

**Antitrust Issues Concerning Shared
Compensation and Benefit Information**

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Overview

- **The Sherman Act / An Overview**
- **Civil Class Action Litigation**
- **Employers Facing Antitrust Risk**
- **How Do Employers Protect From Antitrust Risk?**

The Sherman Act / An Overview

- Key U.S. antitrust law is the Sherman Act
- Section 1 states:
 - “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”
15 U.S.C. § 1.
 - Key concept is “**Agreement**”

▪ *Per Se* Agreements

- Automatically unlawful
- Common examples include price-fixing, market allocation
- How about an understanding with competitors not to hire employees from each other ...?

- *Per se* rule condemns any practice that, on its face, appears to be one that would always or almost always tend to **restrict competition**

▪ Rule of Reason

- Restraints are analyzed by examining the purpose, operation and effect of an agreement
- More flexible analysis

- Sometimes it is easy to spot a *per se* antitrust violation...
 - “Then it’s agreed, we both will go up 5%”
 - “Ok, if you don’t bid this one, I won’t bid on the next”
 - “We won’t hire your employees if you won’t hire ours”

- An illegal agreement must be:
 - (a) Formal
 - (b) In writing
 - (c) Proven by direct evidence



(d) – *none of the above.*

- Written or explicit agreement not necessary
- “A knowing wink can mean more than words.”
- Example
 - Members of realtor trade association gathered at a country club. The head of the association said: “I don’t care what the rest of you do. Commission rates are too low and I intend to raise mine tomorrow.” After the meeting, some of the association members raised their rates too.
 - Result: **Guilty** of price-fixing agreement

Civil Class Action Litigation

▪ Background

- Common to have multiple lawsuits often filed by experienced plaintiffs' counsel and consolidated before a single Judge
- Litigation can often be lengthier and last several years – class and merits phases to litigation

▪ Potential Damages

- Antitrust laws permit plaintiffs to recover treble damages of the conspiracy
 - If jury finds damages were \$100 million, then plaintiffs can recover \$300 million plus attorneys' fees
- Each defendant is jointly and severally liable for all damages of the conspiracy
 - If five defendants, plaintiffs can recover all damages from just one

- **Establish “agreement” among defendants through direct evidence**
 - Guilty pleas in related government investigation
 - Written documents establishing that competitors agreed to limit competition
 - Admissions by witnesses during depositions
- **Establish “agreement” among defendants through circumstantial evidence**
 - Competitors attending trade association meetings
 - Telephone records showing contacts between competitors
 - Evidence of parallel pricing / wages

- Compensation and Benefits Policies
- Informal surveying among counterparts from competing companies
- Sharing formal survey data that does not satisfy FTC “safe harbor” provisions

■ **Background**

- In 2009, following DOJ investigation, seven high-tech companies agreed to end anticompetitive agreements which were intended to reduce employee compensation and mobility
- In May of 2011, a former software engineer at Lucasfilm filed class action lawsuit encompassing more than 60,000 potential employees charging Adobe Systems, Apple, Google, Intel Corporation, Intuit, Lucasfilm and Pixar with violating the antitrust laws

■ **The Complaint's Allegations**

- Conspiracy from approximately 2005 to 2009
- Intent to suppress pay of technical, creative and other salaried employees, including agreeing not to actively recruit each other's employees

■ **Litigation Record / Difficult Documents**

- Apple’s Steve Jobs emailed Google’s Sergey Brin to stop all recruiting at Apple: “if you hire a single one of these people ... that means war.”
- Dell / Google exchange: “I learned recently that Google extended an offer to one of our sales guys ... Not real happy about this and not the kind of thing we would expect given our partnership. We should discuss next time we are together but I think we should have a general understanding that we are not actively recruiting from each other.

■ **Settlements**

- Last year some defendants paid \$20 million to settle the case.
- **But**, a few months ago, Judge Koh in California federal court denied preliminary approval of a \$324.5 million settlement with the remaining defendants, saying that the amount was **too low!**
- Trial scheduled to begin next year

▪ Factual Background

- In 2006, registered nurses from eight hospitals who provided direct patient care at Detroit-area acute hospitals filed a lawsuit alleging the hospitals violated the antitrust laws

▪ The Complaint's Allegations

- Defendants entered into an “agreement” to suppress RN wages in the relevant market
- Either “agreement” among executives or *per se* violation or exchange of sensitive wage information over a four year period through direct contacts, health care industry organizations and third-party surveys constitutes antitrust violation under rule of reason analysis

Spotlight on Recent Cases – Detroit Hospitals

- **Litigation Record**

- Class of 20,000 nurses certified (twice) by District Court

- **Settlements / Current Status**

- All but one of those hospitals have settled in agreements totaling more than \$48 million
- Detroit Medical Center sole defendant continuing to fight the lawsuit and facing potential \$1.7 billion damages claim
- *Per se* claim dismissed on summary judgment but rule of reason claim remains, *i.e.*, allegations that exchange of wage information used to set wages, wage surveys, exchanges among competitors

Employers Facing Antitrust Risk

- **General Characteristics**
 - Service industries with highly skilled or technical employees with interchangeable skillsets are particularly vulnerable
 - Non-union professionals who can move
 - Industry examples include: Technology, Healthcare, Finance
- **Employers In Industries That Use Compensation Surveys And Benefits Benchmarking**

How Do Employers Assess Whether They Have A Potential Issue

- **Is compensation set through formal process?**
 - Formal, written process specific to company
 - Use of compensation consultant, third party wage surveys
- **Is compensation set through informal process?**
 - “Find out how much VPs of sales get paid in our industry”
 - Telephone calls to industry counterparts
 - Checking with others at trade association events
- **How does your company set compensation?**
- **What Information Is Shared With Industry Counterparts?**
 - Wages? Benefits? Employment terms?

▪ Potential Problem Areas

- Any agreements or informal agreements with other industry competitors regarding the solicitation / compensation of employees
- Pay particular attention to industry competitors that have close relationships
 - Joint venture partners
 - Executive sits on Board of competitors

How Do Employers Protect From Antitrust Risk?

- **Antitrust compliance policies**
 - Review your policy – does it cover employment-related issues such as compensation benchmarking or solicitation of employees from industry competitors
- **Educate employees on the antitrust risks**
 - HR professionals, recruiting managers, and executives should be educated on the antitrust risks associated with the exchange of compensation and benefits information and non-solicitation agreements with competitors.
- **Communication**
 - Be careful to avoid ambiguity in written communications on wages and benefits issues

▪ **FTC Guidelines**

- Ensure that any compensation surveys or gathering of compensation information fit within “safety zone” of FTC Antitrust Guidelines for Collaborations Among Competitors
- For example, in healthcare area, DOJ and FTC will not challenge employer participation in wage surveys if:
 - the survey is managed by a third-party
 - the information provided by survey participants is based on data more than 3 months old
 - at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

Questions



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Selected Recent Antitrust Representations

- Defense of The Dow Chemical Company in multidistrict class action litigation and Department of Justice investigation;
- Defense of Korean Air in multidistrict class action litigation;
- Defended American Airlines in connection with Department of Justice's challenge of proposed merger with US Airways;
- Obtained a rare nolo contendere ("no contest") plea for Florida West International Airlines in a criminal antitrust prosecution in federal court in Miami; and
- Represented multiple company executives in Department of Justice criminal antitrust investigations into the air cargo, air passenger, and cathode ray industries, including, in one instance, persuading the Department to reverse its position and "carve-in" and protect the company executive from individual prosecution.

Selected Recent Publications

- Co-author of "The Intersection of Antitrust and Anti-Corruption Enforcement and the Impact on Companies in Asia" (Ethisphere magazine, forthcoming)
- Co-author with Holly House of "The Ninth Circuit Gives the Antitrust Division Another Victory in a Cartel Case and Provides Further Guidance on the FTAIA"
- Co-author of "Executives Beware: The Long-Arm of the U.S. Government Strikes Again"



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A substantial portion of his practice is devoted to the design and administration of tax-qualified retirement plans. Mr. Keller frequently advises plan fiduciaries how to reduce their risk of fiduciary liability for plan investments and represents sponsors of employee benefit plans in voluntary compliance programs maintained by the Internal Revenue Service and the Department of Labor. In the executive compensation area, he advises boards of directors and compensation committees on how to design and implement executive compensation arrangements that comply with Dodd-Frank, Sarbanes-Oxley, stock exchange listing requirements, securities disclosure requirements, and other corporate governance standards.

In the employee welfare benefit plan area, Mr. Keller has been chiefly responsible for advising firm clients on Health Care Reform, HIPAA privacy compliance for group health plans, as well as Health Reimbursement Accounts (HRAs), Health Savings Accounts (HSAs), and other consumer-driven health plan designs. In addition, he represents plan fiduciaries in administrative claim disputes with participants and contractual disputes with service providers.