CLIENT ALERT

Non-Statutory Labor Exemption to the Federal Antitrust Laws Does Not Bar Class-Action by Employees Against Hospitals

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According to a recent federal district court decision, *Reed v. Advocate Health Care, et al.,* No. 06C 3337 (N.D. Ill. Mar. 28, 2007) (Grady, J.), the nonstatutory labor exemption to the federal antitrust laws does not apply in a situation where the alleged anti-competitive behavior takes place independent of the collective bargaining process, even though the employer conduct concerns sharing of information on subjects of bargaining under the National Labor Relations Act ("NLRA") and the employer is party to a collective bargaining agreement. In *Reed*, a group of registered nurses ("RNs") brought a class-action against several Chicago-area hospitals, some organized and some unorganized, alleging that the hospitals conspired to depress the wages of RNs because the hospitals agreed to exchange nonpublic nurse compensation information, which was alleged to be a violation of the federal antitrust provision in the Sherman Act. One of the defendant hospitals, the University of Chicago Hospitals ("UCH"), moved for summary judgment, arguing that the nonstatutory labor exemption bars the plaintiffs' antitrust claims against it, as the wages and other terms and conditions of employment of its RNs were determined through the collective bargaining process and set forth in collective bargaining agreement[s] between UCH and the Illinois Nurses Association ("INA").

The labor exemption to the federal antitrust laws was created after passage of the Sherman Act, as Congress and the courts established two types of exemptions for labor organization activities:

> a statutory exemption based on various sections of the Clayton and Norris-LaGuardia Acts, and a nonstatutory exemption based on an 'accommodation between the congressional policy favoring collective bargaining under the [National Labor Relations Act] and the congressional policy favoring free competition in business markets.'

Reed, No. 06C 3337, slip op. at 4, citing *Connell Constr. Co. v. Plumbers & Steamfitters Local* 100, 421 U.S. 616, 621-22 (1975).

Judge Grady, of the federal district court, found that the nonstatutory exemption did not apply where the RNs alleged collusion among and by the hospitals to share "detailed and non-public information about the compensation each is paying or will pay its RN employees." Judge Grady decided that the sharing of such information among hospitals subject to a collective bargaining agreement and hospitals not subject to a collective bargaining agreement was neither necessary to nor facilitated the collective-bargaining process between UCH and the INA in the context of the NLRA. Judge Grady determined that the non-statutory exemption applied to "concerted activity among and between unions and employers," and was necessary to prevent the courts from interfering with the functions of the National Labor Relations Board.

In denying UCH's motion for summary judgment and allowing the case to move forward, Judge Grady relied heavily on the analysis and decision in an oral opinion by Judge McAvoy in a factually identical case, *Unger v. Albany Medical Center*, No. 06-CV-765-TJM-DRH (N.D.N.Y. Dec. 11, 2006) (transcript of oral opinion). In *Unger*, as in *Reed*, there was "'no evidence before the Court that sharing nonpublic compensation information with other hospitals was part of the give-and-take of the negotiation process,'" and as a result, "'[w]ithout any evidence that sharing such information was necessary to the collective bargaining process, it cannot be said that [the defendant hospital's] activities fall[] within the nonstatutory labor exemption ...[the

defendant hospital] cannot use its collective bargaining agreement with the nurses union to insulate any anti-competitive activity it may have engaged in outside of and separate from the collective bargaining process with the nurses union.'" *Reed*, No. 06C 3337, slip op. at 8, 10, citing *Unger*, Tr. at 17-19, 21-25.

In light of these recent decisions, employers, whether hospitals or in other industries, must be careful concerning the sharing of information with competitors with respect to labor costs. Even though the information exchanged is a subject of bargaining for an employer that is party to a collective bargaining agreement, the fact that the employer exchanged the information with a competitor is conduct within the scope of the prohibition set forth in the Sherman Act. For the employer that is a party to a collective bargaining agreement, it is now unsettled as to the type of industry information-sharing that remains within the scope of the non-statutory exemption, except that concerted activity among and between labor organizations and employers remains within the statutory exemption.

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