

Compensation Data – Department of Justice Anti-Trust Regulation and Collusion Fact Sheet

Cannabis executives and managers, including those in human resources and finance, naturally want the most current and relevant information before making salary, incentive, or contract price decisions. Unfortunately, this desire runs headlong into the crosscurrents of anti-trust regulations. One aspect restricts companies from sharing non-public price or cost information due to concerns that it could lead to illegal collusion. Another promotes sharing through a general acknowledgement in antitrust literature that more price and cost information in the marketplace is better for competition.

Federal anti-trust agencies have established basic rules to permit a significant exchange of information (with safeguards to prevent illegal collusion that might result from the misuse of the information). This is vital to the lawful functioning of the economic markets that affect cannabis organizations. This fact sheet describes the danger areas and safe harbors that protect legal information exchanges.

What is NOT allowed per the Anti-Trust regulations:

1. Informal calls or emails to friends at nearby companies
2. Chatting with friends at industry conferences
3. Using survey companies whose procedures you do not know
 - a. Note: If done in a way that complies with the guidelines adopted by federal antitrust agencies, these surveys are legal and the safest way to obtain salary information.

What IS allowed per the Anti-trust regulations:

The Department of Justice and the Federal Trade Commission have issued a joint policy statement. This statement has been interpreted to provide a "safe harbor" for organizations involved in the exchange of compensation and benefits information. The Agencies will not likely challenge provider participation in written surveys of wages, salaries, or benefits, if the following conditions of the "safe harbor" are satisfied:

1. The survey must be managed by an independent third-party (e.g., compensation consultant, government agency, or trade association);
2. The information provided by survey participants is based on data more than three months old; and
3. Adhere to the following data aggregation policies:
 - a. There are at least five providers reporting data upon which each disseminated statistic is based (i.e., each job or position);
 - b. No individual provider's data represents more than 25% on a weighted basis of that statistic; and
 - c. Any information disseminated is sufficiently aggregated. This ensures recipients won't be able to identify the prices charged or compensation paid by any participant or service provider.

Penalties

Antitrust violations are punishable by criminal penalties, including imprisonment and fines, as well as civil penalties, such as payment of trebled damages and attorneys' fees. Penalties for non-compliance with the Act include:

1. Criminal imprisonment for up to three years;
2. Criminal fines up to \$10 million, twice the damages born by the victims or twice the individual's monetary gain for the violation, whichever is greatest; and
3. Attorneys' fees and cost of litigation incurred by the plaintiff.

Conclusions

Employers can protect themselves and their human resource employees by **discontinuing** the practice of contacting other employers directly to share wage, benefit, and policy information. Companies should also be careful about using data provided by non-complaint sources, such as informal surveys or otherwise noncompliant, but easily available, reports. There are currently very few surveys conducted by qualified independent compensation consultants that will provide information to employers while complying with the DOJ antitrust regulations. These surveys include the Cannabis Compensation Survey with strict compliance with the defined "safety zones."