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A series of union-backed lawsuits demonstrate that employers should use caution when participating in compensation and benefit surveys involving competitors. This ASAP provides a short summary of the law related to compensation and benefit surveys and practical recommendations to avoid potential antitrust liability.

Sharing Compensation or Benefit Information Between Competitors May Violate Antitrust Laws

By John M. Skonberg, Kerry E. Notestine and Nitin Sud

Employers commonly participate in surveys to assist in setting competitive wage rates, salaries, or benefits. With today's tight labor markets, these surveys can be valuable in attracting and retaining employees. However, a series of lawsuits filed during the summer of 2006 demonstrate that there are potential dangers in this practice.

The Nurse/SEIU Lawsuits

Several registered nurses supported by the Service Employees International Union (SEIU) filed four separate proposed class actions against various major hospitals and hospital chains, alleging a conspiracy to exchange compensation information and depress their wages in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. These federal lawsuits accused hospitals in the Albany, Memphis, Chicago, and San Antonio areas of regularly exchanging detailed and non-public information about the wage rates each is paying or is willing to pay to its registered nurses, and allege that there was an agreement among the hospitals to use this information for the purpose of containing the nurses' wages.

The Sherman Act and similar state statutes generally prohibit combinations or "trusts" in restraint of trade. The most common application of these laws pertains to alleged conduct of monopolizing markets, fixing prices and excluding competitors. Many employers may question whether the nurse/SEIU cases have any actual merit because these cases appear to be part of a corporate campaign with the actual purpose being to put economic pressure on the hospitals to recognize the SEIU as the bargaining representative of the nurses. However, these cases highlight that the antitrust laws may apply to compensation and human resources practices.

The Application of the Antitrust Laws to Wage Surveys

The plaintiffs in the nurse/SEIU cases appear to be alleging facts in an attempt to assert claims permitted by the Court of Appeals for the Second Circuit in *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001). There, the plaintiffs alleged a violation of the Sherman Act by several employers in the oil and petrochemical industry through the exchange of salary information regarding managerial, professional and technical employees. The defendants in the *Todd* matter utilized a third party, Towers Perrin, to collect the salary data, and Towers Perrin distributed the complete survey every two years to the defendants. Towers Perrin updated parts of the survey every year, and, perhaps most importantly, defendants' human resources personnel allegedly held meetings at least three times a year to discuss and exchange salary-related information including current and future salary budgets for individual defendants.

The Court of Appeals reversed the dismissal of the case by the district court and concluded there was enough evidence to "arouse suspicion of anticompetitive activity," from which a trier of fact could find that the purpose of this information exchange was to set employees' salaries at artificially low levels. The court found the alleged meetings of the human resources employees to discuss the survey and salaries "accompanied by assurances

that the participants would primarily use the exchanged data in setting their ... salaries" to be "troubling." The court also found that the specificity of the information and the fact that the information was not public to be "problematic." *Todd v. Exxon Corp.*, 275 F.3d at 212-13. Moreover, a case following *Todd* found that the public dissemination of information in a survey did not "insulate the activity from consideration in the larger price-fixing claim." *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 167 (D.D.C. 2004).

Antitrust Violations

Generally, courts will focus on two primary factors to determine if sharing compensation and benefit information violates federal and state antitrust laws: (1) the market power of the companies involved; and (2) the nature of the information exchanged. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978); *Todd v. Exxon Corp.*, 275 F.3d at 199. The analysis of market power involves a review of positions that are interchangeable with those held by the employees allegedly impacted by the arrangement. *Todd*, 275 F.3d at 202. If an employer combination has sufficient market power, a conspiracy to exchange compensation/benefit information may result in decreased compensation/benefits for interchangeable positions and violate the antitrust laws. For example, the plaintiffs in one of the nurse/SEIU cases allege that because hospital nurses "possess unique skill sets and gain industry-specific and employer-specific experiences as they work," the hospitals then "become the only practical outlets for hospital [nurses] to sell their services at an amount reflecting their skills and knowledge." *See e.g.*, Complaint in *Unger v. Albany Medical Center, et. al*, civil action no. 06-cv-00765-TJM-DRH, (N.D.N.Y.) at 49. If the plaintiffs are able to prove these allegations, a jury could find that target hospitals have sufficient market power to subject them to liability under the antitrust laws.

In addition to market power, the courts analyze the nature of the information exchanged among competitors. Surveys of compensation/benefit information have the potential to lead to a depression of wages in an industry. *Todd*, 275 F.3d at 213. To determine the anti-competitive potential of a specific information exchange, courts look to a number of factors, including: (1) timing (*i.e.*, how current the information is); (2) availability of the information to the general public; (3) the specificity of the information; and (4) the purpose of the information exchange. Basically, the more specific and timely the information, the more likely a company is to use it to set its own compensation and benefits, and, therefore, the more likely it is to impact compensation and benefits across the industry.

Joint Policy Statement by FTC and Justice Department

In 1993, the Federal Trade Commission and the Justice Department issued a joint policy statement that provides some guidance for employers concerning the sharing of compensation/benefit information. While the policy statement specifically applies to health care companies and may not necessarily be directly applicable to other industries, there is no assurance that it will be used only in this limited area.

The policy statement defines an "antitrust safety zone" for exchanges of information about wages, salaries or benefits and indicates that government agencies will not challenge the exchange of this information absent "extraordinary circumstances." The statement provides that written wage, salary or benefit surveys will fall within the antitrust enforcement safety zone if the survey meets three conditions: (1) the survey is managed by a third party; (2) the information provided by the survey participants is more than three months old; and (3) there are at least five employers reporting data for each statistic, with no one employer reporting more than 25 percent of any statistic, and no single employer may be identified with any specific information. While compliance with this antitrust safety zone would protect an employer from a government antitrust enforcement action, employers might very well question the utility of limiting wage surveys to such incomplete or stale information. Furthermore, conduct outside the antitrust safety zone also may not violate the antitrust laws.

Recommendations

To avoid liability, an employer could decline to participate in or utilize surveys sharing compensation/benefit information. We assume, however, that many employers will decide to use surveys for legitimate business purposes. If a company decides to participate in a compensation/benefit survey, it may want to consider the following suggestions to minimize the risk of an antitrust violation:

1. Hire a third-party to conduct the survey. Competitors should not have direct contact with each other regarding the actual survey or compensation/benefit information. However, keep in mind that the companies in the *Todd* case used a third-party, so this alone will not prevent liability.

2. The survey results should not identify the participating companies, either directly or indirectly. The *Jung* case found that survey results offering only aggregated data in subsets, rather than employer-specific information, could still be used to facilitate a price-fixing conspiracy because those subsets grouped employers based on employment, region and ownership type, therefore possibly leading, indirectly, to the identification of each specific employer. *Jung*, 300 F. Supp. 2d at 167.

3. Competitors should not discuss in any way the results of the third party survey, unless they are part of a multi-employer bargaining association involved in collective bargaining negotiations.

4. Weigh the value of the compensation/benefit information against the age of the information. The older the information, the less likely it could be found to have an influence on current compensation/benefit rates, although excessively old information may not have much value to the employer.

5. Avoid conducting compensation/benefit surveys too frequently. In the nurse/SEIU lawsuits, the plaintiffs allege that the hospitals "regularly surveyed each other" and exchanged information more frequently and in greater detail towards the end of the fiscal year "when hospitals draft budgets and decide on [nurse] compensation levels for the following year." It would not seem unreasonable to consult wage surveys on a yearly or other periodic basis when determining wage

increases, but more frequent collection of information could support an improper motive. *See Todd*, 275 F.3d at 213.

6. Use surveys as only one factor in setting compensation or benefits. If the employer can identify other factors used in setting compensation/benefit rates, this could undermine a plaintiff's ability to prove that the survey caused a depression of compensation or benefits.

Employers need not avoid compensation/benefit surveys entirely. There are situations in which the sharing of compensation/benefit information specifically is permitted. For example, the sharing of wage information (and, indeed, the setting of uniform wages) within a multi-employer bargaining group is lawful, as the antitrust laws provide an exception for such conduct. Furthermore, courts have held that "information exchange is not always anticompetitive and can enhance competition by making competitors more sensitive to each other's price changes, enhancing rivalry among them." *Todd*, 275 F.3d at 214. If the employer *increases* compensation or benefits after a survey, particularly if the increases exceed those of other employers surveyed, it will be difficult for affected employees to claim anti-competitive activity.

As with other legal risks, the employer should weigh the risk of antitrust litigation against the value of the survey, and take necessary steps to minimize potential liability.

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