

# Comp & Benefits Survey Precautions

This Law Review was written by Susan Feingold Carlson and edited by Jed Mandel of Chicago Law Partners LLC. CLP serves as the Association Forum's general counsel.

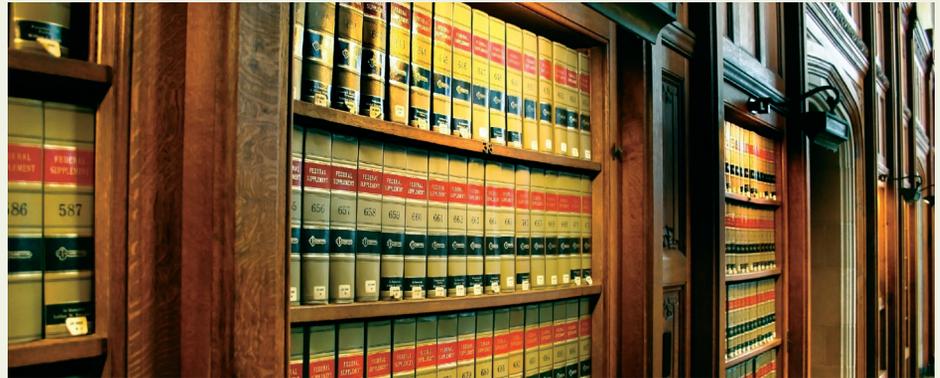


**Q: We would like to conduct a compensation and benefits survey of our professional association members. What issues should the board think about before it begins?**

**A:** Although compensation and other industry surveys are useful tools for associations and their members, they raise a number of issues that your board should consider, the majority of which arise from the restrictions imposed by federal and state antitrust laws. Antitrust laws prohibit groups of competitors, which, for certain purposes, include trade associations and professional societies, from engaging in activities that unreasonably restrain trade. Association exchanges of price and cost information (e.g., salary surveys, cost surveys and sales surveys) raise particular antitrust concern because while surveys can have significant pro-competitive benefits, they also can facilitate price-fixing or other illegal standardization of the terms and conditions of trade — if they are conducted without appropriate safeguards in place.

To assist associations and others involved in the exchange of price and other sensitive business information, the U.S. Department of Justice and the Federal Trade Commission have developed “antitrust safety zones,” guidelines that describe information exchanges that generally will withstand an antitrust challenge. Specifically, the agencies have stated that, absent extraordinary circumstances, they will not challenge provider participation in a written survey of price and cost information if the following conditions are met:

- (i) The survey is managed by a third party data-gathering organization, which may include an association, government agency, third-party consultant or academic institution;
- (ii) All survey information provided by participants is based on data that is more than three months old; and
- (iii) Disseminated statistics are based on



data from at least five participants, and such statistics are aggregated such that no individual participant's data represents more than 25 percent on a weighted basis.

Although the guidelines were specifically prepared to address price and salary information related to health care services, they are deemed applicable to a much broader range of industries and information. Thus, for example, trade associations representing businesses rely on them in reporting sales data, and associations representing individuals use them in developing and publishing salary surveys.

The first and third requirements of the guidelines underscore the importance of masking the survey data provided by individual members. Generally, individuals and companies are free to publish their own data. To the extent the same information is collected for an association survey, however, the association should obtain the participants' agreement not to publish any data that would compromise the confidentiality protections of the published survey results. In addition, if the association wants to control the publication of the masked and aggregated survey results, it should obtain the participants' agreement not to publish the survey results at all. Prior to conducting the survey, the association also should determine who can participate (e.g., members only, members and non-members) and whether only those who

provide information will be entitled to receive the results. Any such restrictions should be established as a condition of survey participation.

When publishing survey results, an organization should confirm its ownership of the survey by use of a copyright notice. Finally, it is prudent to include a disclaimer, such as the following, with the survey results:

*This survey has been published by [Association] and contains information provided by participating members. The information published in this survey was developed from historical information and does not include any projected information. [Association] has not verified the accuracy, completeness or suitability of any information provided here, and it does not recommend, encourage or endorse any particular use of the information reported. [Association] makes no warranty, guarantee or representation whatsoever and assumes no liability or responsibility in connection with the use or misuse of this survey.*

Industry surveys can provide useful information not only to association members, but to others as well. Structured properly, they should not create unintended liability for your association or its members. ■

*The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.*