



Briefs Focus

Salary and Price Sharing Among Hospitals from the Anti-Trust Perspective

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Hospital executives, including those in human resources and finance, naturally want the most current and relevant information before making salary or contract price decisions. Unfortunately, this desire runs headlong into the crosscurrents of anti-trust regulations, which restrict companies from sharing non-public price or cost information because of the concern that it could lead to illegal collusion, and the general acknowledgement in antitrust literature that more price and cost information in the marketplace is better for competition.

Federal anti-trust agencies have established basic rules to permit a significant exchange of information (with safeguards to prevent illegal collusion that might result from the misuse of the information) because it is vital to the lawful functioning of the economic markets that affect hospitals, provider contracting, and staff salaries. This *Briefs Focus* describes the danger areas and safe harbors that protect lawful information exchanges.

Risky Efforts to Obtain Salary and Price Information

Informal Calls or E-mails to Friends at Nearby Hospitals

The hospital industry has long enjoyed a well-deserved reputation for being collegial, so it may feel normal to ask for help when confronted with a decision about what to pay a nurse or what price to agree to with a health plan. Unfortunately, making informal calls to fellow hospital executives requesting non-public salary or price is the most frequent conduct cited by federal anti-trust agencies when they file lawsuits for illegal sharing of this information among hospitals. It is not whether you get price and salary information that leads to the anti-trust problems, but rather how, when and what information you get that are at the core of federal anti-trust complaints against hospitals and their executives.

Chatting With Friends at Industry Conferences

Informal discussions at industry conferences have been cited in collusion cases by federal anti-trust agencies numerous times over the years. Fortunately, to date, the hospital industry has not been among the industries where these claims have

been made. However, such collegial gatherings naturally lead to discussions of general interest, and what could be of more general interest than salaries and health plan contracts? Again, the fact that conversations occur is not the critical element. Instead, the agencies focus on what is discussed, when it is discussed, and what is done with the information.

Using Survey Companies Whose Procedures You Do Not Know

Surveys of salaries and contract rates are common in the health care industry, and are necessary sources of information about what is being paid or received in compensation within the marketplace. If done in a way that complies with the guidelines adopted by federal antitrust agencies, these surveys are legal and the safest way to obtain salary and health plan contract information. HASC's Annual Compensation Surveys and the contract benchmarking provided by PDS are good examples of safe sources of survey information about salary and health plan contracting.

Rules for Safely Obtaining Salary and Contracting Information

Statements of Anti-trust Enforcement Policy in Health Care Provide 'Safe Harbor'

In 1993, two federal anti-trust agencies – the Federal Trade Commission and the Department of Justice – jointly issued the *Statements of Anti-trust Enforcement Policy in Health Care*, universally referred to as the Statements. The Statements were revised and reissued in 1996 in response to a call from the health care industry requesting clear guidance as to what types of cooperative conduct could be engaged in safely by entities within health care. The Statements provided those assurances and to this day remain the standard by which cooperative conduct is measured, not only in health care, but all industries.

Relevant to the concerns discussed about hospitals sharing salary and contracting information, the agencies issued *Statement 6 – Provider Participation in Exchanges of Price and Cost Information*, which permits exchanges of price (in our context, contract prices to health plans) and cost (in our context, salaries) and provides a safe har-

bor when the following criteria are met:

1. The information is shared through a survey managed by a third party;
2. The information provided is at least three (3) months old; and
3. There are at least five (5) providers whose data is combined to report a statistic and one provider's data comprises no more than 25 percent of the 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.

Sharing Salary and Price Information Safely Means Following the Basic Principles in the Statements

Because most hospitals are risk adverse when it comes to information sharing which might run afoul of the anti-trust laws, the prudent path for them is to strictly follow the requirements of *Statement 6*. In most instances that means subscribing to surveys that have been constructed with a careful eye toward compliance within the anti-trust safety zones in *Statement 6*. While it is possible to conduct a lawful survey on an individual basis, it should only be done under the careful scrutiny of an experienced anti-trust counsel and with full understanding of the risks being taken.

Conclusion

As described in this *Briefs Focus*, there may be occasions when hospital executives can safely make informal inquiries about certain salary or price information (such as very old data) that has no possible use as a basis for an inference of collusion on current or future salary or price. Doing so without an unreasonable amount of risk and expense is the challenge. This is why most hospitals choose to rely on professional surveys, such as HASC's Annual Compensation Surveys and the benchmarking conducted by PDS on hospital reimbursement, to provide them with the market data they need to ensure they remain competitive.