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SETTLEMENT AGREEMENT WITH U.S. DEPARTMENT OF JUSTICE DEMONSTRATES THE RISKS ASSOCIATED WITH THIRD-PARTY INFORMATION SHARING

To Our Clients and Friends:

On July 25, 2022, the U.S. Department of Justice ("DOJ") entered into an $84.8 million settlement agreement[1] with several poultry processing companies over allegations that the poultry processors conspired with one another to share wage and benefits information through third-party data aggregation firms.[2] The companies entered the settlement without admitting any wrongdoing or liability. In addition to the $84.8 million restitution payment, the settlement agreement also imposed a court-appointed compliance monitor for ten years to ensure compliance with the proposed settlement decree.[3] Government enforcement actions based on information-sharing are rare,[4] and this settlement agreement includes important lessons for all companies that provide internal wage or benefits data to third parties, including consulting firms or trade groups that engage in other information sharing with competitors.

The DOJ's settlement is the latest in a series of aggressive enforcement of the antitrust laws to protect labor markets. Since the DOJ and the Federal Trade Commission's ("FTC's") 2016 Antitrust Guidance for Human Resource Professionals, the DOJ has been outspoken about intending to prosecute criminally stand-alone wage-fixing and no-hire, no-poach, and non-solicit agreements. Over the past two years, the DOJ has given these threats teeth, bringing criminal indictments against several companies and individuals for alleged wage-fixing, no-poach, and no-solicit agreements.

Here, the DOJ alleged that three poultry processors engaged in a long-running conspiracy to exchange information about wages and benefits for poultry processing plant workers and collaborated with their competitors to deprive "a generation of poultry processing plant workers of fair pay set in a free and competitive labor market."[5] In addition, the government alleged that the processors coordinated the conspiracy by sharing information with third-party data consulting firms[6] and, importantly, that the information exchanged was "current or future, disaggregated, or identifiable in nature, which allowed the poultry processors to discuss the wages and benefits they paid their poultry processing plant workers."[7] The data consulting firms also hosted in-person meetings where, the government further alleged, the poultry processors "shared additional compensation information and collaborated on compensation decisions."[8]

Key to the government's case, the complaint alleges that the poultry processors failed to abide by the safe-harbor requirements for sharing information outlined in the 2016 Guidance.[9] Under this Guidance, information sharing is unlikely to have anticompetitive effects when "[1] a neutral third party manages the exchange, [2] the exchange involves information that is relatively old, [3] the information

is aggregated to protect the identity of the underlying sources, and [4] enough sources are aggregated to prevent competitors from linking particular data to an individual source."[10] The DOJ alleged that the poultry processors did not qualify for the safe harbor because their information was current or future, disaggregated, and identifiable.[11]

Looking ahead, the safe harbor—which the DOJ and FTC have long used in contexts beyond labor markets—may be revised as a result of President Biden's July 2021 Executive Order On Promoting Competition in the American Economy. Section 5(f) of the Order directs "the Attorney General and the Chair of the FTC . . . to consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016" in order to "better protect workers from wage collusion."[12] The Fact Sheet on the Executive Order suggests that those revisions may be aimed at information sharing: "the President . . . [e]ncourages the FTC and DOJ to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another."[13] To date, the guidance on information sharing has not been modified.

One other noteworthy aspect of the settlement agreement is the imposition of a ten-year monitorship. Monitorships for antitrust violations are uncommon and typically last only three years—even in the context of hard-core criminal cartels.[14] The groundbreaking agreement to a ten-year monitorship may be an indication that the new regime of antitrust enforcers will seek out monitorships, including lengthy ones, as part of future settlement agreements.

Take-aways

- Carefully assess benchmarking practices. Consider how sensitive information—including wages and benefits, as well as pricing and production data—is shared with others in the industry to ensure that it qualifies for the current safe harbor—that is, the exchange is managed by a third party, such as a trade group, and includes information that is historical, aggregated, and anonymized.[15]

- Monitor developments in DOJ and FTC guidance regarding information sharing, as the safe-harbor provision for human resources could change as a result of the Executive Order On Promoting Competition in the American Economy which directs DOJ and FTC leadership to "revise" the guidance to "better protect workers from wage collusion."

- Recognize that antitrust enforcers will use the antitrust laws to protect labor markets. They are particularly interested in guarding low-wage workers from antitrust violations, but employers in other areas should not be complacent, as enforcement has included conduct involving specialized labor and highly compensated professionals.

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[1] *See* Proposed Final Judgment*, U.S. v. Cargill Meat Solutions Corp., et al.,* (July 25, *2022),* here*,* [hereinafter Proposed Settlement]. The data analysis firms and their executives entered into a separate settlement agreement. *See* Proposed Final Judgment, *U.S. v. Webber, Meng, Sahl and Company* (July 25, 2022), here.

[2] *See* Complaint, *U.S. v. Webber, Meng, Sahl and Company* (July 25, 2022), at ¶ 5 [hereinafter Complaint].

[3] Proposed Settlement at 12-17.

[4] This is the first DOJ antitrust case involving information sharing since 2016. *See* Complaint, *U.S. v. DirectTV Group Holdings, LLC and AT&T, Inc.* (Nov. 2, 2016), here.

[5] *See* Complaint at ¶ 4.

[6] *Id.* at ¶¶ 75–152.

[7] *Id.* at ¶ 75.

[8] *Id.* at ¶ 85.

[9] *Id.* at ¶ 88.

[10] *See* Department of Justice, Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resources Professionals (October 2016), here.

[11] Complaint at ¶ 75.

[12] Executive Order on Promoting Competition in the American Economy (July 9, 2021), here.

[13] FACT SHEET: Executive Order on Promoting Competition in the American Economy, (July 9, 2021), here.

[14] *See* Judgment, *U.S. v. AU Optronics Corporation* (Oct. 2, 2012) (imposing a three-year monitorship).

[15] *See* Department of Justice, Antitrust Division & Federal Trade Commission, Statements of Antirust Enforcement Policy in health Care (August 1996), here (providing that the collection of information qualifies for a "safety zone" when (1) the collection is managed by a third party, (2) the data is more than three months old, and (3) and the data is sufficiently aggregated such that recipients could not identify the data of any individual participant).

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