criminal prosecutions between October 2001 and September 2002 resulted in Rule 29 acquittals.

On the other hand, the Fifth Amendment requires courts to evaluate the record to determine whether a reasonable jury could find that the government has "proven guilt beyond a reasonable doubt." Judges allow the jury to decide the case if it is "fairly possible" for a reasonable jury to reach a verdict for either the defendant or the prosecution. However, judges must enter a judgment of acquittal where the "evidence is insufficient to sustain a conviction."

Judge Says No Way *Per Se*

In perhaps the biggest blow to the Antitrust Division's efforts to criminally prosecute agreements to refrain from soliciting, recruiting, or hiring workers, Judge Bolden stated that this case did not involve a *per se* market allocation "as a matter of law." Applying the Second Circuit case *Bogan v. Hodgkins*, he determined that a no-hire agreement is not *per se* unlawful unless it allocates the market to a "meaningful extent" or the record otherwise reflects a "geographic or market division."

Turning to the facts of the aerospace case, Judge Bolden highlighted that the alleged agreement allowed certain defendants to hire from other defendants "on a case-by-case basis." Further, "shifting hiring restrictions" meant that "often hiring was permitted sometimes on a broad scale." Even emails suggesting a broad no-hire agreement were insufficient to survive the Rule 29 motion because the alleged agreement "allowed for exceptions that were regularly used."Stated differently, switching employers was more than a theoretical possibility for these aerospace engineers: it was "commonplace."

In conclusion, Judge Bolden found that, under *Bogan*, the alleged agreement contained too many exceptions to allocate the market for aerospace engineers to a "meaningful" extent. Holding that a reasonable juror could not conclude that a "secession of meaningful competition" occurred, he directed the clerk of the court to enter a judgment of acquittal for all six defendants.

Don't Expect the Antitrust Division To Back Down

Despite this recent setback, we expect the Antitrust Division to continue to investigate and prosecute cases affecting workers, contractors, and talent. As discussed in our previous Update, Deputy Assistant Attorney General Manish Kumar has affirmed that, despite litigation losses, these cases are "worthy, and we are going to continue to bring them." This increased antitrust focus on labor markets has been building across the last three administrations, possibly in response to rising income inequality. Whereas civil enforcement actions brought during the Obama administration focused on technology employees, the Biden administration is expanding the scope of its enforcement to criminal prosecutions of conduct affecting workers that earn relatively lower wages, such as school nurses and home healthcare workers.

Given the government's appetite for pursuing these cases, companies should consult with experienced counsel to craft antitrust policies specifically tailored toward hiring and recruitment personnel.

For example, companies should implement trainings and review best practices to avoid even the appearance of improper discussions about labor and employment issues. Specifically, human resource professionals should be trained not to discuss employee compensation, benefits, solicitation, recruitment, hiring, or other sensitive information regarding terms or conditions of employment with counterparts at other companies. According to the Federal Trade Commission's "Antitrust Red Flags for Employment Practices," the mere act of attending trade association meetings or social events where these topics are discussed could result in civil or criminal liability.

Receiving documents that contain another company's internal data regarding employee compensation can also trigger lengthy and costly government investigations. This holds true regardless of whether those companies compete to sell their goods or services to customers. Even firms that do not compete in downstream product markets may still compete for workers and talent in upstream labor markets. For example, a company that manufactures chairs and a company that makes bed frames likely do not compete to sell their products to consumers but may nonetheless compete to attract and retain employees. In other words, a company's competitors in the labor market are generally much broader than its competitors for products and services.

A previous version of this Update appeared in Law360.

Authors

Explore more in

Antitrust & Unfair Competition Labor & Employment White Collar & Investigations

Related insights

Update

California Court of Appeal Casts Doubt on Legality of Municipality's Voter ID Law

Update

February Tip of the Month: Federal Court Issues Nationwide Injunction Against Executive Orders on DEI Initiatives