

Salary Surveys and Safe Harbor Guidelines

The late 1800s was a time when monopolistic corporations, corporate trusts and business combinations heavily influenced the U.S. economic landscape. In 1890, the Sherman Antitrust Act, named for its primary author Sen. John Sherman of Ohio, was passed;

it predominantly affects compensation professionals through its provisions for pricing and competition. **WS**

Back to Basics is intended to provide entry-level information on issues relevant to compensation, benefits and the work experience. Though factual in nature, nothing herein is to be construed as legal, accounting, actuarial or other such professional advice.

In 1914, the Sherman Act was amended through the Clayton Act (§ 2 Clayton Act, 15 U.S.C. §§ 13(2)), which established the Federal Trade Commission (FTC). Since the passage of the Clayton Act, the FTC and the antitrust division of the U.S. Department of Justice (DOJ) have had primary responsibility for enforcement of the nation's antitrust laws.

In August 1996, the DOJ and the FTC jointly published "Statements of Antitrust Enforcement Policy in Health Care." Some in the compensation profession have looked to the so-called "Antitrust Safety Zone" statements when using salary survey data. Although they have not been extensively tested in the courts, these safety zone statements have been interpreted as a "safe harbor" for companies to act within in order to avoid antitrust violations.

The DOJ/FTC Antitrust Safety Zone Statements are as follows:

The agencies will not challenge, absent extraordinary circumstances, provider participation in written surveys of (a) prices for health-care services, or (b) wages, salaries or benefits of health-care personnel, if the following conditions are satisfied:

1. The survey is managed by a third party (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 three months old.
3. There are at least five providers reporting data upon which each disseminated statistic is based, no individual provider'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 provider.

The conditions that must be met for an information exchange among providers to fall within the antitrust safety zone are intended to ensure that an exchange of price or cost data is not used by competing providers for discussion or coordination of provider prices or costs. They represent a careful balancing of a provider's individual interest in obtaining information useful in adjusting the prices it charges or the wages it pays in response to changing market conditions against the risk that the exchange of such information may permit competing providers to communicate with each other regarding a mutually acceptable level of prices for health-care services or compensation for employees.

James R. McMahon from MCS and Janice S. Hand from Hewitt Associates developed a salary survey guideline that applies some of the safety zone conditions to help professionals when developing their own salary surveys:

- Do not identify individual company data in the survey report.
- Avoid assigning and publishing participant codes because it may lead to concerns that codes exist only to be exchanged among the participants.
- Display aggregate data, not individual company data.
- Collect historic data; projections are riskier because of the implication of controlling future plans.
- Be especially cautious if the industry has only a few members or consists of primarily high-profile companies. These may be instances where the group of companies arguably has the ability to control wage levels.
- Do not exert undue pressure on reluctant participants.

For more information, log on to the Department of Justice at: www.usdoj.gov/atr/public/guidelines/0000.htm. **WS**

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