



Use Caution When Conducting Wage Surveys

Insights

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Conducting wage surveys to determine whether healthcare workers, particularly nurses, are being paid competitively is nothing new. They can be helpful in determining whether a particular employer might need to raise wage levels to minimize turnover and remain an attractive employer in a competitive field. But if not done carefully, such surveys can land you in the middle of an anti-trust law suit defending your company from allegations of collusion.

How Courts View The Problem

In March of last year, two Albany-area hospitals settled class claims alleging that the hospitals had colluded to keep nurses' salaries artificially low. The settlement, for \$1.25 million, was reached after the court agreed to certify a class of more than 2,000 area nurses. Similar lawsuits have been filed in the past few years in Chicago, Detroit, Memphis, and San Antonio, alleging, among other things, that the hospitals sharing of compensation information was evidence of a conspiracy to keep salaries artificially low.

And a Michigan court has ruled that the fact that a hospital's nurses were largely unionized did not shelter it from anti-trust claims, even though the hospital argued that its nurses' wages were not set through a competitive process, and therefore could not establish the "requisite anti-trust injury."

Cason-Merenda v. Detroit Med. Ctr.

In reaching its decision, the court held that the hospital had not sufficiently shown that the collective bargaining process "exists entirely outside of, and wholly insulated from, the separate 'competitive arena' in which Defendant and other Detroit area hospitals allegedly have reduced competition by agreeing upon RN wages."

Practical Tips For Conducting Wage Surveys

Any prudent human resources professional might be forgiven for thinking that wage surveys should be abandoned altogether as too risky. But wage surveys can still be a useful tool for human resources personnel as long as they are thoughtfully conducted. Here are some practical suggestions for protecting your organization from ant-trust liability.

1. Have salary surveys managed or conducted by a third party. This is a key precaution to help your organization avoid allegations of price-fixing.
2. Conduct salary surveys on an infrequent basis to avoid the appearance of collusion, including informal communications among employers.
3. Keep salary information exchanges to data exchanges only, as any accompanying discussions and recommendations create the appearance of improper motive.
4. Provide information as part of the data exchange that is 60 days old. Do not, under any circumstances, include information regarding projected or future pay rates.
5. Make the data available to those outside the group of participants. Of course, it might be reasonable to charge non-participants a fee for access to the information.
6. Aggregate the data so that rates cannot easily be associated with any individual survey participant, and make the surveys large enough to obscure the identity of any particular participant.

As courts will look at the overall size and nature of the market being surveyed, along with the "market power" of survey participants, surveys of larger and more generally competitive markets are less likely to support the inference of a conspiracy to fix wages. Courts are also more inclined to examine all of the facts and circumstances in assessing allegations of an illegal price-fixing conspiracy; no single factor is likely to decide the outcome in the event of litigation.

While salary surveys remain a helpful tool for any organization, it is recommended that employers seek legal guidance and maintain appropriate safeguards before participating in a salary survey.

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