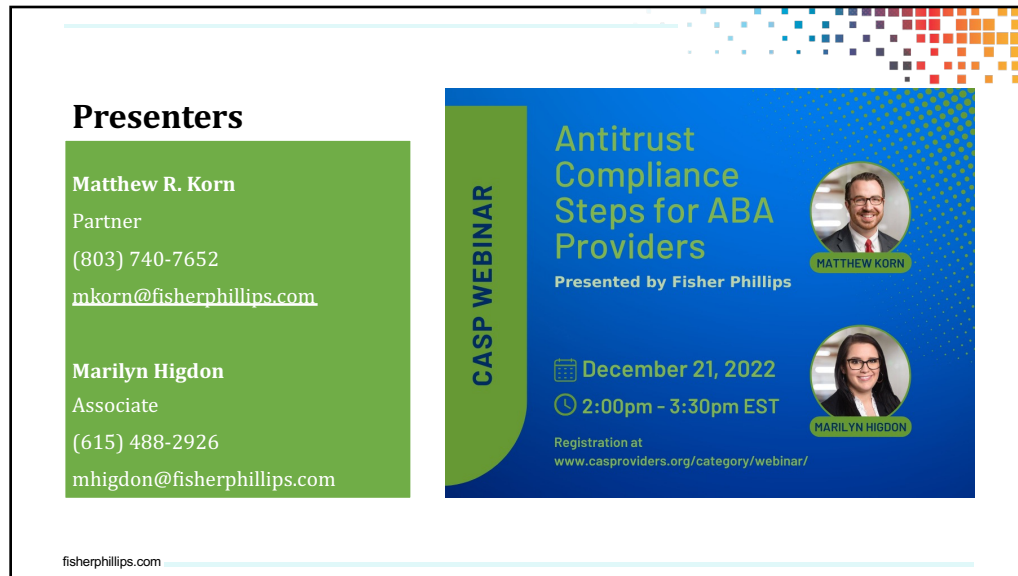


CASP
The Council of Autism
Service Providers

Antitrust Compliance Steps for ABA Providers

Presented by:
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CASP WEBINAR

Antitrust Compliance Steps for ABA Providers

Presented by Fisher Phillips

MATTHEW KORN

MARILYN HIGDON

December 21, 2022
2:00pm - 3:30pm EST

Registration at
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Antitrust Compliance Steps for ABA Providers

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December 21, 2022

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Overview

- Background of Anti-Trust Laws + Why They Are Relevant
- No-Poaching + Wage-Fixing Agreements
- Recent Litigation Developments
- Practical Steps to Protect Your Practice
- Questions

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What Are Anti-Trust Laws

Laws that “protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”

- Federal Trade Commission.

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Goals Of Anti-Trust Laws

- Fair competition exists in an open market
- Businesses are incentivized to operate independently
- Consumers can benefit from different options or competition in the marketplace
- Consumers are not forced to pay higher prices
- The public can trust the marketplace

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Why Are We Here?

- New focus from Department of Justice on anti-trust issues in the workplace
 - Slew of recent criminal indictments
 - Some have been lodged against individuals and small, private employers, not just large corporations
- DOJ first successful criminal prosecution of a workplace-related antitrust matter

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Enforcement Of Anti-Trust Laws

- The DOJ and the Federal Trade Commission (FTC) jointly enforce anti-trust laws
- Both agencies can bring civil enforcement actions and the DOJ can bring criminal prosecutions against INDIVIDUALS, companies, or both.
- Some anti-trust laws provide a private right of action

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Enforcement Of Anti-Trust Laws

- The DOJ/FTC have always had authority to monitor the employment marketplace
- Certain agreements are *per se* illegal
 - “wage-fixing” and
 - “no-poaching” agreements



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Recent DOJ Enforcement Success

- October 2022 – DOJ’s first successful criminal prosecution of a workplace-related antitrust matter
- A small healthcare staffing firm in Nevada made a pact with a competitor not to recruit each other’s nurses and to fix wages
- The agreement involved a single phone call and one email between the firm’s regional manager and a competitor’s employee

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Recent DOJ Enforcement Success

- Competitor's employee: "I am glad we can work together through this and assure that we will not let the field employees run our businesses moving forward."
- Firm's regional manager: "If anyone threatens us for more money, we will tell them to kick rocks!"

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Recent DOJ Enforcement Success

- The staffing firm pled guilty to conspiring with a competitor to fix wages and engaging in a no-poach agreement
- Sentenced to pay \$134,000
- The violations occurred over less than a 1 year period

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Recent DOJ Enforcement Success

The guilty plea “demonstrates [the DOJ’s] commitment to ensuring that workers receive competitive wages and a fair chance to pursue better work and that criminals who conspire to deprive them of those rights are held accountable.”

- Assistant Attorney General Jonathan Kanter of the DOJ's Antitrust Division

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DOL And NLRB Have Thrown Their Hats In The Ring

- Spring/Summer 2022 - the DOL and the NLRB published joint Memoranda of Understanding with DOJ/FTC
 - Agreed to share information about possible anticompetitive actions in the employment marketplace
- Identifies the anticompetitive actions subject to scrutiny, including:
 - “noncompete and nondisclosure provisions”
 - “classification and treatment of workers”

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What Is At Risk?

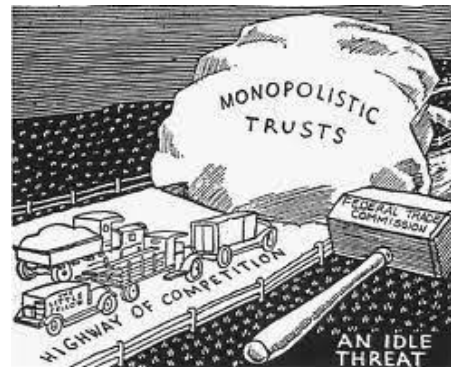
- Time, money, and fees associated with an investigation and charges by the Department of Justice
- Potential assessment of money penalties
- Potential civil monetary damages
- Potential prison sentence
- Possible individual liability
- Private lawsuits
- Disclosure of confidential information
- Diversion, distraction, disruption
- Adverse publicity



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Core Anti-Trust Laws



- Sherman Act
- Federal Trade Commission Act
- Clayton Act

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The Sherman Act

- Enforced by DOJ
- Serves to protect competition for the benefit of consumers
- Prohibits contracts and conspiracies that create *unreasonable* restraints on trade or commerce
- Proscribed in general terms to allow the courts to assess the facts of each case on an individual basis
- Certain *per se* violations
 - Price fixing
 - Dividing the market
 - Rigging bids

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The FTC Act

- Enforced by the Federal Trade Commission
- Bans “unfair methods of competition”
- Substantially similar to the Sherman Act
 - Violations of the Sherman Act = Violations of the FTC Act

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The Clayton Act

- Addresses specific practices not clearly prohibited by the Sherman Act:
 - Mergers and acquisitions that lessen competition/create a monopoly
 - Certain discriminatory prices, services, and allowances in business dealings
- Provides a private right of action for individuals harmed by the Sherman Act or the Clayton Act

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What Are No-Poaching Agreements?

- Restrains on trade between competing companies
- Refers to a variety of agreements made between companies that involve the hiring and recruiting of employees
- Most commonly involve companies agreeing not to hire or solicit employees or customers from one another

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Potentially Violative Agreements

- Agreements pertaining to *employees, suppliers, or patients*:
 - Agreeing not to solicit or hire a competitor's employees
 - Expressing to competitors that you should not compete too aggressively for each other's employees
 - Agreeing not to hire employees or admit new patients without the permission from the practice the employee/patient is departing from
 - Agreeing not to take a new patient unless the patient pays off all debts to previous providers
 - Agreeing not to use a particular supplier or vendor

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What Are Wage-Fixing Agreements?

- Collusion between competing companies to fix or suppress employees' or potential hires' wages and benefits
 - How much to pay employees
 - What types of benefits to provide
 - Imposing salary maximums or caps
 - Withholding pay raises or bonuses



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Potentially Violative Agreements

- Fixing *prices, wages, or benefits*:
 - Colluding with individuals at a competitor about salaries, benefits, and other terms of compensation or employment
 - Agreeing not offer therapy or other services below a certain dollar amount
 - Agreeing not to raise prices in the coming year
 - Agreeing on incoming new provider (or other staff) salaries or benefits offered
 - Sharing information with competitors about employee compensation or terms of employment, such as salary surveys

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Additional Potentially Violative Agreements



- Dividing or allocating *markets or market shares*:
 - Agreeing not to take patients from certain areas seen as another provider's "market"
 - Agreeing which practice will offer certain resources or services
 - Agreeing on hiring or admissions criteria

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Real Life Scenario

- Two local practice groups have a longstanding agreement that encompasses a number of issues, including:
 - They will not solicit the other's practitioners or patients
 - They will refuse any patient who has an outstanding balance with the other practice group

- Any concerns?

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Hot Potatoes: Compensation And Benefits

- Late 2020 – DOJ began bringing criminal cases against employers for colluding to suppress wages
- Agreements that set entry level wages for certain positions are illegal
- Evidence that competitors are discussing planned wage increases/levels, planned benefits, etc. could form the basis of an allegation of collusion
 - U.S. v. Jindal
 - NCAA

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Hot Potatoes: No Poach Agreements

- First criminal no poaching case went to trial in April of this year
- The CEO of DaVita, Inc. was accused of conspiring with three other companies to suppress competition by agreeing not to hire each others' employees
- The DOJ brought the full weight of the federal government to the litigation
- Two of the companies were not charged and testified against the CEO and DaVita
- Ultimately, the jury did not find evidence of a conspiracy.

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Hot Potatoes: No Poach Agreements

- Civil class actions brought against Duke University and UNC-Chapel Hill
- The schools were alleged to have engaged in a no-poach agreement not to hire each others faculty
- Entered into DOJ agreements prohibiting them from having no-poach agreements moving forward

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What About Non-Competes?

- March 2019 - labor and public interest organizations filed a petition urging the FTC to ban non-compete clauses
- July 2021 - President Biden issued an executive order encouraging the FTC to “curtail the unfair use” of non-competes
- Recent FTC/DOJ workshop on labor-market competition suggests the agency is taking that request seriously.

- Potential anti-competitive effects:
 - Employees cannot avail themselves of better job opportunities
 - Rival employers cannot hire those workers
 - Consumers may face lower output and higher prices

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What About Non-Competes?

- Can serve procompetitive goals of protecting an entities trade secrets and incentivizing investments in human capital
- Must:
 - Identify some interest the clause is designed to protect
 - Narrowly tailor to that interest

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How To Avoid Running Afoul Of Anti-Trust Laws

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Educate Managers, Executives, & HR

- Incorporate anti-trust issues into your compliance and training programs
- Train key employees on the risks inherent in their positions
- Provide clear protocols to follow
 - Exchanging employment information
 - Wage fixing
 - No-poach agreements

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Review Your Risks & Compliance Measures

- Review all agreements (even verbal ones) for potential restraints on competition and trade, including:
 - Hiring practices
 - Wage setting
 - Salary reviews
- Tailor compliance efforts accordingly:
 - Comprehensive and robust policies pertaining to hiring, retention, and communications with competitors and prospective employees
- Investigate and remedy potential violative agreements and practices

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Avoid Communications That Could Be Perceived As No-Poach Agreements

- It does not take much for an “agreement” to be made
- Discussions with another practice about refusing to solicit or hire that other’s employees or seek out their patients
- Expressing to competitors that you should not compete too aggressively for employees or patients

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Be Cautious In Entering Into Any No-Poaching Agreement

- Some agreements may be permissible if limited in scope and ancillary to another transaction
- DOJ and other agencies are taking a more critical look at these agreements
- Consult with legal counsel to assess viability before entering into an agreement

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Be Wary Of Trading Information

- Certain exchanges of wage and benefit information with other employers can lead to antitrust exposure
 - Serves as evidence of an implicit illegal agreement
- Pay particular attention to compensation and benefits information shared with industry and trade groups

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How To Obtain Information



- Red Light: Do not call competitors and ask them directly
- Yellow Light: Information exchanges
- Green Light: Publicly available websites, internet, etc.

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Risky Information Exchanges

- Staff choices and recruiting
- Marketing or recruiting to certain patients
- Service prices, alary levels, benefits, and other topics impacting financials
- Current or future business or strategic plans
- Projections or assumptions of competitive value
- Other competitive issues, such as access to services, reopening of facilities during the pandemic, etc.

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High Risk Situations

- Participating in a meeting where the risky topics are discussed unless key safeguards have been implemented
- Discussing the risky topics with colleagues at other practices, including social events or in other non-professional settings
- Receiving documents that contain another practice's internal data about employee compensation

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Safe Information Exchanges

The Information must:

- Be gathered by a third party (e.g., trade association or outside consultant)
- Be more than 3 months old
- Involve at least 5 participants (and no one participant accounts for more than 25% on a weighted basis of the statistic reported)
- Be aggregated in such a way that it would not be possible to identify any particular participant

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Real Life Scenario

- Your practice's CFO asked you to benchmark competitive benefits packages for your industry.
- Given the concerns about comparing compensation and benefits, how can you do this properly?

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Questions?

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