

HEALTH INDUSTRY ANTITRUST ALERT

ANTITRUST ENFORCEMENT AGENCIES SUE ARIZONA HOSPITAL AND HEALTHCARE ASSOCIATION: TEMPORARY NURSE PROCUREMENT PRACTICES CALLED INTO QUESTION



On May 22, 2007, the U.S. Department of Justice and the state of Arizona sued the Arizona Hospital and Healthcare Association (the Association) and its subsidiary, the AzHHA Service Corporation, for unlawfully negotiating lower rates and more favorable terms with temporary nursing agencies providing per diem and travel nurses to Arizona hospitals. Coming in the wake of suits charging unlawful price fixing and wage surveys involving nurses employed by hospitals in Chicago, San Antonio, Memphis and Albany (New York), this latest nurse antitrust case underscores that hospital purchasing activities can give rise to significant antitrust troubles. A related private action had earlier been brought challenging some of the conduct on the basis of which the antitrust enforcement authorities sued the Arizona Hospital Association.

This recent government case sends a cautionary signal to hospitals and their associations that they should examine carefully their temporary nurse procurement programs for antitrust minefields. While the government action was brought only against the Association and its subsidiary, it alleges collective action on behalf of all hospitals that participated in the program. The detailed complaint filed by the DOJ and the state attorney general gives good guidance on the type of conduct that can create antitrust problems. The enforcement agencies also set forth important guidelines as to conduct that hospitals may more safely pursue collectively in connection with the procurement of nursing services.

For many years, Arizona hospitals have had difficulty meeting their nursing needs with their own regularly employed nurses because of such things as daily variations in hospitals' censuses, an influx of visitors to Arizona during the winter months and a rapidly increasing population. They have filled the gap with nurses provided by nurse staffing agencies, which provide either per diem nurses or travel nurses. The per diem nurses are typically local nurses who work on short notice to fill hospitals' immediate needs on a single shift. In contrast, travel nurses contract to work at hospitals for longer periods, usually for periods of many weeks. Unlike per diem nurses, travel nurses generally lived outside Arizona and received short-term housing in Arizona while employed there. Arizona hospitals pay agencies an hourly bill rate for the work done by the agencies' nursing personnel.

In 1988 Arizona hospitals began to coordinate their purchase of temporary nurse services through their hospital association. Initially, the Association focused on setting uniform quality standards for per diem and travel nursing personnel. However, it also required each participating agency to offer the same rates to every hospital participating in the program, although each agency determined its own rates. Later, the Association changed the program. For example, it imposed the same bill rates on each participating agency and required the agency to offer those uniform rates to each participating hospital. It also imposed uniform contractual provisions regarding payment terms between participating hospitals and participating agencies, indemnification and cancellation policies. This program saved Arizona hospitals significant amounts in temporary nursing costs.

The Association and its members had the clout and promulgated rules to make sure its program worked. For example, in 2005 the hospitals participating in the per diem nurse purchasing program controlled approximately 80 percent of hospital beds in the Phoenix area and approximately 84 percent of hospital beds in the Tucson area. The Association funded the program through the imposition of an administrative fee on the agencies. It protected against agencies circumventing the program by requiring hospitals that wished to participate in the program to seek their temporary nursing services first through the program, and only if they were unable to procure the needed services that way to approach agencies outside of the program. Even then, the hospitals had to purchase at least 50 percent of their per diem services through the Association. The Association took further steps to police compliance.

The United States and Arizona charged the Association and its subsidiary with unlawfully conspiring in violation of section 1 of the Sherman Act and its state counterpart to reduce the rates paid the agencies and set the terms and conditions of services. They explained that efficiencies, such as simplification of contracting or scale economies in the provision of temporary nurse services, did not justify the conduct. They did not challenge the appropriateness of the Association's role in assuring the quality of the temporary nurses, but they alleged that the Association did not need to set prices or competitively sensitive contract terms to maintain the quality assurance aspects of the program.

Rather than contest the charges, the Association entered into a consent decree with the agencies. If ultimately entered by the federal court (which is likely absent an unforeseen development), the stipulated injunction will prohibit the Association from, among other things, negotiating any contract with an agency that—

1. sets the rates paid by hospitals to the agency
2. establishes the process or manner by which agencies negotiate with or submit rates to hospitals, or
3. sets the payment or cancellation terms.

Moreover, the Association cannot, among other things—

1. require hospitals to deal with agencies through the Association
2. refuse to deal with non-participating agencies
3. require agencies to deal with hospitals through the Association, and
4. gather or disseminate competitively important contract terms, other than under limited circumstances.

At the same time that it prohibits certain conduct, the proposed injunction gives important guidance on what is not objectionable to the agencies. For example, the Association is permitted to establish a credentialing program, including auditing and file retention requirements. It may require background checks, drug panel screens and prior experience for the nurses hired through its program and set insurance and indemnification requirements for participating agencies. Nothing prohibits a hospital from choosing unilaterally to require agencies to go through the quality assurance program before contracting with the hospital. Finally, the Association may work and communicate with the hospitals and agencies regarding its quality assurance program in a manner consistent with the specific prohibitions contained in the decree.

CONTACT INFORMATION

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