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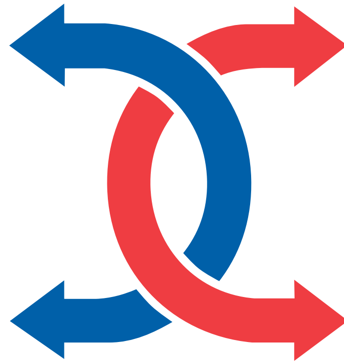
HR Connection



HR and Antitrust: What HR Professionals and Legal Administrators Should Know

Members of the ALA, like members of other professional associations, are subject to, and thus should have a keen awareness of, the antitrust laws. The following provides an overview of the antitrust laws and cases most relevant to HR professionals and legal administrators, and provides some practical advice for reducing risks.

The Basics

The purpose of antitrust laws is to protect consumers by encouraging and preserving competition. The underlying theory is that competition leads to innovation, efficiency, and, ultimately, lower prices, higher-quality products or services, and greater output. Broadly, the antitrust laws make it illegal to unreasonably restrain competition, attempt to acquire or use monopoly power, or engage in unfair methods of competition. Importantly for human resource professionals, the laws apply to services as well as goods, and to purchasing as well as selling.

For associations, one of the most important antitrust statutes to be aware of is Section 1 of the Sherman Act, a federal statute that prohibits contracts, combinations, or conspiracies in restraint of trade. A Section 1 violation arises when two or more companies agree to engage in conduct that unreasonably restrains competition that affects interstate commerce.

An agreement can take various forms, from an explicit agreement to an implied one.

A "wink and a nod" may be enough. Associations must be particularly careful because they often include competitors among their members, and courts sometimes construe their activities to constitute joint conduct by their very nature.

Whether a restraint is unreasonable generally is analyzed in one of two ways. Some conduct, such as agreements to fix prices, boycott competitors, or to divide territories or customers, is illegal ***per se*** – which means such conduct is always unreasonable, regardless of the justification. But the legality of other conduct, such as information exchanges, depends on whether the pro-competitive benefits outweigh the anticompetitive harm. This, in turn, depends on several factors, such as the effect of the restraint on prices, quality, or output.

Both federal and state governments, as well as private parties, can bring antitrust suits. If successful, penalties for violations can be severe. For criminal violations, individuals can face fines up to $1 million and jail time of up to ten years; corporations can be fined up to $100 million or, if greater, twice their ill-gotten financial gain or twice the loss suffer by consumers. Additionally, plaintiffs in civil litigation can recover three times their damages, which can easily cost companies millions. The cost of defending suits alone can be massive, let alone the harm to individual and firm reputations.

HR Cases

So how does antitrust law affect HR professionals, legal administrators, and associations? The following cases show that HR professionals can be swept into an antitrust case when they share information about current or future compensation and benefits.

For example, in ***United States v. Utah Society for Healthcare Human Resources Administration***, the Department of Justice ("DOJ") charged two associations and eight hospitals with conspiring to exchange non-public current and future wage information about registered nurses. The hospitals, through their HR directors, allegedly exchanged wage and budget information, including the timing and frequency of wage increases, through telephone calls, regular association meetings set up for the express purpose of exchanging this information, and annual surveys of current and future wage increases.

The DOJ alleged that this conduct resulted in smaller increases of wages and promoted interdependent wage setting strategies between the hospitals. The case was settled by a consent order that, among other things, prohibited the defendants from engaging in this type of conduct, restricted their ability to participate in wage surveys, and required them to submit annual compliance reports to the DOJ.

In ***Todd v. Exxon***, plaintiffs brought a class action against fourteen oil companies that allegedly conducted detailed wage surveys about current and future compensation, benefits, bonuses, entry wages, and job responsibilities by pay grade. The oil companies allegedly shared the information with one another, their HR personnel met regularly to exchange this information, and the surveys were not made public. Plaintiffs claimed that this resulted in artificially low salaries and slower job advancement.

Although the district court dismissed the case, the appeals court reversed, finding that the information exchange could have violated Section 1 of the Sherman Act. The appellate court explained that the information exchange must be analyzed in light of market structure and the nature of the information exchanged.

With respect to market structure, a highly-concentrated market with few participants that have market power to affect prices makes it more likely that the exchange will harm competition. Even where there are a large number of industry participants, however, the court said that information exchanges can still be illegal.

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With respect to evaluating the propriety of the information, itself, the court highlighted these factors: (1) the time-frame of the information – exchanges of current and future prices (i.e., compensation), as opposed to historical information, are especially problematic; (2) the specificity of the information (e.g., employee specific by firm vs. average salary among several firms) – the more detailed the information, the greater risk of liability; (3) whether the information is made publicly available – making survey results public enables the data to serve potentially pro-competitive uses; and (4) how frequently the information is shared – frequent exchanges are riskier because they allow participants to police improper agreements.

Finally, in 2006, several class actions were filed by registered nurses against hospitals for alleged antitrust violations. Plaintiffs alleged, among other things, that hospital HR staff exchanged current and future compensation information at job fairs, over the telephone, and association meetings. These cases are ongoing.

Some Practical Advice

Of course, lots of HR and law firm administration topics are unlikely to raise antitrust issues, and firms can receive market information lawfully from press and other public sources. Still, other activities, including those carried out through associations, can raise antitrust risks. Associations, HR professionals, and legal administrators can take many steps to reduce those risks. For example:

- Don't share current or prospective compensation (salary, bonus, or benefits) or other competitive-sensitive information without prior advice of an antitrust counsel.
- Don't discuss allocating clients or services, dividing territories, or boycotting customers and vendors.
- Establish an antitrust policy and distribute the policy to members.
- For meetings, prepare an agenda that comports with your antitrust guidelines, keep minutes that are reviewed by an attorney in draft, and interrupt any speakers who veer into inappropriate topics.
- Always be vigilant about what is put in writing, taking care to avoid any ambiguity that could suggest an improper discussion or course of conduct.
- Be careful when conducting compensation surveys. Generally, compensation surveys are fine if they are managed by an outside third party (e.g., a consultant or an association where survey staff are not affiliated with any association member), the data are more than three months old, there are five or more respondents, no single respondent's data represents 25% or more of a data point, and the data are aggregated.
- And, of course, when in doubt, always seek advice from an antitrust attorney.

This information is provided as a general educational service to ALA members. It should not be construed as imparting legal advice on any specific matter.

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Sustainability in the Construction Process
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Case Study: Mobilizing to "Go Green"
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