

Employers Beware: Sharing HR Information Can Create Antitrust Concerns

September 26, 2022

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Last month, the U.S. Department of Justice entered into a settlement agreement with several poultry processors and a data consultant regarding allegations that they had conspired to share wage and benefit information, harming the labor market for poultry processing plant workers. As part of the settlement, the defendants agreed to pay (collectively) \$85 million in restitution and the DOJ imposed a lengthy *ten-year* monitorship to ensure defendants' compliance with the settlement and with antitrust laws. The United States District Court for the District of Maryland entered orders approving the settlements the day after they were filed.

According to DOJ, the competing poultry processors allegedly exchanged Competitively Sensitive Information related to wages and benefits that was "current or future, disaggregated, or identifiable in nature."ⁱ The processors allegedly disclosed such information directly with each other and to a third-party consulting firm that then shared the information with competitors. The processors also exchanged competitively sensitive information during annual in-person meetings, hosted by the consulting firm.ⁱⁱ

The settlement agreements define Competitively Sensitive Information broadly to include non-public "information that is *relevant to, or likely to have an impact on*, at least one dimension of competition, including . . . prices, strategic plans, amounts and types of Compensation, formula and algorithms used for calculating Compensation or proposed Compensation, . . . and *any confidential information the exchange of which could harm competition*."ⁱⁱⁱ

The complaint notes that although the processors were exchanging information through a third-party consultant, it was only to create "a veneer of legitimacy" of the exchange.^{iv} DOJ alleged the processors and their consultants were sharing the type of information that DOJ's 2016 antitrust guidance^v called out as raising antitrust concerns, *e.g.*, current, and future information, disaggregated and easily identifiable to a specific processor, and perhaps even a specific processing plant.^{vi}

The terms of the settlement provide that the poultry processors are prohibited from communicating (or encouraging or facilitating the communication of) Competitively Sensitive Information with each other or to any consulting firm that produces reports to poultry processors regarding poultry processing worker compensation.^{vii} The processors are also forbidden from using any Competitively Sensitive Information about another processors' compensation for processing plant workers.^{viii}

As the DOJ notes in the Complaint, although 2016 guidance was intended to inform companies how they could reduce the likelihood that the exchange of information would violate antitrust laws, that "guidance does not immunize any competitor information exchange."^{ix} DOJ, through this action and other commentary, has signaled that its 2016 statement is no longer a safe harbor, although it continues to cite the 2016 guidance in describing what types of information exchanges are more likely to draw antitrust scrutiny. In addition, in July 2021, the President issued an Executive Order that, among other things,

encouraged the Attorney General and the Federal Trade Commission to consider revising the 2016 guidance.

Thus, clients should continue to exercise extreme caution when considering disclosures of any compensation-related information. Even if sharing information through a neutral, third-party consultant, it is important to make sure that the information provided is **historical, i.e., not current or future, aggregated, and not identifiable**. The 2016 guidance suggests that aggregation of information from enough sources is important to prevent competitors from tying particular data to an individual source (including a particular competitor or particular plant or facility). But, as noted above, recent comments from the Antitrust Division and the Executive Order have cast doubt on whether the 2016 guidance continues to reflect current enforcement policy. The disclosure or sharing of any information with another employer that could impact compensation, or competition, could raise antitrust concerns and clients should review any such disclosures with experienced antitrust counsel before proceeding.

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ⁱ Compl. ¶ 75, *U.S. v. Cargill Meat Solutions Corp.*, Civil Action No. 22-cv-01821 (ELH) (D. Md. July 25, 2022).

ⁱⁱ *Id.* ¶¶ 39-40.9

ⁱⁱⁱ Proposed Final Judgment at 3 (July 25, 2022) (emphasis added). Note that the consulting firm and its executives entered into an agreement, entered on the same day.

^{iv} Compl. ¶ 87.

^v See Dep't of Justice Antitrust Div. and Fed. Trade Comm'n, *Antitrust Guidance for Human Resources Professionals* (October 2016), <https://www.justice.gov/atr/file/903511/download>.

^{vi} Compl. ¶ 110.

^{vii} Proposed Final Judgment at 7-8.

^{viii} *Id.*

^{ix} Compl. ¶ 88.