

Nursing Wage Antitrust Litigation Update

The Tempo is Increasing as a Possible Vote on the Employee Free Choice Act Nears

For those who thought that the class action antitrust litigation pending in five states, with a related action involving temporary nursing services pending in Arizona, was just a fad, recent developments in the last couple of months prove otherwise. What is alarming is that these lawsuits may take on a whole new complexion if the Employee Free Choice Act becomes law.

On March 24, 2009, the United States District Court in Michigan denied the defendant-hospital's motion for summary judgment which argued that the plaintiffs' complaint did not demonstrate an "antitrust injury" because eighty percent (80%) of the hospital's nursing work-force was unionized. See *Cason-Merenda v. Detroit Medical Center*, Slip Op., Civil Action No. 06-15601 (March 24, 2009, E.D. Mich.). Under the antitrust laws, a plaintiff must establish that the conduct of the defendants reduced competition. The hospital argued that because the wages are the result of a collective bargaining process, this collective bargaining insulates the nurses from anticompetitive harm. In essence, the hospital argued that the collective bargaining process itself is not competitive and thereby nullifies any alleged anticompetitive effects caused by the defendant-hospitals' sharing of wage information.

On perhaps a more disturbing note, the defensive fortifications have begun to crack in the New York class action litigation. As previously reported, the New York court granted class certification on liability grounds to the plaintiffs. On January 23, 2009, Northeast Hospital and its subsidiaries settled with the plaintiffs. In addition to paying \$1.2 million to be distributed to the class, Northeast agreed to refrain from exchanging wage information with other hospitals unless such exchange complied with the Antitrust Safety Zones, thereby turning a Safety Zone into a minimal standard for antitrust compliance. Additionally, on March 26, 2009, counsel for the proposed plaintiffs' class in Detroit filed a motion to approve a settlement with St. John Health for over \$13 million. Unlike the New York settlement, the St. John Health settlement does not contain a specific antitrust compliance provision. Both settlements need to be approved by the court.

Finally, on March 19, 2009, the Arizona District Court, in *Doe v. Arizona Hospital and Healthcare Assoc.*, Slip Op., Civil Action No. 07-cv-1292 (March 19, 2009, D. Ariz.), denied the defendants' motion to dismiss an antitrust complaint brought by temporary nursing agencies against the Arizona Hospital and Healthcare Association and multiple hospital defendants. That class action alleges that hospitals in Arizona conspired to fix the prices for the wages paid to temporary (per diem or travel) nurses. Unlike the five R.N. wages cases which allege that the sharing of information constitutes an antitrust violation, the Arizona case alleges direct price fixing.

These developments, combined with the threat of the Employee Free Choice Act (EFCA), may have ominous consequences if they chill non-union hospitals' willingness to participate in wage surveys. The EFCA as currently proposed would require that contract negotiations be submitted to arbitration if the parties are unable to agree to terms after 120 days of unsuccessful bargaining. The only way to effectively establish a fair rate at the arbitration is to compare the hospital's prevailing wage offer to the wages paid by comparable employers. If hospitals are chilled in terms of participation in these surveys, and there is no free flow of legitimate survey information regarding wages, the only rates that will be available for comparison are the rates paid to unionized hospitals, thereby artificially increasing wages as ordered in arbitration.

If you have any questions on the appropriate utilization of wage surveys, please contact Mark Mattioli at 215-587-1087 or mmattioli@postschell.com. To prepare your organization for an Employee Free Choice Act environment, it is essential that policy review, workforce analysis and supervisory training begin immediately. We have prepared a PowerPoint presentation explaining the EFCA and its impact on employers that is available upon request. Please

send your request along with any questions you may have to Bill Flannery at 717-612-6022, or wflannery@postschell.com, Vince Candiello at 717-612-6024 or vcandiello@postschell.com, or Andrew Allison at 215-587-1161 or aallison@postschell.com.

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