



DEPARTMENT OF JUSTICE
Antitrust Division

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Brian M. Foley, Esquire
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Dear Mr. Foley:

This letter responds to your request of October 15, 1993,¹ on behalf of the New Jersey Hospital Association ("NJHA"), for a statement by the Department of Justice ("the Department") of its current enforcement intentions with respect to a proposed wage and salary survey and report. NJHA, along with the New Jersey Society for Healthcare Human Resources Administrators ("NJSHHRA"), proposes to produce a survey and report of employee wages and salaries paid by New Jersey hospitals.²

As we understand the NJHA and NJSHHRA proposal, the wage and salary survey and report will be conducted in written form and prepared by an independent contractor. The independent contractor will annually survey and report the wages and salaries of nonexempt, exempt and per diem employees.³ The independent contractor will also conduct a mid-year update of the wages of selected nonexempt positions. Participation in the survey and report will be voluntary and open to all hospitals and health care institutions in New Jersey. The information in the report will be based on data that will be at least three months old when published, and neither the survey nor the report will request or provide anticipated future wages and salaries.

For each nonexempt position surveyed, the report will identify the regional and statewide average

¹You also provided additional clarifying information by letters dated December 21, 1993, January 6, 1994, and January 26, 1994.

²NJHA is a trade association of 86 New Jersey hospitals.

³Nonexempt employees are compensated on an hourly wage rate basis and are eligible for overtime pay. Exempt employees are compensated on an annual salary basis and are not eligible for overtime pay. Per diem employees are hired on a day-to-day basis.

wage,⁴ average wage range (e.g., average minimum, mid and maximum wage), average wage by shift differentials, and average wage increase during the preceding year. Besides state and regional breakdowns, the report will also include position breakdowns by hospital size, teaching versus non-teaching hospitals, and bargaining unit. Each statistical breakdown will be reported as a total of reporting hospitals and by quartiles.⁵

For each exempt position surveyed, the report will identify the regional and statewide average salary, average salary range, and average hospital operating budget. The report will also include position breakdowns by hospital size and by teaching versus non-teaching hospitals. Each statistical breakdown will also be reported as a total and by quartiles.

For per diem employees, the report will identify the average rate for different shifts, reported as a total and by quartiles.

All data published in the report will be aggregated -- the report will not identify any data with a specific participating hospital. Individual responses to the survey will not be disclosed to any health care institution or its employees. Furthermore, the report will not publish any data for any statistical subcategory or breakdown in which there are fewer than five hospitals providing information.⁶

After careful consideration of the information you have provided, the Department has concluded that it has no present intention to challenge the proposed activities of NJHA, as set out in your letters, on antitrust grounds.

The Department would be concerned with information exchanges among competing hospitals, including wage and salary surveys and reports, if the exchanges would likely facilitate collusion or otherwise have the purpose or effect of reducing competition on prices or compensation. A collusive restriction on the compensation paid to hospital employees, for example, could create personnel shortages that would adversely affect the availability of health care services. To help alleviate any uncertainty in this area, on September 15, 1993, the Department and the Federal Trade Commission jointly issued a policy statement that sets forth an antitrust safety zone describing information exchanges among hospitals that will not be challenged under the antitrust laws, absent extraordinary circumstances. To fall within this antitrust safety zone, a written survey of wages, salaries or benefits of hospital personnel must satisfy the following conditions:

- (1) the survey is managed by a third-party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association);
- (2) the information provided by survey participants is based on data more than 3 months old; and

⁴NJHA calls this the "weighted average." However, this statistic is simply the arithmetic average of all reporting hospitals' weighted averages for the position. Therefore, no individual hospital's data will be weighted any differently than another's for purposes of the report.

⁵"Quartiles" means that for a particular position, all hospitals paying an average wage in the top 25 percent of all records will be grouped together, as will those hospitals paying in the second 25 percent, third 25 percent, and bottom 25 percent.

⁶Multiple hospitals that are commonly owned or operated will be considered a single hospital for purposes of determining whether at least five hospitals are reporting data in a given statistical category.

- (3) there are at least five hospitals reporting data upon which each disseminated statistic is based, no individual'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 hospital.

The NJHA and NJSHHRA proposed survey and report substantially meets the antitrust safety zone conditions. The only exception is that contrary to the second condition, survey participants will be asked to provide current information, which could be less than 3 months old. However, under NJHA's proposal, the independent contractor conducting the survey will refrain from publishing the information for at least three months, which will ensure the same result as the policy statement requirement. Finally, the Department is not aware of any extraordinary circumstances that might render the safety zone safeguards ineffective in this case.

For all the foregoing reasons, the Department has no present intention to challenge NJHA's and NJSHHRA's proposed wage and salary survey and report. In accordance with our normal practice, however, the Department remains free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest, if the actual operation of the wage and salary survey and report proves anticompetitive in purpose or effect.

This statement of the Department's enforcement intentions is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made available to the public immediately. Your supporting documents will be publicly available within 30 days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Anne K. Bingaman
Assistant Attorney General

Enclosure