



**CONNECTICUT HEALTHCARE
HUMAN RESOURCES
ASSOCIATION**

ANTITRUST COMPLIANCE RELATING TO WAGE AND SALARY SURVEYS

**Robert M. Langer
Wiggin and Dana LLP
January 27, 2021**

Antitrust law prohibits certain agreements with competitors

- Agreements among competitors with respect to any competitive factors – price, customers, territories, etc. – are “per se” illegal
 - Illegal “on their face”
 - Don’t get a chance to explain the reasons, beneficial effects, etc.
 - Criminal antitrust violation



What is an “agreement”?

- Doesn't need to be a formal (or written) contract
- Informal conversations – and *emails* – can evidence an intent to agree sufficient to get you into trouble
→ Watch out for those emails!!
- Coordinated activity with an opportunity to talk may be enough to infer agreement



Why are exchanges of wage and salary information restricted?

Theory: Exchanges of price information among competitors could lead to collusion/agreements on price

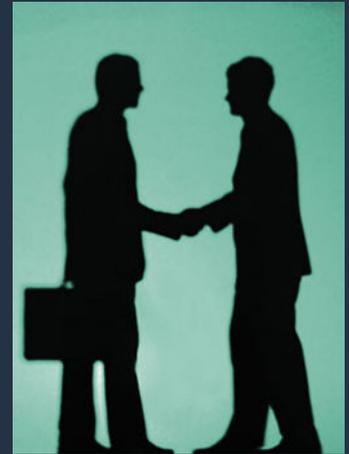
- Wages are a form of price (providers as purchasers, not sellers)
- Exchanging wage information allows hospitals to avoid competing on wage levels



Why are exchanges of wage and salary information restricted?

Exchange of salary information could lead to agreement to keep salaries below competitive levels

Particularly a problem where high demand, shortage of supply (e.g., nurses) – collusive restrictions on compensation paid could adversely affect availability





DOJ/FTC's Statement 6 Safety Zone

Statement 6 of the Health Care Guidelines carves out surveys that fall within certain narrow parameters:

- Data must be collected and surveys managed by a third party
- Information provided must be based on data more than 3 months old



DOJ/FTC's Statement 6 Safety Zone



- Information must be aggregated so that no one provider's data can be identified:
 - Data must be included for at least 5 providers for each reported statistic
 - Each provider's data can total no more than 25% of any statistic

1994 CHHRA Agreement



Key terms:

- Data requests must be in writing
- Survey must be conducted by third party
- No prospective information
- Aggregated data only
- Data must be reported by job category, not by individual employee
 - No direct exchange of salary information, but can verify individual's present or offered compensation in salary negotiations

“Wage and Salary” Information

WAGE INCREASES

- Time, frequency, amount



BENEFITS with value as compensation

- Paid sick days
- Stock options offered
- Medical coverage co- pays/deductibles
- Percentage cost paid by employer vs. total cost of benefits



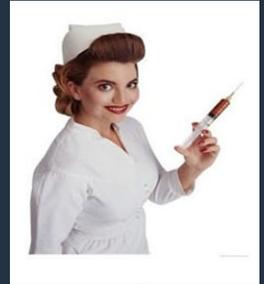
Nurse Wage Suppression Litigation



2006: Five class action lawsuits filed (Detroit, Chicago, Memphis, San Antonio, Albany)

- Allegations:
 - Surveys/phone calls among HR reps about wage increases; more frequent at year's end
 - HR employees evaluated on ability to coordinate compensation
 - Non-compliant surveys (e.g., can identify facility by data provided in third-party surveys; exchanged copies of surveys prepared for competing hospitals)
 - Agreements to limit use of sign-on bonuses to avoid "churning" of nursing staff
 - Multi-million dollar settlements reached in Albany and Detroit cases, including a \$42 million settlement in the Detroit case in 2015!

Nurse Wage Suppression Litigation



May 2007: Complaint by the U.S. Justice Department

- Allegation:
 - Arizona Hospital and Healthcare Association and its subsidiary the AzHHA Service Corp. violated Section 1 of the Sherman Act by setting uniform billing rates for temporary nurses - in effect forming a buyer's cartel to set monopoly prices
 - As a result, prevailing wages for temporary nurses were decreased below competitive levels
 - The case settled in less than four months, and the defendants agreed to stop setting billing rates - but no monetary penalties were assessed, nor did the government go after the individual hospitals that used the nurses

July 2007: Follow-on class action filed in Arizona federal court

- Named dozens of hospitals as co-defendants
- On March 4, 2011, the Court approved settlements with the vast majority of defendants in this case which provide for the payment of **\$22,476,818.18** in cash for both per diem and traveler nurses who worked in the defendant hospitals during the class period

Hi-Tech Employee Antitrust Litigation

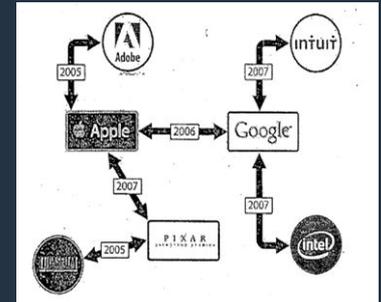
2010 DOJ settlements with Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., and Pixar

■ Allegations:

- The six companies entered into agreements that restrained competition between them for highly skilled employees
- Company executives agreed not to cold call each other's employees
- Settlement prohibits the companies from engaging in anticompetitive no solicitation agreements for five years

2011: Follow-on class action

- Lucasfilm, Pixar and Intuit settled with the class for \$20 million
- The class settlement involving Google, Apple, Intel and Adobe was deemed INADEQUATE at \$324 million!!





Former Owner of Health Care Staffing Company Indicted for Wage Fixing

- In December, 2020, the Antitrust Division of the U.S. Department of Justice announced that the owner had participated in a conspiracy in the Dallas-Fort Worth area to fix prices by lowering the rates paid to physical therapists
- The owner was also charged with obstruction of justice
- The owner faces up to \$1 million and 10 years in prison on the antitrust charge, and up to \$250,000 and 5 years in prison on the obstruction charge

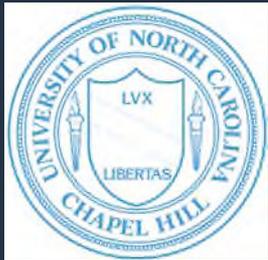


FTC Decision and Order Non-Poaching Agreement

- In 2017, the FTC resolved a matter with the American Guild of Organists.
- FTC challenged the Guild's Code of Ethics provision that prohibited a member from "seeking employment for themselves, a student, or a colleague, in a position held by someone else."
- The Code of Ethics had required a member to obtain "the approval of the incumbent musician before accepting an engagement for a wedding, funeral, or other service requested by a third party. In such cases, the incumbent should receive his/her customary fee."
- The Order included a requirement to retain an Antitrust Compliance Officer to serve as the Guild's Executive Director for a period of three (3) years!!

Class Action - Faculty Non-Poach Agreement

- In 2018, a federal court certified a class of medical school faculty members in an antitrust suit against Duke University and the University of North Carolina
- Allegation – Agreement not to permit lateral moves of faculty members between the two schools
- Settlement agreed to by UNC
- Duke remained in suit to defend antitrust allegations
- In 2019, Duke paid \$54.5 million to settle class action!





Penalties for Antitrust Violations

CIVIL

- *Lost profits*
- *Treble damages*
- *Reasonable attorney fees*
- *Costs of the suit*
- *Injunctive relief*





Antitrust Guidance for Human Resource Professionals



- In October 2016, both the Antitrust Division of U.S. DOJ and the FTC issued very significant guidance to HR professionals
- This includes the real threat that DOJ is prepared to bring CRIMINAL prosecutions against both individuals and companies that have agreed not to compete for employees!!



Outpatient Medical Care Company Criminally Indicted for Agreeing Not to Poach Competitors' Employees

- In January 2021, the Antitrust Division of the U.S. Department of Justice announced that an outpatient medical care company had participated in a nationwide criminal conspiracy not to poach the employees of its competitors
- This is believed to be the first criminal charge of its kind ever brought for entering into non-poach agreements
- A violation of the Sherman Act carries a maximum penalty of a \$100 million fine for corporations. However, the fine may be increased to twice the gain derived from the crime or twice the loss suffered by victims if either amount is greater than the statutory maximum



Penalties for Antitrust Violations

CRIMINAL

- *Sherman Act*: Fine up to \$100 million per offense for corporations, \$1 million for individuals; 10 years jail per offense
- Generally reserved for egregious, *per se* unlawful conduct (e.g., price fixing cartels)

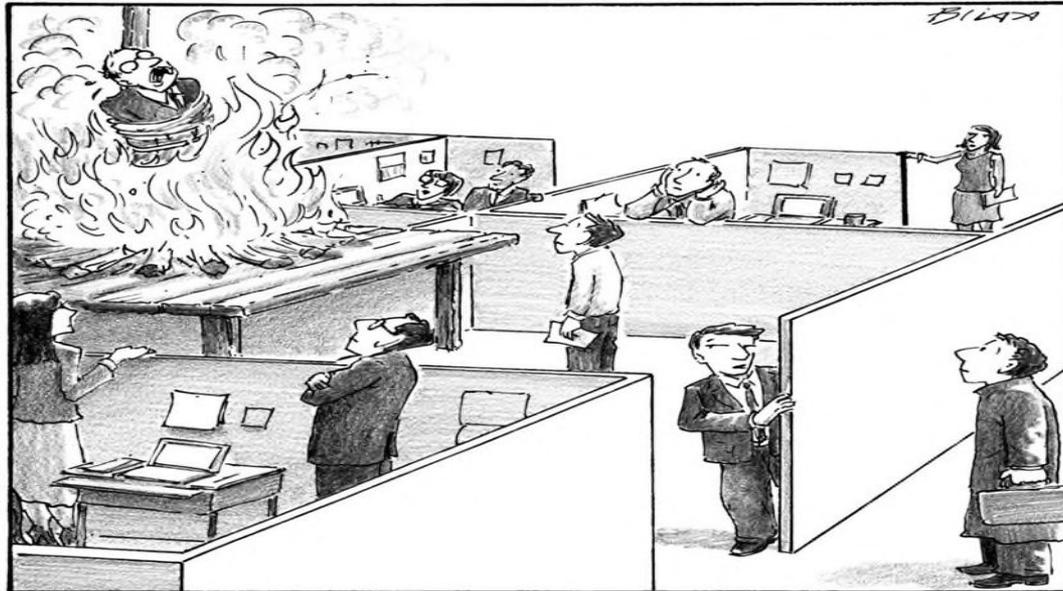




Very Important Recent Antitrust Guidance

- In 2019, the Antitrust Division of the U.S. Department of Justice announced a brand new criminal enforcement policy
- The existence of a robust, functioning antitrust compliance program can, potentially, now shield a company from criminal charges
- Previously, if a company was not eligible for leniency for being the “first in the door,” the fact that it had a robust compliance program was deemed irrelevant to the charging decision and would be considered, if at all, only at the sentencing stage

New Yorker Cartoon



"He replied all."



Conclusions

- Use the survey!
- Follow the rules
- Resist the temptation to make a call to competing providers
- Use caution on list serves, other email
- If you're not sure, please ask your counsel



This presentation is a summary of legal principles.
Nothing in this presentation constitutes legal advice, which can only be obtained
as a result of a personal consultation with an attorney.
The information published here is believed accurate at the time of publication, but
is subject to change and does not purport to be
complete statement of all relevant issues.

WIGGIN

WIGGIN AND DANA

Robert M. Langer
Wiggin and Dana LLP
rlanger@wiggin.com
860-297-3724

www.wiggin.com

WIGGIN

WIGGIN AND DANA