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THE POTENTIAL COMPETITION LAW IMPLICATIONS OF EMPLOYEE HIRING PRACTICES

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A superior line of thought

DAVIES

THE POTENTIAL COMPETITION LAW IMPLICATIONS OF EMPLOYEE HIRING PRACTICES

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Recent developments in the United States highlight how hiring practices can create the risk of competition law violations for companies and their H.R. personnel.

Earlier this year, for example, there were reports that the Antitrust Division of the U.S. Department of Justice was investigating whether some of the largest technology companies in the country had agreed not to recruit one another's skilled employees (such as engineers). The Antitrust Division was exploring whether the alleged "anti-poaching" agreements restricted mobility in the high tech marketplace and had served to suppress wages.

Reports also emerged that the Federal Trade Commission ("FTC") has been scrutinizing the hiring practices of certain oil companies to determine if they had shared salary information in an effort to depress wages for management, professional and technology employees in the industry. The investigation stems from a lawsuit brought by a former Exxon employee in the late 1990s against Exxon and 13 other oil companies. Among other things, the employee claimed that the alleged collusion on wage levels allowed Exxon to save US$20 million per year on salaries. The employee's lawsuit was finally settled in 2009 but the FTC investigation remains open.

The consequences of information sharing among employers was also at the heart of a series of class actions launched in 2006 alleging that hospitals/healthcare systems in different parts of the United States had conspired to suppress wages paid to nurses. Specifically, the plaintiffs alleged that major hospitals/healthcare systems in Memphis, San Antonio, Albany, Chicago, Detroit and Arizona had either (i) reached express agreements on what their nurses would be paid, or (ii) in the alternative, had used the confidential wage information they exchanged to set compensation at levels below what the nurses might have earned otherwise.

The various lawsuits are at several different stages of proceeding, with some having been denied certification at first instance (subject to appeal). Most recently, however, one lawsuit was allowed to proceed to trial when the U.S. District Court for the Northern District of New York issued a decision on July 22, 2010 denying the defendants' motions for summary judgment.

In the case at issue, *Fleischman* v. *Albany Medical Center et al*, five hospitals/healthcare systems in Albany, New York were alleged to have engaged in collusive conduct with respect to nurses' wages. Three of the defendants settled after the Court granted certification to the plaintiffs' class in July 2008 for the purposes of determining liability (although not damages). The other two defendants continued to litigate the case and brought motions for summary judgment on the grounds that:

(i) their wage rates are immune from antitrust attack because they are set exclusively through a federally-mandated collective bargaining process;

(ii) the information exchanged was publicly available and non-confidential; and

(iii) there was insufficient evidence on the record for a jury to conclude that the defendants had engaged in collusive behaviour.

In its judgment of July 22, 2010, the Court denied the defendants' motions for summary judgment, holding that:

(i) the relevant collective bargaining agreements could not be used to insulate from antitrust scrutiny anticompetitive activity that the defendants may have engaged in outside the scope of, and separate from, the collective bargaining process;

(ii) it would be up to the jury to determine if the information at issue was confidential or not; and

(iii) there was sufficient circumstantial evidence on the record upon which a reasonable jury could conclude that an antitrust violation had occurred, including that (a) hospital personnel had engaged in numerous e-mail exchanges, telephone calls and in-person conversations in which they discussed both current and future wages (rather than historical information), and (b) it would have been contrary to the economic interests of the defendants to exchange this type of sensitive information absent a wage suppression agreement.

Conduct of the type described above also could give rise to potential issues under Canadian competition law.

For example, section 45 of Canada's *Competition Act* makes it a criminal offence for competitors to agree to fix, maintain, increase or control prices for the supply of a product, and to allocate sales, territories, customers and markets for the production or supply of a product. Depending on the circumstances, this provision could be broad enough to cover agreements among competitors to collectively determine wages for employees or to refrain from recruiting each other's employees.

Alternatively, conduct of this nature could be reviewed under section 90.1 of the *Competition Act*, which authorizes the Commissioner of Competition to apply to the Competition Tribunal for relief where an agreement between competitors – existing or proposed – prevents or lessens or is likely to prevent or lessen, competition substantially in a market.

A company's H.R. functions, such as recruitment and compensation, are not typically regarded as antitrust "hot spots" (as opposed to sales and marketing). What the various U.S. proceedings and investigations described above demonstrate is that companies must ensure that they guard against potential antitrust risks in this area as well. In particular, companies must be wary of coordinating their hiring practices with competitors and should carefully assess any such ongoing conduct to determine its legality.