

Trial Setbacks Are Unlikely to Deter the Antitrust Division from Aggressively Pursuing Labor Cases

John Roberti; Jonathan S Abernethy; Mark S Cohen; Melissa H Maxman; David F Lisner; Ronald F Wick

Last week, the Department of Justice Antitrust Division suffered two trial setbacks in its efforts to bring cases involving alleged anticompetitive conduct in labor markets. Despite these losses, we expect the Division to continue to pursue similar cases.

On April 14, the Antitrust Division lost its first-ever criminal wage-fixing trial¹. The case charged two Texans operating a therapist staffing company of conspiring to lower rates paid to physical therapists. A Texas jury acquitted the defendants, Neeraj Jindal and John Rodgers, of all conspiracy charges, although Jindal was convicted of obstructing a Federal Trade Commission investigation.

On April 15, a federal jury in Colorado acquitted DaVita Inc., a provider of dialyses and related services, and its former CEO, Kent Thiry, on three counts of conspiracy to limit competition in the hiring of certain employees². The indictment charged that the defendants had entered into no-poach agreements with several competitors, restricting the ability of their respective employees to change jobs among the competitors.

Trial Setbacks Are Unlikely to Chill the Biden Administration's Enforcement Agenda

The setbacks in these trials are unlikely to deter the Biden Administration from continuing its aggressive criminal enforcement agenda in labor markets. Recent actions and public statements from the DOJ, combined with the uptick in criminal enforcement activity generally, suggest the opposite.

The Antitrust Division's Criminal Division has been as busy as it has ever been. In fiscal year 2021, the Division brought 25 criminal cases against 29 individual and 14 corporate defendants. There are currently 146 open grand jury investigations, which is the most in 30 years, according to Attorney General Merrick Garland³. The Division is preparing for trial in 18 indicted cases against ten companies and 42 individuals, including eight current or former CEOs or company presidents⁴.

Labor markets—and particularly protecting employee rights through antitrust enforcement—are at the top of the Biden Administration's enforcement agenda. In July 2021, President Biden signed an Executive Order that instituted a “whole of government” approach to enforcing competition law⁵. Labor markets

¹ Verdict, *United States v. Jindal*, 4:20-cr-00358-ALM-KPJ (E.D. Tex. Apr. 14, 2022), ECF No. 112

² Verdict, *United States v. DaVita, Inc.*, 1:21-cr-00229-RBJ (D. Col. Apr. 15, 2022), ECF No. 264

³ Press Release, U.S. Dep't of Justice, Attorney General Merrick B. Garland Delivers Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>

⁴ *Id.*

⁵ Executive Order on Promoting Competition in the American Economy, Exec. Order No. 14036, 86 Fed. Reg. 36987 (Jul. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

were at the top of the Executive Order's list of industries and markets that the administration believed were not acting competitively. Further, On March 10, 2022, the Antitrust Division and the Department of Labor entered into a Memorandum of Understanding meant to facilitate cooperation between the agencies in the enforcement and the promotion of competition in the workplace⁶. And the administration has been aggressive in raising labor issues, not only in criminal cases but also in merger evaluations. The focus has been particularly acute in healthcare (as reflected in the two recent trials), agriculture, technology platforms, and transportation.

The Division has some reason to discount the trial setbacks in the *Jindal* and *DaVita* cases. Both were investigated under the Trump Administration. In both cases, courts denied motions to dismiss that challenged the underlying legal theories; the cases failed due to a failure of proof on the facts. The courts' endorsement of the Division's legal theories in these cases is more likely to embolden than deter the current administration's continued pursuit of them.

Indeed, there are three indictments involving labor cases that are in line to be tried. One case, *United States v. Hee*, pending in the District of Nevada, involves a no-poach and wage suppression agreement among school nurse staffing agencies and is set for trial in July 2022⁷. A case arising out of the same facts as the *DaVita* case—*United States v. Surgical Care Affiliates, LLC*, pending in the Northern District of Texas—is set for trial in January 2023⁸. A third case, *United States v. Patel*, which is pending in the District of Connecticut, alleges a no-poach agreement among aerospace engineering firms and is set for trial in March 2023⁹. We understand that there are a number of additional investigations pending, and we believe that more indictments are likely.

The Biden Administration has made clear that it is willing to test new theories. Indeed, antitrust commentators from all sides of the political spectrum have encouraged the agencies to bring more cases, even if the agencies lose them. If the government wins all of its cases, the argument goes, then it should be bringing harder cases. In this regard, the Biden's Antitrust Division will not disappoint—it will continue to bring cases and will undoubtedly lose a number of them. The cases that are being tried now were generally begun in the past administration. Even more aggressive legal theories are in the works.

In light of the increased focus on criminally policing the labor markets, we expect last week's trial setbacks will not deter the Division from aggressively pursuing expanded theories in the no-poach and wage-fixing areas. Companies are well-advised to review and focus internal compliance efforts on these areas.

⁶ Press Release, U.S. Dep't of Justice, Department of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), <https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers>

⁷ *United States v. Hee*, 2:21-cr-00098-RFB-BNW (D. Nev.)

⁸ *United States v. Surgical Care Affiliates, LLC*, 3:21-cr-00011-L (N.D. Tex.)

⁹ *United States v. Patel*, 3:21-cr-00220-VAB (D. Conn.)

The Authors:



[John Roberti](#)
Partner

+1 202 851 2073
[Email John](#)



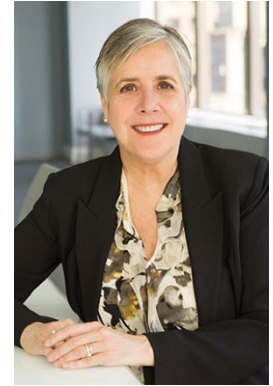
[Jonathan S Abernethy](#)
Partner

+1 212 707 1322
[Email Jonathan](#)



[Mark S Cohen](#)
Partner

+1 212 957 7601
[Email Mark](#)



[Melissa H Maxman](#)
Partner

+1 202 851 2071
[Email Melissa](#)



[David F Lisner](#)
Partner

+1 212 707 1329
[Email David](#)



[Ronald F Wick](#)
Partner

+1 202 851 2072
[Email Ronald](#)

About Cohen & Gresser:

Cohen & Gresser is an international law firm with offices in New York, Paris, Washington, DC, and London. We have an outstanding record of success in high-stakes and high-profile litigation, investigations, transactional and government relations work for our clients, including major financial institutions and companies across the world. Our attorneys have superb credentials and are committed to providing the efficiency and personal service of a boutique law firm along with the quality and attention to detail that are the hallmarks of the best firms in the world. The firm has been recognized in a wide range of publications, including *Chambers* and *The Legal 500*.

New York | Paris | Washington DC | London

www.cohengresser.com

info@cohengresser.com

+44 (0) 20 8037 2330

+1 212 957 7600



[View C&G's Profile](#)