

# Ending Where It Began?: DOJ No-Poach Prosecutions Take Another Hit

A photograph of a modern building's curved glass facade, showing multiple floors and windows reflecting the sky.

2 MIN READ

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By: Daniel K. Oakes

The Department of Justice's years-long campaign to criminally prosecute no-poach agreements may be taking a hiatus. On November 13, 2023, the DOJ moved to dismiss its indictment against Surgical Care Affiliates, LLC ("SCA"), and its successor, SCAI Holdings, LLC, which alleged that SCA entered non-solicitation agreements with competitor outpatient medical centers, covering each other's senior-level employees.

Originally filed in January 2021, the SCA indictment marked the first of a line of criminal indictments prosecuting labor market allocation following the October 2016 release of the DOJ and FTC's [Antitrust Guidance for Human Resources Professionals](#). But for various reasons, the SCA case languished as the court refused to rule on a motion to dismiss filed in March 2021. Meanwhile, the DOJ brought more indictments—and lost several closely-watched trials in *DaVita*, *Jindal*, *Manahe*, and most recently *Patel*.

While SCA shares common facts with *DaVita* (where a jury acquitted SCA's alleged co-conspirators), the dismissal of SCA was likely also influenced by the outcome in *Patel*. There, the court held that a no-poach agreement must create a significant impediment to employee movement, amounting to a "cessation of meaningful competition" in the affected labor market, to receive per se treatment. If followed by other courts, this ruling would impose a high standard for obtaining per se treatment in no-poach cases going forward.

There is evidence the DOJ is concerned about the potential of wider affirmation of *Patel's* central holding. In fact, the DOJ blasted the *Patel* dismissal in a filing to the SCA court, arguing that no-poach agreements are per se unlawful even when they result in only minor effects on labor markets.<sup>[1]</sup> Apparently, this argument did not prompt the SCA court to side with the DOJ on the long-pending motion to dismiss.

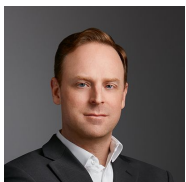
The labor crusade has not only resulted in a long string of high-profile losses, but has now created damaging precedent that could threaten future labor prosecutions and may even impact the per se standard more broadly. At present, the government has no active no-poach or non-solicitation prosecutions remaining. Now seems like an opportune time for the DOJ to broadly and honestly assess its labor prosecution strategy. Perhaps the dismissal of SCA is a sign that the government has already started that process.

[1] United States' Response to Defs.' Notice of Additional Authority at 1–2, *United States v. Surgical Care Affiliates*, No. 3-21-cr-00011-L (N.D. Tex.), ECF No. 201 (“horizontal non-solicitation agreements are a form of per se unlawful market allocation even though such agreements merely limit, rather than eliminate, competition.”).



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