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Client Alert

Antitrust/Competition

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Is It Still Safe To Exchange Wage and Other Compensation-Related Information?

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Since the mid-1990s, human resource (HR) professionals (and those advising them) have relied on the Department of Justice (DOJ) and Federal Trade Commission's (FTC) "antitrust safety zone" articulated in Statement 6 of the *Statements of Antitrust Enforcement Policy in Health Care* (1996 Statements). Statement 6 provided a degree of comfort that they would unlikely violate antitrust laws when participating with competitors in surveys exchanging competitively sensitive information (wages and other compensation-related information, for example) if they complied with certain "conditions"–"absent extraordinary circumstances."

In February, the DOJ announced the withdrawal of a number of "outdated" enforcement policy statements, including the 1996 Statements. In a speech announcing the withdrawal of these statements, Doha Mekki, the DOJ's Principal Deputy Assistant Attorney General at the Antitrust Division, commented that the statements no longer "fully reflect market realities, the risk of serious competitive harm, or the full scope of liability under the antitrust laws." In particular, she singled out the "'safety zones' around the exchange of competitively sensitive information" found in Statement 6 as "understat[ing] the antitrust risks of competitors sharing competitively-sensitive information."

For context, Statement 6's antitrust safety zone has been relied on by many to justify the exchange of competitively sensitive information. In her speech, Mekki dismissed several of Statement 6's "conditions that [had to] be met for an information exchange among [competitors] to fall within the antitrust safety zone" to ensure that "an exchange of price or cost data is not used by [competitors] for discussion or coordination" of prices or cost.

For example, Mekki noted that "exchanges facilitated by intermediaries can have the same anticompetitive effect as direct exchanges among competitors." Mekki also disagreed that data "at least three-months old is unlikely to be competitively-sensitive or valuable" given that the "rise of data aggregation, machine learning, and pricing algorithms can increase the competitive value of historical data for some products or services." And finally, Mekki noted that "enforcement actions and the case law itself demonstrate that having five or more participants in an information exchange is no guarantee that the exchange will not harm competition, especially in situations where the companies exchanging the information collectively have significant shares of the relevant market."

Lost among most of the commentary that followed Mekki's speech is how (if at all) losing the antitrust safety zone really matters to the HR professional involved in the compensation-setting process. One need only look to the DOJ's and the FTC's 2016 *Antitrust Guidance for Human Resource Professionals* (2016 HR Antitrust Guidance) and recent enforcement actions for that answer.

The 2016 HR Antitrust Guidance explains how sharing information "with competitors about terms and conditions of employment can also run afoul of the antitrust laws." Even if you do not "agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement." And "[w]hile agreements to share information are not per se illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect." Take "evidence of periodic exchange of current wage information in an industry with few employers" where such an exchange "could establish an antitrust violation because, for example, the data exchange has decreased or is likely to decrease compensation."

That was the exact issue back in the mid-1990s, when the DOJ sued the Utah Society for Healthcare Human Resources Administration and a number of Utah hospitals for conspiring to exchange nonpublic prospective and current wage information about registered nurses. That wage information exchange resulted in the hospitals matching each other's wages, effectively keeping pay lower than what would have been otherwise paid.

And that was also the case with the sole enforcement action involving the exchange of wage and benefit information highlighted in Mekki's speech justifying the withdrawal of Statement 6. In that case, the competitor employers had an agreement to exchange current and future compensation information and shared the disaggregated job-level compensation information, and the third-party consultant involved facilitated meetings to share the same competitively sensitive information.

Mekki's speech and the DOJ's announcement withdrawing Statement 6 did not mention the 2016 HR Antitrust Guidance, which makes clear that "not all information exchanges are illegal" and that it "is possible to design and carry out information exchanges in ways that conform with the antitrust laws." The 2016 HR Antitrust Guidance states that "an information exchange ***may be lawful*** if: [1] a neutral third party manages the exchange, [2] the exchange involves information that is relatively old, [3] the information is aggregated to protect the identity of the underlying sources, and [4] enough sources are aggregated to prevent competitors from linking particular data to an individual source." (Emphasis added.)

In sum, following the 2016 HR Antitrust Guidance does not guarantee that companies sharing information will not face antitrust scrutiny when exchanging wage and other compensation-related information–including when sharing information through a third party. But neither did following Statement 6. With the increased DOJ and FTC scrutiny of labor practices, now is the time to revisit not only your participation in wage and other compensation related surveys but also how you use such surveys in the compensation-setting process.

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