

# FIA

# SOLUTIONS

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## New Alerts on Using Salary Survey Data

### Sherman Antitrust Regulations Affect the Collection and Use of Salary Data

In the past several years, employees and unions have sued employers alleging that by internally administering formal or informal salary surveys, their employer is violating the Sherman Antitrust Act. The Sherman Antitrust Act was designed to limit monopolies and other acts by companies that suppress fair and open competition. Thus, when determining competitive salaries, human resources professionals find themselves asking:

If I conduct a market salary survey for my company, am I violating the law?

The answer is -- possibly.

The Sherman Antitrust Act prohibits unfair methods of competition. One method of creating unfair competition is price fixing (i.e. salary fixing). Salary fixing occurs when organizations agree to stabilize or control the pay of position(s) for the entire market. What constitutes salary fixing is a gray area; it depends upon how salary survey data are collected, analyzed, reported, and utilized.

The mere exchange of salary information between two organizations is not itself illegal, however it can be found unlawful under the rule of reason test. For example, if organizations have continuous contact regarding the salaries for positions, and this

contact results in the organizations increasing salaries at a slower (or faster) rate than what would normally occur, than it could be considered salary fixing under the Sherman Antitrust Act.

Another example of a potential violation is if an organization has discussions regarding specific positions with other organizations that participated in a salary survey. Depending upon the detail of these discussions, even without the two organizations consenting to specific actions, it may constitute salary fixing. The determination will be based on how the organizations act in the future. Therefore, organizations may be fixing salaries without realizing their actions could be considered illegal.

Most of our clients are public (government) organizations. They have a common need for labor that is generally found in multiple industries. As a result, we believe they would have a difficult time controlling salaries for a specific employment market (as required for a violation of the Sherman Antitrust Act to occur). However, specific job families and/or organizations such as health care, and public safety (police and fire) have limited sources of labor (and employees have limited employers), thus the labor market is more concentrated and more susceptible to salary fixing.

One might think that because salaries for public organizations are a matter of public record that the government could not be charged

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with salary fixing. This is not true, since several public organizations have been the target of lawsuits in Utah and Massachusetts with other allegations never reaching trial. The public organizations faced these allegations because the organizations did not take the necessary steps to protect themselves.

Most of the organizations and consulting firms that have been sued or involved in a lawsuit entered into consent decrees. Those that did not spent millions defending themselves.

Consent decrees are neither an admission of guilt or innocence; its basically an agreement for the defending organizations to conduct activities in a different manner.

Consent decrees provide important guidance, because they set precedents as to what we can expect the courts will find acceptable in future cases. The consent decrees state the following.

1. Data cannot reflect the identity or any factor that may allow someone to identify a participating organization.
2. Data shown must be aggregate results.
3. The data must be more than three months old.
4. There must be at least five participants per benchmark.
5. No organization can represent more than 25% of the aggregate data.

If your organization chooses to administer a salary survey internally, thus not abiding by the past consent decrees, will your organization violate the Sherman Antitrust Act?

The answer is -- possibly.

Even though your organization may not be violating the Sherman Antitrust Act, it is still vulnerable to allegations. Organizations are still permitted to

conduct internally administered salary surveys, however FLA believes it is important for our clients and other compensation professionals to be aware of these circumstances that have developed over the past several years. Based on the consent decrees, the only way to substantially limit your liability is to have a third party collect and analyze the data.

If you are concerned about your current situation, give us a call. We understand this may be a new and complex issue and we are available to provide guidance and recommendations in understanding this issue. Look for a follow-up article by FLA that describes what organizations can do to limit their potential liability.

This article does not constitute legal advice. For further assistance, please contact your organization's legal counsel.

#### **References:**

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