



Takeaways from MHA Webinar:

A Primer on Antitrust Issues Surrounding COVID-19:

A Discussion with H. Holden Brooks and Lawrence W. Vernaglia of Foley & Lardner, LLP | April 21, 2020

Overview

As hospitals are faced with disruption in all realms of their operations, it is critical to understand how antitrust laws apply to health care, how to prioritize compliance messaging and how to reinforce policies and procedures to ensure effective management of antitrust risk. How hospitals collaborate with other providers, approach volatile labor markets, and manage procurement in an effort to address COVID-19-related challenges are all relevant activities in the topic of antitrust issues. This webinar briefs the basics of antitrust law, how it relates to health care, and how to reinforce compliance at this time of heightened enforcement.

The Antitrust Laws Apply During COVID-19

The Basics. Antitrust laws, created at both the state and federal level, ensure fair competition exists by prohibiting competitor agreements that unreasonably harm competition. Examples of classic violations of antitrust laws include price fixing, market allocation, group boycott, bid rigging, employer-side agreements and some group purchasing. Some of these activities are considered per se activities and are presumed to harm competition. In this case, plaintiffs need to prove the agreement only and penalties can include steep criminal fines and incarcerations, regardless of knowledge of illegality. It is important to note that unlawful agreements take many forms and violations are not always blatant.

Challenges of Antitrust Compliance in Healthcare. Antitrust enforcement is on the rise in health care and it is critical for providers to consider expanding the scope of typical compliance programs.

Challenges in antitrust compliance include:

- Providers often act collaboratively in delivery of care
- Providers may not consider themselves as potential competitors
- Referral and other relationships may create disincentive to compete
- Antitrust can be a “blind spot” in health care compliance due to the heavy focus on HIPPA, leading to an absence of robust antitrust training.

Antitrust and COVID-19. The Federal Trade Commission and the Department of Justice Antitrust Division issued two joint statements in the past few weeks:

- March 24th, 2020—Addressing COVID-19 will require “unprecedented cooperation,” including among private businesses, in R&D, joint purchasing, lobbying, protocols and best practices and provision of services. The agencies will not hesitate to hold entities that violate antitrust laws accountable, including through criminal enforcement actions. Additionally, they offered a 7-day turnaround expedited business advisory guidance protocol on questions related to COVID-19.
- April 13th, 2020—The FTC and DOJ recognize that this time has a significant amount of volatility in staffing and employment. They have indicated that they are watching out for collusion among employers on wages, benefits, hours, hiring, recruiting, soliciting, retention of workers, etc.

Reinforcing Compliance. Do you have an existing antitrust policy and have you recently trained key employees in antitrust compliance principles?

- If yes: Consider reinforcing that the policy and antitrust laws still apply despite the COVID-19 emergency. This can be done through supplemental e-mails, re-administering training modules and creating talking points for routine meetings.
- If no: Consider taking steps to educate key employees and leadership through compliance training with the following targeted messages:
 - Providers should make business decisions independently.
 - Providers cannot disclose or receive competitively sensitive information without prior approval from a legal counsel.
 - Providers should be cautious about competitor contracts and should seek guidance from a legal counsel before connecting.
 - If employees become aware of potentially unlawful conduct, it should be reported to a legal counsel.

Additional Considerations

DOJ Leniency Program. The Dept. of Justice Antitrust Division has created a leniency program where the first person to report violation of antitrust laws becomes immune to prosecution for this crime.