

Inter-Employer Shop Talk — Not Always A Bad Thing

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As a group, the chairs of the economics departments of major US research institutions such as Harvard, Yale, and the University of Chicago might be expected to be more familiar with antitrust policy than the average employer. After all, the law and economics of antitrust are a staple of the economics curriculum and many of those professors have played important roles in the development and enforcement of modern antitrust policy. Yet, if the recent trend in antitrust policy in the labor market continues, then these chairs will increasingly find some of their own longstanding practices to be held illegal and, if sued, their universities could be found liable in future antitrust litigation.

At issue is the practice of sharing information on salaries offered and paid in various labor markets. In the example of economics departments, chairs have historically met over breakfast at the year-end convention of the American Economic Association to discuss the salaries they expect to offer Ph.D. students looking for jobs as assistant professors. These discussions address the intensity of demand, the quality of supply, and the salaries and benefits that schools expect to offer new assistant professors. This practice has gone on for decades among economics departments and, in different forms, in many other labor markets as well.

These policies are under increasing attack under current antitrust policy. Explicit agreements to hold down wages have always been clearly illegal. In the recent past, the NCAA has been successfully sued for an explicit agreement to hold down the salaries of assistant basketball coaches.¹ Similarly, the NFL was successfully sued when its teams agreed to hold down the salaries of taxi-squad players that were not covered by its collective bargaining agreement with the NFL Players' Association.² Thus, the legal application of antitrust principals to the labor market is not new.

What is new, however, is the increased presumption that communication between employers about the wages they pay or expect to pay may be illegal even in the absence of any explicit agreement to hold down wages. As examples, Federal antitrust authorities — the Department of Justice and the Federal Trade Commission — have prosecuted several cases against state hospital associations for holding down nurses' pay where the allegations

of collusive behavior were based in part on evidence that hospitals had communicated directly about the wages they were paying. As another example, the FTC is currently investigating, separately, both large oil companies and large IT firms for potential antitrust violations related to their joint discussions about the salaries paid to technical and managerial employees.³

These cases represent a sharpening of antitrust enforcement in labor markets. Like the economics chairs, employers from a wide range of industries have historically relied on salary information from industry competitors to guide their own salary offers. Some of this information was collected by the Federal government itself in the form of published wage surveys. Indeed, one of us, while an economist with the Bureau of Labor Statistics, helped develop an on-line “Wage Calculator” that provides empirical salary ranges — to both employers, employees or anyone else on-line — for jobs defined by occupation, location and skill level.⁴ Since the underlying information was collected directly from employers, this Calculator was akin to the meetings held by economics chairs that may be illegal in the new view. Trade associations, i.e. collections of employers hiring in the same labor market, often collect and distribute labor market information in an aggregated format. Similarly, an entire industry of compensation consultants — including longstanding companies such as Hay Associates and Watson Wyatt — uses market salary data to guide employers on their own salary offers. Where does this market data come from? Other employers.

In this environment, the line between legal and illegal information sharing may hinge on answers to two questions. First, is the salary information collected by a third party such as a trade association. Second, is the information aggregated in such a way that the responses of individual employers are masked? If the answer to both these questions is “yes,” then the information sharing is likely to pass antitrust review even under the new standards. If, however, one or both of these questions gets a “no,” then salary sharing may draw increased scrutiny under the new enforcement regime. Economics chairs have tightened up their act in recent years from this perspective, as they now only explicitly discuss summary results of a survey (of themselves) that is tallied by the University of Arkansas.⁵ Still, one wonders if, on their way for a cup of coffee, the chairs of the Harvard and Yale departments don’t have opportunities for a more detailed discussion. If this kind of sidebar discussion is found to be common, then this collective discussion of aggregated results could be interpreted as a violation of antitrust law.

Is this tightening standard a good idea? On the plus side, the increasingly stringent prohibitions on interemployer communications may preclude some instances of collusion. After all, if employers cannot talk at all about wages, then they will find it difficult to reach a collusive agreement that holds down wages. The preclusion of such price-setting agreements is of course a valid and important function of antitrust enforcement and, indeed, there is limited evidence that explicit communication about pricing among competitors may result in an increase in market prices.⁶ The economics literature indicates that the risk that interemployer communication facilitates collusion is highest when the information shared is a) current, b) not mediated by a third party and c) is employer-specific. At the same time, however, we must acknowledge that economists cannot predict with great confidence when a cartel is and is not likely to be facilitated.

While a reduction in the likelihood of collusion is an important benefit of restrictions on interemployer communication, those benefits come at a cost that must also be considered. These costs come in several forms. First, information sharing increases the rate at which the market arrives at an equilibrium price, a process known as *tatonnement*. By reducing the time required for *tatonnement* in response to market changes, interemployer communication reduces search costs for both employees and employers.

Second, by reducing uncertainty about prevailing wages, such communication provides buyers of labor increased confidence that they are not making a bad deal. This increased knowledge and comfort level allows employers to make job offers and hires without undue concern that they will be putting themselves at a competitive disadvantage by overpaying for labor. These mechanisms reduce job search costs and increase employers' willingness to take on new hires, both effects that work to the net advantage of job-seekers.

Third, competitor-specific information on prices can, in the absence of a cartel, be used by employers to enhance competition for workers. The basic mechanism is that, absent such information, employers that are failing to make hires can learn something about what they're doing wrong by knowing who is being successful and at what prices. To analogize to the car market, the implications to BMW are quite different if it is losing sales to Mercedes-Benz vis-à-vis Ford. In much the same way, employers can learn something about how to make their job offers more attractive (more salary? more benefits?) by knowing who they're losing out to.

Finally, information on prevailing wages, both in the present and in the future, is a crucial input into the planning decisions of many employers. If employers have access to better forecasts about these future costs, they can make better decisions about their current investments — in technology, in capital and in structures — that will be complementary with later hiring. Since employers are at least somewhat risk averse, this improved information can increase firms' willingness to undertake such investments and, subsequently, to take on new employees as well.

Collusion by purchasers requires each purchaser to buy less than they would individually like to at the collusive price — it is this holding back of demand that allows the colluders to collectively lower prices. (Collusion by sellers would require holding back *supply* to thereby *raise* prices). Because each member of a cartel has a unilateral incentive to raise prices and purchase more, cartel members' prices must be monitored for the collusion to be effective. Monitoring is relatively easy for homogenous goods such as corn — one bushel of corn is pretty much the same as another, and so a corn purchasing cartel (say, a group of cereal manufacturers) seeing prices that were "too high" would know that one of its members had violated the cartel agreement. In contrast, monitoring is difficult for heterogeneous products where prices vary for all sorts of reasons, not merely because one cartel member has failed to hold back demand. Employers find it difficult to collude in labor markets because people are perhaps the ultimate heterogeneous product — no two are the same. From a labor cartel's perspective, the difficulty is that employees' heterogeneity makes it difficult to detect other employers' deviation from the agreement.

For these same reasons, both employers and employees find it difficult to detect broad market movements from the noisy signals they receive. In this environment, employers' shared access to information on salaries, demand and supply can play a useful role in improving the workings of the market without the presumption that it will always lead to a cartel. While explicit cartels should continue to be regulated and punished, antitrust authorities should tread warily in their treatment of information sharing between employers that falls short of collusive price-setting.⁷ In particular, we advocate a "rule of reason" approach towards the evaluation of interemployer communication rather than a "per se" approach that would view such communication as always illegal. This approach makes economic sense and is consistent with the historical treatment of such communication. As an added benefit, it will continue to give economics chairs — not the most personal group — something to talk about over their annual breakfast meetings.

Endnotes

1. *Law et al. v. National Collegiate Athletic Association.*
2. *Antony Brown et al v. Pro Football, Inc.*
3. Thomas Catan, "FTC Investigates Oil Firms Over Hiring, Wages," Wall Street Journal, April 26, 2010, <http://online.wsj.com/article/SB10001424052748704388304575202282201874278.html>; Thomas Catan and Brent Kendall, "U.S. Steps Up Probe of Hiring in Tech," Wall Street Journal, April 9, 2010, <http://online.wsj.com/article/SB10001424052702304703104575174293867620832.html>.
4. Bureau of Labor Statistics, National Compensation Survey.
5. Survey of the Labor Market for New Ph.D. Hires in Economics: 2009-10. Center for Business and Economic Research and Department of Economics, Sam M. Walton College of Business, University of Arkansas, http://cber.uark.edu/2009-10_new_phd_labor_market_survey_report.pdf.
6. While the presumption that interemployer communication facilitates collusion in some cases is uncontroversial, there is surprisingly little empirical research that demonstrates this relationship. One leading study examined a Danish policy to facilitate pricing communication between producers of ready-made concrete and found some evidence of a resulting price increase (Svend Albaek, Peter Mollgaard and Per B. Overgaard, "Government-Assisted Oligopoly Coordination? A Concrete Case," *Journal of Industrial Economics*, vol. 45, no. 4 (Dec. 1997), pp. 429-443).
7. This reasoning is consistent with the some but not all recent economic thinking on this issue (Dennis Carlton, Robert H. Gertner and Andrew M. Rosenfield, "Communication Among Competitors: Game Theory and Antitrust," *George Mason Law Review*, 1996).