

Is "No Poach" No More?

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In this article, Members Lauren Briggerman and Kirby Behre and Associate Helen Marsh* write that the U.S. Department of Justice's (DOJ) Antitrust has had a devastating track record in prosecuting no-poach agreements: zero convictions and acquittals of 13 individuals and one company on antitrust charges across four trials. The authors argue that collectively, these losses undermine the DOJ's ability to successfully prosecute no-poach and wage-fixing cases in the future. But the acquittal of six executives in *United States v. Patel* this past April might make it even more difficult, namely because it challenges DOJ's grounds for bringing these criminal cases as a matter of law. The authors conclude that while the law may not require the DOJ to prove anti-competitive effects on the market under the criminal standard of liability, three juries and a federal judge have signaled their unwillingness to convict individuals of a crime where they do not see harm to the employee. Recent rulings should be a wake-up call for the Antitrust Division to rethink its strategy for pursuing labor collusion cases criminally — at least where it does not have a compelling story to tell at trial.

**Former Miller & Chevalier attorney*