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## DOJ's Recent Loss in Antitrust Labor Case Highlights Ongoing Focus on Alleged Healthcare Labor Market Restrictions

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### The Government Continues to Seek Criminal Sanctions in Cases Regarding Wage-Fixing and No-Poach Agreements

On Wednesday, March 22, a Maine federal jury acquitted four operators of home health agencies who were accused of conspiring to fix wages for caretakers. The verdict marks the latest in a series of losses by the Department of Justice in criminal antitrust litigation focused on the healthcare sector. It also highlights a continuing focus by the DOJ Antitrust Division on alleged labor market restrictions.

#### BACKGROUND

The case, *U.S. v. Manafe et al.*, No. 2:22-cr-00013-JAW (D. Me.), concerned a purported agreement by the defendants to set wage rates for home caretakers to \$15 per hour for entry-level workers and \$16 per hour for caretakers who had completed a certification program. The government presented evidence that defendants had corresponded on WhatsApp about the prospect of fixing wages, met several times, and drafted an agreement to formalize their discussions. However, the DOJ was unable to persuade jurors that the defendants had actually entered a conspiracy to suppress wages. Counsel for the defendants pointed out that, while the written agreement included blank signature lines, it was never signed by any of the defendants. The government's case was also hampered by the fact that the defendants seemingly never carried out their purported plan to fix wages for caretakers at \$15 and \$16 per hour, as they continued to pay their employees \$18 to \$19 per hour throughout the relevant period.

The acquittal follows several other recent losses by the DOJ antitrust division in cases concerning labor market restrictions in the healthcare



industry. In April 2022, a Texas jury acquitted the defendant in *U.S. v. Neeraj Jindal*, a case where the government alleged that the operator of a physical therapist staffing company had fixed wages paid to physical therapists and assistants (the defendant was convicted of an obstruction charge). That same month, in *U.S. v. DaVita Inc. et al.*, a Colorado jury found that DaVita and its former CEO were not guilty in a case alleging that the defendants had entered an agreement with other healthcare companies not to solicit senior-level employees from each other. One of the other members of the alleged agreement, Surgical Care Affiliates, also was charged by DOJ. Trial is scheduled to take place at an undetermined date later this year, pending a renewed bid by defendants to dismiss the case.

Despite a strong interest in the intersection of antitrust and employment practices which dates back as early as 2016, DOJ's success in such criminal actions thus far has been minimal, with its only victories coming from settlements in advance of trial. In October 2022, healthcare staffing company VDA OC LLC agreed to pay a criminal fine and restitution totaling \$134,000 in a wage-fixing case, and in January 2023, former VDA manager Ryan Hee agreed to a pretrial diversion agreement in relation to allegations that he suppressed the wages of Las Vegas school nurses. Outside of that, the *Manafe* case marks the most recent in a string of government losses in this area.

### LOOKING AHEAD

Despite these setbacks, the Antitrust Division remains focused on labor market restrictions and will continue to pursue enforcement actions. As seen in recent cases, these enforcement actions can concern either no-poach agreements, in which two or more employers agree not to compete for employees, or wage-fixing agreements, in which two or more employers agree to fix wages for similarly situated employees. Such agreements need not be memorialized in writing, and, in the absence of a formal agreement, liability also can be proven through parallel or reciprocal conduct by employers.

It should be noted that the DOJ's recent losses were lost on the facts, not because the legal theories presented by the government were unsound. The *Manafe* case, for example, involved sympathetic defendants—Iraqi immigrants who had previously worked as translators for the U.S. military—and the government was unable to present jurors with concrete evidence that the accused actually had carried out a plan to fix wages.

Notwithstanding the government's recent losses, employers—particularly those in the healthcare industry—should recognize that employment and antitrust issues are becoming increasingly intertwined. When concerns arise, and ideally before they do, it is important to consult with antitrust counsel in effort to mitigate risk.



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