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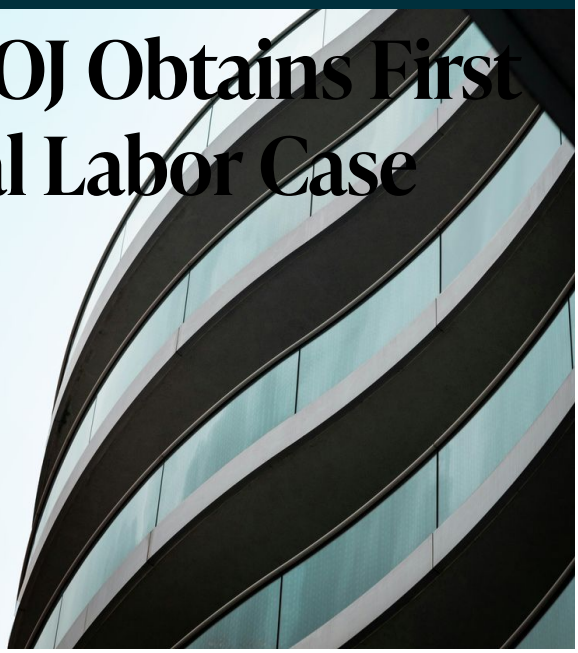
A Labor of Love: Trump DOJ Obtains First Guilty Verdict in a Criminal Labor Case



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By: James W. Attridge

In October 2016, the Obama Administration announced that it would criminally prosecute no-poach and wage-fixing agreements among competitors for talent. Starting in December 2020, through the Trump and Biden Administrations, seven cases followed. Last week, for the first time, a jury found a defendant guilty of a labor-market criminal antitrust violation under the Sherman Act.

Case	Industry	DOJ Theory	Result
U.S. v. Jindal & Rogers (E.D. Tex. 2020)	Healthcare	Wage fixing & obstruction	Acquittal (by jury) on antitrust charges. Jindal convicted of obstruction.
U.S. v. Surgical Care Affiliates (N.D. Tex. 2021)	Healthcare	No solicit	Dismissed by DOJ
U.S. v. DaVita & Thiry (D. Col. 2021)	Healthcare	No solicit	Acquittal (by jury)

U.S. v. Hee & VDA (D. Nev. 2021)	Healthcare	Wage fixing & no-poach	Plea (VDA); Pre-trial diversion agreement (Hee)
U.S. v. Patel, et al. (D. Conn. 2021)	Engineering	No poach & no solicit	Acquittal (Rule 29)
U.S. v. Manahe, et al. (D. Me. 2022)	Healthcare	Wage fixing & no poach	Acquittal (by jury)
U.S. v. Lopez (D. Nev. 2023)	Healthcare	Wage fixing & fraud	Guilty verdict

Background. After a series of not-guilty verdicts and a Rule 29 acquittal, DOJ made clear it remained committed "to charging more no-poach and wage-fixing cases" and would use every tool at its disposal to build stronger cases.

In particular, DOJ said it would seek to marshal covert forms of evidence gathering like wiretaps and recordings, develop stronger cooperating witnesses, and more compelling victim testimony. When prosecutors receive evidence of ongoing misconduct, they can spend more time and place greater emphasis on gathering covert evidence. For example, a recent Antitrust Division case charging antitrust violations and wire fraud involved a court-authorized wiretap. And the Division changed its leniency policy in April 2022 to require prompt self-reporting, rather than prompt termination of cartel conduct, in part to enable covert evidence gathering by leniency applicants against their co-conspirators.

U.S. v. Lopez. In addition to the result, the investigative techniques and testimony in Lopez differed from prior cases.

- To begin, DOJ's indictment and briefs pointed to: texts, including the defendant's messages about a "mutual agreement" to "stay within the same hourly rate" as his competitors; statements Lopez made to FBI agents that he met with competitors so they could "stay within the arena" on nurse wages; multiple telephone recordings and recordings of an in-person meeting made by the leniency applicant; communications seized from Lopez's e-mail provider; and victim testimony.

- DOJ also coupled wage-fixing allegations with five wire-fraud counts based on Lopez's failure to disclose the ongoing DOJ investigation when selling his company. No doubt, multiple allegations of fraud allowed prosecutors to argue that Lopez's wage-fixing was not isolated misconduct.

- Finally, this case involved wage-fixing, rather than a no-poach or non-solicitation agreement. Analogizing to price fixing, rather than market allocation in the case of a no-poach agreement, may have more intuitive appeal to juries. Likewise, wage-fixing allegations are usually more likely to avoid legal complications, like the argument that any agreement was ancillary to a legitimate business relationship, a common complexity for no-poach allegations.

The result was a guilty verdict on all counts.

Takeaways. After Lopez, DOJ will look at the investigation and evidence it took to convince a jury and try to duplicate that effort in investigations and indictments to come. But the question remains what this guilty verdict for wage-fixing and fraud means for other forms of labor-market collusion. DOJ has made clear it will continue to view no-poach and non-solicit agreements as per se illegal. Meetings between Division leadership and labor unions and a new FTC Labor Markets Task Force demonstrate the Trump Administration's broader commitment to American workers. But the lessons and import of a wage-fixing guilty verdict for no-poach prosecutions — which often come with added legal and factual complexity — will take time to play out.

In the meantime, executives and businesses should take note. The focus on and prioritization of protecting workers and policing labor-market collusion will continue, making compliance efforts all the more critical.

> **"Today's verdict highlights what should be a clear message with antitrust crimes: the agreement is the crime. The Antitrust Division will zealously prosecute those who seek to unjustly profit off their employees. The nurses here deserved better and, under President Trump's leadership, they will be protected." — Assistant Attorney General Abigail A. Slater**

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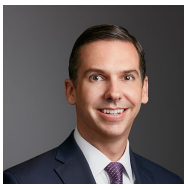

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