

## *Cartel*

# Cartels 2022 — Halfway There Update: Policy Shifts, Labor and Trial Losses, and DOJ Not Backing Down ... in Fact, Tripling Down

*By Ann O'Brien & Kayley Sullivan | BakerHostetler*



# Cartels 2022 — Halfway There Update: Policy Shifts, Labor and Trial Losses, and DOJ Not Backing Down ... in Fact, Tripling Down

By Ann O'Brien & Kayley Sullivan<sup>1</sup>

## I. INTRODUCTION

The first half of 2022 has been an exceptionally busy time for criminal antitrust enforcement and policy announcements. The Department of Justice (“DOJ”) Antitrust Division (“Division”), led by Assistant Attorney General (“AAG”) Jonathan Kanter, has taken an aggressive and expansive stance on bringing criminal antitrust charges against individuals and companies. Between declarations of major policy changes, continued indictments, and the Division’s willingness to try and retry cases, companies and individuals must continue to keep a close eye on potential antitrust risk and shore up their compliance programs to avoid potential criminal investigations and charges.

## II. SEISMIC POLICY CHANGES

### A. Updates to Leniency Policy

On April 4, AAG Kanter delivered remarks at the 2022 Competition Enforcers Summit, which the DOJ cohosted with the Federal Trade Commission, announcing changes to the DOJ Antitrust Division’s leniency program.<sup>2</sup> This announcement preceded the largest gathering of antitrust lawyers each year — the American Bar Association (“ABA”) Antitrust Spring Meeting. The changes are the first to the Leniency Policy since 1993. The announcement was followed by the release of updated policies

and procedures, including 50 new Frequently Asked Questions (“FAQs”) regarding the program.<sup>3</sup>

To qualify for leniency, a company must be the first company to self-report a suspected antitrust violation and then must also fully comply with all aspects of the DOJ investigation. In return, qualifying companies and individual employees may avoid criminal convictions, fines, and prison sentences for cooperating executives.<sup>4</sup> In his speech, AAG Kanter referred to the program as “one of the division’s most important enforcement tools for rooting out cartels.”<sup>5</sup>

#### 1. Change: “Prompt” Self-Reporting upon Discovery by Authoritative Personnel Now Required

The most significant change to the Corporate Leniency Policy is that, in addition to being the first company to report the misconduct to the Division upon its discovery, the company must now also “promptly” report that misconduct to the Division.<sup>6</sup> The leniency policy in effect from 1993 until April 3, 2022, required prompt and effective “termination” of the illegal activity upon discovery by the company but it did not require immediate reporting. When announcing this change, AAG Kanter said, “A company that discovers it committed a crime and then sits on

<sup>1</sup> Ann O'Brien is a partner in BakerHostetler's Washington Office and head of Baker's Cartel and Government Antitrust Investigations Task Force. Previously, she spent almost 20 years at the Department of Justice's Antitrust Division in various leadership and management positions. Kayley Sullivan is an Associate in BakerHostetler's New York Office and a member of Baker's the firm's Cartel and Government Antitrust Investigations Task Force.

<sup>2</sup> U.S. Dep't of Justice, *Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit*, JUSTICE NEWS (Apr. 4, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers#:~:text=Leniency%20is%20one%20of%20the.policy%20will%20further%20promote%20accountability>.

<sup>3</sup> U.S. Dep't of Justice Antitrust Div., *Frequently Asked Questions About the Antitrust Division's Leniency Program* (updated Apr. 4, 2022), available at <https://www.justice.gov/file/1490271/download>.

<sup>4</sup> U.S. Dep't of Justice, *Leniency*, available at <https://www.justice.gov/atr/leniency-program>.

<sup>5</sup> U.S. Dep't of Justice, *Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit*, JUSTICE NEWS (Apr. 4, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers#:~:text=Leniency%20is%20one%20of%20the.policy%20will%20further%20promote%20accountability>. See also U.S. Dep't of Justice, *Leniency*, available at <https://www.justice.gov/atr/leniency-program>.

<sup>6</sup> U.S. Dep't of Justice, *7-3.400 Antitrust Division Leniency Policy and Procedures*, JUSTICE MANUAL (updated Apr. 4, 2022), available at <https://www.justice.gov/atr/page/file/1490246/download>.

its hands hoping it goes unnoticed does not deserve leniency.”<sup>7</sup>

Neither the leniency policy nor the leniency FAQs specifically define “promptly.” That determination is left to the discretion of the Division. One would hope guidance on this issue would be found in FAQ 22: “What does it mean to report the illegal activity ‘promptly?’” Unfortunately, the Division speaks in generalities, saying that when considering whether the self-reporting at issue was timely, it will evaluate “the facts and circumstances of the illegal activity and the size and complexity of the operations of the corporate applicant.” Although the Division acknowledges that a company may need to conduct a preliminary investigation to confirm the wrongdoing, it also notes that if the company waits until after the Division opens an investigation, that will be grounds for exclusion. Further, “[i]t is the applicant’s burden to prove,” and the guidance suggests that “potential applicants that are uncertain whether particular conduct is criminal should seek a marker as soon as possible.”<sup>8</sup>

Under previous FAQs, “company discovery” was defined as either a member of the board of directors or counsel for the company learning of the conduct. The updated FAQs now put the responsibility on any “authoritative representative of the applicant for legal matters,” broadening the scope of who is responsible for reporting violations.<sup>9</sup> In tandem with the new prompt-reporting requirement, this could create issues for companies and possibly make them ineligible for leniency.

Finally, the Division was forcefully clear that “[a]n applicant that fails to appreciate that its conduct could be criminal is not absolved of the

prompt self-reporting requirement.”<sup>10</sup> This statement is a particularly concerning message given the Division’s recently aggressive stance on criminally prosecuting no-poach and monopolization cases that have typically been brought civilly.

## 2. No Presumptive Coverage for Former or Type B Individuals

The Corporate Leniency Policy now memorializes, in even harsher terms than the original policy, two important changes affecting individual employees of corporate leniency applicants, first contained in the Division’s 2017 FAQs. The Corporate Leniency Policy now 1) specifically excludes presumptive coverage of former employees, and 2) leaves coverage of even current employees of Type B applicants to the Division’s sole discretion.<sup>11</sup> This move takes certainty for individuals away and may diminish individual leniency cooperation in all but Type A situations where non-prosecution protections appear guaranteed.

## 3. Other Changes: Restitution, Remediation, No More Carve-ins

Other major changes relate to a company’s duties regarding restitution and remediation and updates to both the model individual and corporate leniency letters. The updated leniency policies (corporate and individual) are available publicly in the *Justice Manual*, and links to the Policy and updated FAQs are available through the Division’s website.<sup>12</sup>

### **B. Doing Away with Carve-in Policy**

One important policy change outside the leniency program was also announced but buried among the changes to the *Justice Manual*.<sup>13</sup> That change, which has not been

<sup>7</sup> U.S. Dep’t of Justice, *Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit*, JUSTICE NEWS (Apr. 4, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers#:~:text=Leniency%20is%20one%20of%20the.policy%20will%20further%20promote%20accountability>. See also U.S. Dep’t of Justice, *Leniency*, available at <https://www.justice.gov/atr/leniency-program>.

<sup>8</sup> U.S. Dep’t of Justice Antitrust Div., *Frequently Asked Questions About the Antitrust Division’s Leniency Program*, at 22 (updated Apr. 4, 2022), available at <https://www.justice.gov/file/1490271/download>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Dep’t of Justice, *7-3.400 Antitrust Division Leniency Policy and Procedures*, JUSTICE MANUAL (updated Apr. 4, 2022), available at <https://www.justice.gov/atr/page/file/1490246/download>; U.S. Dep’t of Justice Antitrust Div., *Frequently Asked Questions About the Antitrust Division’s Leniency Program* (updated Apr. 4, 2022), available at <https://www.justice.gov/atr/page/file/1490311/download>.

<sup>12</sup> *Id.*

<sup>13</sup> See U.S. Dep’t of Justice, *7-3.530 Individual Releases of Criminal Liability in Corporate Resolutions*, JUSTICE MANUAL, available at <https://www.justice.gov/jm/jm-7-3000-organization-division>.

fleshed out by the Division and has also not been as highly publicized as the leniency changes, seemingly modifies the Division's decades-long carve-in, carve-out policy, which provided for non-prosecution protections for employees of companies reaching dispositions such as corporate plea agreements with the DOJ unless they were specifically "carved out" from those non-prosecution provisions by name in a sealed appendix. While the *Justice Manual* language is not clear and requires more fleshing out, it appears to constitute a major policy change. At the ABA Antitrust Spring Meeting, Criminal Deputy AAG Richard Powers made clear during a panel discussion that the Division will no longer presumptively include cooperating employees in non-prosecution protections contained in corporate pleas. Non-prosecution decisions now will be made on an individualized basis.

Given the often-large number of employees who are potentially technically culpable under the Sherman Act (think secretary or low-level employee who emails pricing information to a competitor at their boss's request), the carve-in, carve-out policy removed the threat of prosecution for broad swaths of potentially technically culpable, typically lower-level, employees. Then free from the threat of prosecution, they could efficiently come forward with their company to cooperate and aid the Division in its investigation. How this change plays out remains to be seen, but if the Antitrust Division implements a more Criminal Division-style system, a very large number of potentially technically culpable fact-witness-type employees may require separate counsel and be more reticent to cooperate. This undoubtedly would slow antitrust investigations and reduce the number of available witnesses.

### **C. DOJ Looking to Criminally Prosecute Section 2 Claims**

In another major policy change, on March 2, 2022, while speaking on a panel at the Annual ABA White Collar Crime Conference, Deputy AAG Powers indicated that the Division would be willing to bring criminal charges for violations

of Section 2 of the Sherman Act. Section 2 typically has been used civilly to prevent unilateral and exclusionary monopolistic practices, and it requires the government to prove actual monopolization of the relevant market and intent to do so. Although the Division has brought Section 2 cases in conjunction with Section 1 cases, it has not brought a stand-alone monopolization case since the 1970s, when antitrust crimes were prosecuted as misdemeanors rather than felonies.<sup>14</sup>

After making this surprising declaration, Deputy Powers noted the Antitrust Division has always had the power to go after violations criminally. While that's technically true, the reality is that this is a departure from decades of practice. On April 4, 2022, Kanter doubled down on this approach, stating that "Section 2 [violations have] been a felony, just like Section 1," and "the Division will not hesitate" to file Section 2 charges when appropriate. Since the announcement, the Division has continued to hint at pursuing criminal monopolization cases but has yet to bring forth an indictment or give more-concrete guidance as to what conduct may be considered criminal and what the DOJ will be weighing in making these determinations. During a June 7, 2022 ABA webinar, Deputy Powers noted that the policy was more than just an "academic exercise" and that the Division is considering filing Section 2 charges in current investigations of different industries. Many took this as a strong hint that the Division is actively looking for, or already investigating, its first criminal monopolization case in decades.

This raises obvious questions about what the criminal elements of proof will be and how the DOJ will go about proving criminal monopolization beyond a reasonable doubt. The DOJ presumably will have to get into the fact-intensive questions of defining the relevant market, which typically requires expert economic analysis. Given these and other complications that prosecuting these cases would bring, it will be interesting to see how often the Division pursues Section 2 criminal cases. Regardless, now more than ever, it is important for companies to assess their market

---

<sup>14</sup> The last criminal indictment brought under only Section 2 of the Sherman Act was in *United States v. Empire Gas Co.*, which involved physical destruction of a competitor's assets. The defendant was eventually acquitted and later found not liable in a civil action by the government. See *United States v. Empire Gas Corp.*, 537 F.2d 296, 304 (8th Cir. 1976).



power in all markets they participate in, be ready to point to pro-competitive justifications for their conduct, and be prepared to defend against potential charges brought.

#### **D. Initiative to Pursue Supply Chain Collusion**

On February 17, 2022, the DOJ announced a new initiative to investigate and prosecute companies that exploit supply chain disruptions.<sup>15</sup> This came after the White House announced its “Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain” to counter consolidation among meatpackers, and after the DOJ and the U.S. Department of Agriculture launched an online tool to help farmers and ranchers anonymously report potentially anticompetitive practices.<sup>16</sup>

The DOJ also has joined forces domestically with the FBI and the Federal Maritime Commission and internationally with competition authorities in Australia, Canada, New Zealand, and the United Kingdom in pursuit of these goals. There are reports one such investigation has already surfaced regarding the consolidation of the ocean freight shipping market.<sup>17</sup>

### **III. DESPITE TRIAL SETBACKS, DOJ SAYS IT WON'T BACK DOWN**

Notwithstanding the string of acquittals in recent trials, discussed below, AAG Kanter and the Antitrust Division refuse to relent on criminal enforcement efforts and continue to proudly tout their continued aggressive stance. After several

consecutive criminal trial losses, Kanter declared that the DOJ is “not a part of the chickenshit club,”<sup>18</sup> referring to the 2017 book by Jesse Eisinger<sup>19</sup> and the now-famous speech by then U.S. Attorney for the Southern District of New York, James Comey, both of whom criticized prosecutors who are afraid to take tough cases to trial. It was also reported that Kanter sent an email to Division staff telling them to listen to Tom Petty’s *I Won’t Back Down* and to “dance like nobody’s watching.”<sup>20</sup> Kanter reiterated this point publicly while speaking at the Stigler Center’s Competition Conference, stating that the Division is going to “continue to bring cases” and is “not backing down.”<sup>21</sup>

Kanter has gone even further than not backing down, actually touting the losses as precedent-setting victories for the Division, stating that the two recent losses in wage-fixing and no-poach cases — “which were extremely important cases establishing that harm to workers is antitrust harm — survived motions to dismiss. The courts said, ‘These are legally sound cases. We want those decisions.’” Kanter’s statements may be correct in that the decisions could open the door for future prosecutions in the no-poach space and the survival of those claims past the motion-to-dismiss stage, but the Division has yet to convince a jury to criminally convict a single defendant for no-poach or wage-fixing conduct. We can certainly expect to see more labor cases being brought by the Division.

The growing list of DOJ trial losses also will make defense counsel representing individuals and companies more likely to recommend clients go to trial rather than seek leniency or accept a plea, which may make it even more

<sup>15</sup> Dep’t of Justice, *Department of Justice Announces Initiative to Protect Americans from Collusive Schemes Amid Supply Chain Disruptions*, PRESS RELEASE, Feb. 17, 2022, available at <https://www.justice.gov/opa/pr/department-justice-announces-initiative-protect-americans-collusive-schemes-amid-supply-chain>.

<sup>16</sup> White House, *Fact Sheet: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Chain*, Jan. 3, 2022, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/>.

<sup>17</sup> *Maersk Receives Subpoena in DOJ Antitrust Investigation of Carriers*, MAR. EXEC., available at <https://www.maritime-executive.com/article/maersk-receives-subpoena-in-doj-antitrust-investigation-of-carriers>.

<sup>18</sup> Jack Queen, *DOJ Antitrust Head: No ‘Chickenshit Club’ Despite Loss*, LAW360 (Apr. 21, 2022), available at <https://www.law360.com/articles/1486196/doj-antitrust-head-no-chickenshit-club-despite-losses>.

<sup>19</sup> JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017).

<sup>20</sup> “I sent out an email to our team telling them they had an assignment. Pump up Tom Petty’s ‘I Won’t Back Down.’ Turn it up, put it on repeat. Dance like nobody’s watching and sing out loud, over and over and over again: We’re not backing down.” Steve Stroth, *DOJ Chicken Antitrust Team Sets New Trial After Two Hung Juries*, BLOOMBERG LAW (Apr. 26, 2022), available at [https://www.bloomberglaw.com/bloomberglawnews/antitrust/X3JT63BG000000?bna\\_news\\_filter=antitrust#jcite](https://www.bloomberglaw.com/bloomberglawnews/antitrust/X3JT63BG000000?bna_news_filter=antitrust#jcite).

<sup>21</sup> *Won’t Back Down: The Tipline for 22 April 2022*, GCR USA (Apr 22, 2022), available at <https://globalcompetitionreview.com/gcr-usa/article/wont-back-down-the-tipline-22-april-2022>.

difficult for the DOJ to get witnesses to come forward and cooperate. Between these losses, the recent heightened standard for leniency applicants, and the Division's reach into new or rarely explored corners of criminal application of the Sherman Act with criminal no-poach and monopoly cases, the calculus for a defense attorney in recommending that a client come forward has certainly shifted this year.

### **A. Acquittal after Unprecedented Third Trial Attempt in Price-Fixing Case against Chicken Industry Executives**

On March 29, 2022, at the end of a five-week trial, a second jury failed to reach a unanimous decision regarding ten executives alleged to have fixed prices and rigged bids in the market for broiler chickens.<sup>22</sup> The executives were indicted in June and October of 2020, and after a mistrial, the DOJ proceeded a second time against the ten. After the second mistrial and the Division's announcement that it would proceed a third time, the presiding judge, Judge Philip A. Brimmer, ordered Kanter to appear in court to explain why a third trial was likely to end differently.<sup>23</sup> Prior to Kanter's appearance, the Division dropped the case against five of the executives, after which Kanter, in turn, explained why he believed the third trial would end in convictions.<sup>24</sup> The Judge acknowledged that he could not force the Division to back down on the case, but that it should "consider carefully" before proceeding. A little over a week later, and consistent with its not-backing-down pronouncements, the Division announced that it would press on and try the remaining five chicken-industry defendants a third time.

In determining whether to bring cases, DOJ officials should be guided by the Principles of Federal Prosecution, and their duty to bring only cases in which they have a good-faith belief that

a federal offense has been committed and that there is more than a 50 percent chance that a conviction will be obtained and sustained. For many, the chicken-industry case has begged the question of how a prosecutor might in good faith believe that there is a greater than 50 percent chance of winning the same case that twice resulted in hung juries.

Shortly after the second mistrial, Kanter announced publicly that the Division was not a part of the "chickenshit club," among other statements. Judge Brimmer then ruled that the two previous mistrials and the DOJ's intent to pursue a third did not create unconstitutional double jeopardy. According to the defendants' brief, as a matter of "fundamental fairness," the case should be dismissed, since permitting a third trial unfairly allows the government to continue working on its case, interviewing one witness "16 more times until he finally said the magic word 'agreement.'" Despite this, Judge Brimmer held that prevailing law treats retrial after a mistrial as a form of "continuing jeopardy."<sup>25</sup>

The win for the Division was short-lived, however, as the jury in the third trial acquitted the five remaining executives — finally putting an end to the three-trial saga, which began with indictments in 2020. Not appearing to relent at all regarding the verdict, Kanter stated that the Division was "disappointed" but "will not be deterred."<sup>26</sup> However, on August 5, the Division filed an unopposed motion to drop charges against two of the four remaining indicted chicken-industry executives, noting a desire to "conserve the resources of the court, the parties, and the public" and "promote the fair administration of criminal justice."<sup>27</sup> The DOJ is set to take the remaining two executives to trial in October 2022 and two companies involved in related conduct to trial in April 2023, pending in

<sup>22</sup> Matthew Perlman, *Chicken Execs Teed Up For 3rd Price-Fixing Trial*, LAW360 (June 2, 2022), available at <https://www.law360.com/corporate/articles/1499094/chicken-execs-teed-up-for-3rd-price-fixing-trial>.

<sup>23</sup> *U.S. Drops Price-Fixing Charges Against Chicken Executives After Mistrials*, REUTERS (Mar. 31, 2022), available at <https://www.reuters.com/legal/government/us-drops-price-fixing-charges-against-chicken-executives-after-mistrials-2022-03-31/>.

<sup>24</sup> *Id.*

<sup>25</sup> Matthew Perlman, *Chicken Execs Teed Up For 3rd Price-Fixing Trial*, LAW360 (June 2, 2022), available at <https://www.law360.com/corporate/articles/1499094/chicken-execs-teed-up-for-3rd-price-fixing-trial>.

<sup>26</sup> Patrick Thomas & Dave Michaels, *Justice Department Fails for Third Time to Convict Chicken Executives in Price-Fixing Trial*, WALL ST. J. (July 9, 2022), available at [https://www.wsj.com/articles/chicken-industry-officials-acquitted-in-price-fixing-case-11657287202?mod=Searchresults\\_pos1&page=1](https://www.wsj.com/articles/chicken-industry-officials-acquitted-in-price-fixing-case-11657287202?mod=Searchresults_pos1&page=1).

<sup>27</sup> Ivan Moreno, *DOJ Drops 2 Ex-Pilgrim's Pride Execs From Price-Fixing Case*, LAW360 (Aug. 8, 2022), available at <https://www.law360.com/articles/1519221/doj-drops-2-ex-pilgrim-s-pride-execs-from-price-fixing-case>.

the same Denver court. These cases are likely to involve similar allegations and evidence similar to those of the recently dismissed case — potentially foreshadowing another tough road for the Division if it doesn't back down.

### ***B. Acquittals in First-Ever Labor Cases***

The DOJ recently brought its first-ever cases against companies for anticompetitive conduct in the labor market. Both trials began on April 4, 2022, and both resulted in acquittals for all defendants. Despite this, Kanter vowed that he would not yield in his efforts to investigate and criminally charge no-poach and wage-fixing agreements. He highlighted the fact that both courts initially denied the defendants' motions to dismiss, and he agreed with the DOJ's reading that these cases constituted *per se* violations, noting that both were "extremely important cases establishing that harm to workers is antitrust harm." Kanter noted that the Division will "strengthen [its] resolve to bring cases that are righteous." A trial in another no-poach matter against Surgical Care Affiliates, LLC, remains scheduled to begin in January 2023.<sup>28</sup>

#### *i. US v. Jindal*

In the first-ever criminal wage-fixing case, Neeraj Jindal, the former owner of a health care staffing company, and John Rodgers, the company's former clinical director, were indicted for allegedly colluding with a competitor to decrease pay for physical therapists and assistants. The court denied the defendants' motion to dismiss last fall, when it held that since wage-fixing was akin to price-fixing, it warranted *per se* scrutiny of the conduct rather than the more-lenient rule-of-reason analysis. After a six-day trial, both defendants were acquitted.<sup>29</sup>

#### *ii. US v. DaVita*

Likewise, the DaVita defendants did not succeed on their motion to dismiss, with the judge finding that the government could proceed under a *per se* theory of liability for what was

alleged to be a naked no-poach agreement.<sup>30</sup> Defendants DaVita Inc., a kidney dialysis provider, and its former CEO proceeded to trial. However, the defendants did score some meaningful pretrial wins, which undercut the force of the *per se* motion-to-dismiss ruling. First, Judge R. Brooke Jackson agreed to instruct the jury that the government had to prove as part of its case that the defendants entered into the conspiracy "with the purpose of allocating the market." The court reasoned that "non-solicitation agreements are not *per se* violations of the Sherman Act, but non-solicitation agreements aimed at allocating markets are." Next, the court allowed the defendants to introduce "evidence of salary increases and other beneficial effects," since that evidence "might plausibly show an alternative purpose of the agreement" — i.e. procompetitive justifications for the arrangement.<sup>31</sup>

At trial, the defense admitted that the defendants had entered into agreements with competitors to not hire DaVita's executives and to have DaVita employees applying to competitors first alert DaVita that they were considering leaving. However, it argued that the purpose was not to allocate the market and that there were procompetitive justifications and effects to these arrangements. The defense also argued that the number and size of the companies involved were too small to meaningfully diminish competition. The jury was free to submit written questions to the judge, which members did on a number of occasions. After a two-day deliberation, the jury acquitted both defendants on all counts.<sup>32</sup>

<sup>28</sup> U.S. Dep't of Justice, *U.S. v. Surgical Care Affiliates, LLC & Scai Holdings, LLC*, available at <https://www.justice.gov/atr/case/us-v-surgical-care-affiliates-llc-and-scai-holdings-llc>.

<sup>29</sup> Katie Buehler, *DOJ's 1st Wage-Fixing Suit Ends With Not Guilty Verdicts*, LAW360 (Apr. 14, 2022), available at <https://www.law360.com/articles/1484191/doj-s-1st-wage-fixing-suit-ends-with-not-guilty-verdicts>.

<sup>30</sup> *United States v. Davita Inc.*, 1:21-cr-00229-RBJ (D. Colo. Jan. 28, 2022).

<sup>31</sup> *United States v. Davita Inc.*, 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022).

<sup>32</sup> Dan Papszun, *Davita, Ex-CEO Found Not Guilty in DOJ's No-Poaching Case (2)*, BLOOMBERG LAW (Apr. 15, 2022), available at <https://news.bloomberglaw.com/antitrust/davita-ex-ceo-found-not-guilty-in-dojs-no-poaching-case>.

## IV. OTHER CRIMINAL ANTIRUST HAPPENINGS

### A. Continued Focus on Labor

For years, *per se* treatment and criminal prosecution of Sherman Act violations have been reserved for long-established categories of “hard-core cartel activity” — price fixing, market allocation, and bid rigging. But in the 2016 DOJ and FTC *Antitrust Guidance for HR Professionals*,<sup>33</sup> the Division announced that going forward, it considered “no poach” a form of “market allocation.” The recent no-poach and wage-fixing trials indicate that the Division is set on using its criminal powers to attempt to root out what it views to be misconduct in the “labor market.” This is also consistent with directives coming from the Biden administration to continue to focus on misconduct in labor markets.

In December, the Division indicted the first individuals under a no-poach conspiracy that occurred outside the healthcare field when it returned an indictment charging executives in the aerospace outsource engineering industry with participating in an alleged criminal antitrust conspiracy with their customer to restrict the hiring and recruiting of engineers and other skilled workers.<sup>34</sup> Most recently, though surely not the last such case, in January 2022, the Division announced wage-fixing and labor market allocation charges against four managers of home health care agencies in Maine for allegedly conspiring to suppress wages and restrict workforce mobility for essential workers during the COVID-19

pandemic.<sup>35</sup> The Division again won at the motion-to-dismiss stage in this case.

#### i. First Action for Division’s Procurement Collusion Strike Force

In addition to the recent focus on labor, activity in traditional areas of antitrust enforcement remains robust. The Division has seen more success in this area of enforcement. For example, the Procurement Collusion Strike Force (Strike Force) won its first conviction against a former executive for his participation in a conspiracy to rig bids and submit false certifications of non-collusion for projects funded by the North Carolina Department of Transportation.<sup>36</sup> Brewbaker instructed a coconspirator to submit noncompetitive bids for projects. On March 9, 2022, the Strike Force also indicted a Minnesota-based concrete contractor, and its CEO for allegedly asking its competitor to submit unsuccessful bids for public concrete repair and construction contracts for cities and school districts.<sup>37</sup> The Strike Force was created in 2019 to enforce laws against schemes that impact government procurement, grant, and program funding.<sup>38</sup>

## V. TAKEAWAYS

From the first-ever labor cases to pursuing monopolization charges criminally, the Division is heading aggressively into untraditional areas of criminal antitrust enforcement, and despite recent trial losses, it is unlikely to back down anytime soon. The Division continues to push charges against individuals and companies under both new and old theories of antitrust liability and to tout its willingness to litigate “hard

<sup>33</sup> *Davita and its Former CEO Acquitted of U.S. Antitrust Charges*, REUTERS (Apr. 18, 2022), available at <https://www.reuters.com/business/healthcare-pharmaceuticals/davita-its-former-ceo-acquitted-antitrust-charges-2022-04-15/>.

<sup>34</sup> U.S. Dep’t of Justice, *Six Aerospace Executives and Managers Indicted for Leading Roles in Labor Market Conspiracy that Limited Workers’ Mobility and Career Prospects*, PRESS RELEASE (Dec. 16, 2021), available at <https://www.justice.gov/opa/pr/six-aerospace-executives-and-managers-indicted-leading-roles-labor-market-conspiracy-limited>.

<sup>35</sup> U.S. Dep’t of Justice, *Four Individuals Indicted on Wage Fixing and Labor Market Allocation Charges*, PRESS RELEASE (Jan. 28, 2022), available at <https://www.justice.gov/opa/pr/four-individuals-indicted-wage-fixing-and-labor-market-allocation-charges>.

<sup>36</sup> U.S. Dep’t of Justice, *Former Engineering Executive Convicted of Rigging Bids and Defrauding North Carolina Department of Transportation*, PRESS RELEASE (Feb. 1, 2022), available at <https://www.justice.gov/opa/pr/former-engineering-executive-convicted-rigging-bids-and-defrauding-north-carolina-department>.

<sup>37</sup> U.S. Dep’t of Justice, *Minnesota Concrete Company and Its CEO Indicted for Rigging Bids for Public Contracts*, PRESS RELEASE (Mar. 10, 2022), available at <https://www.justice.gov/opa/pr/minnesota-concrete-company-and-its-ceo-indicted-rigging-bids-public-contracts>.

<sup>38</sup> U.S. Dep’t of Justice, *Justice Department Announces Procurement Collusion Strike Force: A Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding*, PRESS RELEASE (Nov. 5, 2019), available at <https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response>.



cases” and to face losses. At the same time, the Division is making policy changes that appear to be creating uncertainty in the bar and business community and potentially disincentivizing witness cooperation.

In light of the policy changes, tough talk, and aggressive criminal enforcement actions of the

Division, companies and individuals must be on high alert to the need to detect potential antitrust violations through a strong antitrust compliance program and, if misconduct does occur, to effectively navigate the increasingly uncharted waters of determining whether and when to self-report, negotiate with the government, or litigate.