

Duke Antitrust Compliance

October 2019

Overview of the Antitrust Laws

- The antitrust laws protect free and fair competition
- These laws prohibit
 - (i) agreements among multiple companies that harm competition (“**collusion**”); and
 - (ii) improper efforts by a single company to obtain or preserve a monopoly

Agreements That Restrain Competition

- Agreements are judged under one of two standards:
- Some agreements are automatically unlawful
 - e.g., collusion among competitors to fix prices or to divide customers, territories, or employees
 - participants may face *criminal* charges in these instances
- Most agreements are judged on “reasonableness” and likely consumer effects
 - e.g., joint ventures, collaborations, “vertical” agreements
 - test balances consumer benefits and competitive harms

Information Sharing Risks

- Exchanging information with competitors can reflect—or can be seen as—unlawful collusion
 - *collusion can be inferred from conduct*
- Sensitive information includes:
 - future tuition or financial aid plans or strategies
 - current or future employee salary or benefits information
 - bidding plans for projects or purchases
- Avoid sharing sensitive information without approval from counsel
 - ***This includes information requests from third-parties***

Duke and the Antitrust Laws

- While Duke is a non-profit educational institution, its conduct is still subject to the antitrust laws
- Duke may be seen as competing for students, faculty, patients, and other resources
- Duke employees are expected to comply with the antitrust laws and Duke's Antitrust Policy and Guidelines

***Although a significant amount of collaboration
between universities is legitimate . . .
Duke must take care to comply
with the antitrust laws***

Ivy League “Overlap” Financial Aid

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

BROWN UNIVERSITY IN PROVIDENCE
IN THE STATE OF RHODE ISLAND,
AND PROVIDENCE PLANTATIONS;

Civil

The Complaint alleges that beginning at least as early as 1980 and continuing to the date of the Complaint, defendants and co-conspirators conspired to restrain price competition among themselves in the sale of undergraduate education to students receiving financial aid. This conspiracy has been effectuated through the "Overlap" group, which consists of financial aid officers from the defendants' and co-conspirators' colleges and universities. The Overlap group schools have made several agreements restricting the amount of financial aid they award undergraduate students. The conspiracy has had the effect of depriving students receiving financial aid and their families of the benefits of free and open price competition. In addition, the conspiracy has caused some students receiving financial aid and their families to pay more for college than they would have otherwise.

DOJ Early Admission Investigation

INSIDE
HIGHER ED



#Admissions Insider

Justice Department Investigates Early-Decision Admissions

Focus appears to be how some colleges share information about those admitted early. Common App asks applicants to consent to the practice.

By **Scott Jaschik** // April 9, 2018



NCAA Amateurism Rules



SPORTS

Judge Rules Against NCAA in Federal Antitrust Lawsuit

While the ruling was a win for a group of former college basketball and football players, it may have been the best loss imaginable for the athletic association and its model



The NCAA can continue to limit compensation that is unrelated to education, a judge ruled. PHOTO: MATT SLOCUM/ASSOCIATED PRESS

By [illegible]



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

Antitrust Red Flags for Employment Practices



Agreements and information exchanges among employers that compete to hire or retain employees may be illegal. If you are a **manager or human resource (HR) professional**, antitrust concerns may arise if you or your colleagues:

- Agree with another company about employee salary or other terms of compensation, either at a specific level or within a range.
- Agree with another company to refuse to solicit or hire that other company's employees.
- Agree with another company about employee benefits.
- Agree with another company on other terms of employment.
- Express to competitors that you should not compete too aggressively for employees.
- Exchange company-specific information about employee compensation or terms of employment with another company.
- Participate in a meeting, such as a trade association meeting, where the above topics are discussed.
- Discuss the above topics with colleagues at other companies, including during social events or in other non-professional settings.
- Receive documents that contain another company's internal data about employee compensation.

Duke Will Not Enter Into “No-Poach” Agreements

- In the *Seaman* settlement, Duke has agreed not to “**enter into, maintain, or enforce any agreement that restrains any person from cold calling, soliciting, recruiting, hiring, or otherwise competing for employees**”
- Duke may continue to make unilateral decisions not to hire from other schools
- There are also exceptions for agreements that are (among other things):
 - (a) “reasonably necessary” to a “legitimate business transaction or collaboration”;
 - (c) “narrowly tailored to affect only employees who are reasonably anticipated to be directly involved in the agreement”; and
 - (e) in writing and identify the employees who are subject to the restraint.

Contact the Antitrust Compliance Officer before you approve any “no-poach” agreement or if you become aware of any violation or potential violation of this prohibition

Duke Antitrust Resources

Duke Antitrust Policy and Guidelines
(ogc.duke.edu/)

DOJ Guidelines for HR Professionals
(www.usdoj.gov/atr)

Antitrust Compliance Officer
Chris Lott at (919) 684-3955