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A legal update from Dechert's Antitrust Group

DOJ Antitrust Case Could Impact Buying Groups, Human Resources Departments

Key Questions for Clients to Consider

Is it time to conduct another review of your company's group purchasing activities?

Are your human resources personnel getting adequate guidance on their contacts with competitors, including surveys they may be participating in?

Arizona Nurses Registry Charged with Price Fixing

On May 22, 2007, the Justice Department filed a complaint and consent decree charging a buying cooperative of Arizona hospitals with violating Section 1 of the Sherman Act by fixing the price and terms for purchasing temporary nursing services. The case serves as a useful reminder that not all buying cooperatives are lawful, and that the antitrust laws can reach conduct relating to terms of employment.

The Arizona Hospitals Consent Decree

The Arizona Hospital and Healthcare Association (AzHHA) is a buying cooperative of Arizona hospitals that account for at least 80% of the hospital beds in Phoenix and Tucson. Among other services, AzHHA provides to member hospitals a registry of temporary nursing agencies that AzHHA has evaluated based on quality standards and periodic audits.

In a change of policy, AzHHA began in 1997 to require participating nursing agencies to accept a uniform rate schedule for their nurses' services. To attain the leverage to impose such a requirement, the AzHHA required each of its member hospitals, on penalty of expulsion, to purchase at least 50% of its nursing services through the AzHHA registry. The AzHHA also imposed on the participating nursing agencies other uniform contract terms relating to payment terms, indemnification, and cancellation policies.

The Justice Department complaint charged that this arrangement unlawfully reduced competition for hospital purchases of nursing services in Phoenix and Tucson. The imputed effect was to depress the price paid for nursing services between 7% and 16% below competitive levels and reduce the supply of those services in the relevant markets. The complaint further alleged that whatever transactional efficiencies may have accrued to the agencies through "one-stop shopping" were "substantially outweighed" by the anticompetitive effects of the registry.

The consent decree prohibited the defendants from "setting, prescribing, or imposing, directly or indirectly":

- rates, a common process for negotiating rates, or a common rate structure, including shift differentials;
- payment terms;
- cancellation policies;
- bonuses; or
- any requirement or encouragement for hospitals to deal with participating agencies.

The decree further prohibited the gathering or dissemination of competitively sensitive information or views about contract terms, except "as necessary to operate the Register Program," and so long as access was limited "to those AzHHA employees performing ministerial tasks" for the Program.

Implications for Joint Purchasing Arrangements

The AzHHA case serves as a reminder that buying collaborations can sometimes violate the antitrust laws. Government guidelines point out that such agreements can create or increase buying power which allows purchasers to depress the price of the purchased product, and thereby decrease output (the allegation in the AzHHA complaint), or facilitate collusion by standardizing costs or allowing the participants to project or monitor competitors' output levels.[1]

Most buying groups do not implicate these concerns, however, for a variety of reasons. First, because buying groups usually produce lower prices, courts and government agencies tend to give them more leeway than they would a similarly structured sales collaboration.

Second, the collaboration may not have market power. If the group's purchases account for less than 20% of the relevant market for purchases of the product in question, then it falls within a safe harbor defined by the government enforcement agencies.[2] Even if the percentage is higher than 20%, a court is still unlikely to find market power short of a share approaching at least 50%.

Third, the products purchased by many buying collaborations often account for an insubstantial share of the cost of the products or services produced by the participants, making it unlikely that such an arrangement could facilitate collusion on the selling side. As a rough guideline, the federal antitrust health care guidelines provide a safe harbor where the cost of the purchased input accounts for less than 20% of the price of the related output.[3]

Fourth, it is very difficult to establish, even with high market shares, that a buying group is actually depressing output, instead of merely reaping a lawful benefit from more efficient purchasing. As the FTC has pointed out, "It is important not to equate market concentration on the buyer side with [monopsony] power" because consumers do not suffer "when the increased bargaining power of large buyers allows them to obtain lower input prices *without decreasing overall input purchases*."[4]

Finally, many buying groups generate efficiencies in terms of warehousing, distribution, and transaction processing that are more substantial than the contract negotiation and administration services provided by the AzHHA registry, which the Justice Department viewed as "minor."

Joint purchasing arrangements that share most or all of these characteristics are unlikely to draw antitrust attention. Those that do not are potential targets.

Implications for Human Resources Functions

Another reminder prompted by the AzHHA case is that the antitrust laws can reach collaborations among competitors on wages and salaries paid to a company's own employees. While employee compensation was not involved in the AzHHA case (the nurses were independent contractors), the Justice Department has also challenged at least one collaboration among hospitals to exchange information on compensation levels for nurses who were hospital employees, where the exchange had the effect of stabilizing entry level

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1 U.S. Federal Trade Commission and U.S. Department of Justice, "Antitrust Guidelines for Collaborations Among Competitors," §3.31(a) (2004).

2 *Id.*, §4.2.

3 U.S. Federal Trade Commission and U.S. Department of Justice, "Statements of Antitrust Enforcement Policy in Health Care §7.A (1996), *available at* http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm.

4 "Statement of the Federal Trade Commission," *Caremark Rx, Inc./AdvancePCS*, File No. 031 0239 (2004) (emphasis added), *available at* http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf.

wages and limiting the amount and frequency of raises.[5]

This is an area in which surveys can be troublesome. Note that the AzHHA decree contained specific prohibitions against surveys of competitors except under very strict controls on access and dissemination of information. Surveys conducted by third parties, if they are structured not to disclose current, company-specific information on prices or costs, can avoid many of the antitrust concerns that would otherwise arise if the employers themselves were conducting the surveys. Counseling employees on the proper use of survey information, even from a third-party survey, is also important to avoid possible coordination of wages or salaries based on that information.

In our experience, antitrust-sensitive activities involving terms of employment can easily escape the notice of in-house antitrust lawyers because they are often carried out locally and by human resources employees. Several years ago, Dechert represented a company outside the health care field that was faced with a Justice Department investigation into industry surveys of entry level wages and salaries. The company's law department was surprised to find that such surveys were being conducted by local employees at its manufacturing facilities and that human resources personnel at headquarters had joined employer associations that were meeting regularly and conducting broader surveys on employment issues. This activity was being carried on with little guidance on its potential antitrust implications.

Fortunately, the situation was remedied without any need for government enforcement. However, the experience does suggest the periodic need for an antitrust review of the kinds of employment surveys and other communications in which a company's human resources department may be participating.

[5] *United States v. Utah Soc'y for Healthcare Human Resources Admin*, 1994-2 Tr. Cas. (CCH) ¶70,795 1994).

Practice group contacts

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