Federal Anti-Trust Class Action Lawsuits Claim Hospitals Conspired to Depress Registered Nurse Wages

By Edward V. Jeffrey

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On June 20, 2006, four federal anti-trust class action lawsuits were filed against a number of hospitals and health care systems in Albany, Chicago, Memphis and San Antonio alleging that they had conspired to depress registered nurse wages in those markets by exchanging wage rates in a manner that violated federal anti-trust laws. While the lawsuits were filed by groups of nurses working at the named hospitals, the Service Employees International Union (SEIU) played a key role in promoting this litigation. At the press conference announcing the suits, the plaintiffs' attorney was joined by SEIU President Andrew L. Stern, SEIU Nurse Alliance President Cathy Singer and Susan Scanlan of the National Council of Women's Organizations. SEIU said they were invited to appear with the plaintiffs’ counsel "because of the work the Nurse Alliance of SEIU did to help expose the wage issues that led to [the] filings."

The Federal Anti-Trust Claims
While the specific details vary depending upon location, the claims in each of the four suits are similar. Each charges that the defendant hospitals have conspired for years to depress the compensation levels of registered nurses in violation of federal anti-trust laws. For example, the suit in Chicago claims that the co-conspirators were members of an association which offered them “HRS surveys [that] provided members with valuable benchmarking data to assist them in developing best practices in the areas of recruiting, retention, compensation and benefits.” The suit asserts that the data though “ostensibly blinded” could be readily disaggregated hospital-by-hospital due to descriptive information, including the number of licensed beds and institutional revenue. In addition, they allege that the hospitals “jointly recruited RNs at job fairs . . . to avoid competing with each other to attract new RNs.” In addition to these public communications, the plaintiffs claim that the hospitals’ human resources employees regularly telephoned each other to discuss registered nurse (RN) compensation including scheduled increases contained in projected budgets. In all of the complaints the plaintiffs allege that such information exchanges through meetings, telephone conversations and written or oral surveys fell outside the anti-trust “safety zone” identified by the Department of Justice’s Healthcare Antitrust Guidelines. In the press release, the plaintiffs’ attorney claimed that evidence of the conspiracies was obtained “through scores of interviews with current and former hospital employees and executives with direct knowledge of the conspiracies.”

Connection with the SEIU's Nurse Campaign
SEIU is widely regarded as the most successful and fastest growing union representing health care workers in the United States. However, over the years the Union has primarily focused on organizing lower paid service workers, such as nurse aides, transporters, food service workers and janitors. Comparatively speaking the Union has been less successful signing up registered nurses and other health care professionals.

To enhance its profile and compete with state nurse associations, the Union held a press conference earlier this year to announce its creation of the SEIU “Nurse Alliance” and to kick off its “Value Care, Value Nurses” campaign. The Nurse Alliance identified 12 target states for organizing. Coincidentally, four of the twelve states, namely Illinois, New York, Tennessee and Texas, are states in which the four class action lawsuits have been filed. We believe SEIU has been targeting these areas for some time given the fact that it previously commissioned research on nurse wages within these markets.
At its press conference of June 20, 2006, the Nurse Alliance distributed a report it commissioned from the Institute for Women’s Policy Research, entitled “Solving the Nursing Shortage Through Higher Wages.” The report identified low pay, short staffing, and mandatory overtime as conditions that have caused nurses to leave the bedside and sought to demonstrate that raising nurse salaries would help reverse that trend. Among other things, the report recommended that the federal government “should effectively enforce the antitrust laws that protect nurses from potential hospital collusion in wage-setting and should review existing guidelines to see that they adequately protect against collusive behavior.”

The “Corporate Campaign” Against Hospitals
In its 2004 Healthcare Report, SEIU announced its plan to target large hospital systems for organizing. In the aftermath of its departure from AFL-CIO in 2005, SEIU has focused even more aggressively on the use of “corporate campaigns” to facilitate the organizing of large health care systems. Instead of attempting to win NLRB elections among employees at separate facilities, the Union’s “top down” organizing strategy is to pressure health systems to hand over their employees by signing “neutrality” and “card check” agreements. The current lawsuits represent the sort of pressure tactics SEIU is using to achieve this result.

In his book “Death by a Thousand Cuts,” George Washington University Professor Jarol B. Manheim defines a “corporate campaign” as “a form of reputational warfare waged through broadsides, half-truths, innuendo, and a staccato rhythm of castigation, litigation, legislation and regulation.” SEIU President Andy Stern has put it even more bluntly: “We will unionize your workforce or we will destroy your reputation.”

In the case of hospitals, SEIU’s corporate campaigns have focused on: publicizing embarrassing information relating to patient care; the treatment of uninsured patients and the related issues of alleged discriminatory pricing, overcharging and aggressive collection practices; interference with regulatory processes to delay or block construction projects; and questioning the legitimacy of the tax-exempt, charitable status of non-profit institutions. Lawsuits against hospitals for allegedly conspiring to underpay nurses is simply the latest pressure tactic SEIU is using in its corporate campaigns against hospitals. More importantly, it is a tactic – even if unsuccessful – that portrays SEIU as a champion of RNs.

The Merits of the Lawsuits
While the general outline of these claims are fairly clear, the plaintiffs have provided insufficient detail in the court filings with which to assess the merits of their claims. However, if the plaintiffs prevail, the potential liability would be staggering. Defendants likely employ thousands upon thousands of registered nurses. Furthermore, the plaintiffs’ counsel estimates that the nurses were underpaid between $6,000 and $14,000 annually due to the alleged conspiracy depending upon the local market.

The current suit is not unprecedented. In 1984 various hospitals and their associations signed a consent degree to settle a similar suit. In 1996 the Antitrust Division of the U.S. Department of Justice issued “Statements of Antitrust Enforcement Policy in Health Care.” This report generally provides that health care employers may share wage information so long as they fall within certain specified “safety zones.” Absent extraordinary circumstances, a health care provider’s participation in written wage and benefit surveys will not be challenged if the following conditions are satisfied:

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
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 sharing of wage information without using a third party may be permitted, but any conduct that is outside the boundaries of the “antitrust safety zone” described above should be carefully reviewed in advance by counsel.

What Should You Do Now?
Hospitals and other health care employers should take steps to ensure that their practices relating to wage and benefit surveys, or any other activities involving the compilation and use of wage and benefit information from other area health care providers, are consistent with federal antitrust law. In addition, hospitals should review with counsel the other areas of attack in the typical SEIU corporate campaign.

As part of this analysis, we recommend that a hospital develop a task force comprised of key personnel from human resources, operations, risk management, and public relations. The task force must review
SEIU corporate campaign strategy with counsel and prepare a contingency plan to analyze and address all areas in which the organization may be vulnerable to a corporate campaign.

Jackson Lewis has partnered with many hospitals and other health care employers to help them prepare for a SEIU corporate campaign by conducting a thorough corporate campaign vulnerability assessment and helping the employer define and implement a preventive strategy. Health care employers wishing to obtain a copy of the federal court complaints or other information may contact Roger P. Gilson, Jr. or Edward V. Jeffrey (at 1-800-259-5589); Michael R. Cooper (at 212-697-8200); Michael R. Flaherty (at 312-787-4949); Brad Kampas (at 415-394-9400) or the Jackson Lewis attorney with whom they normally work.

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