Antitrust Alert

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$85 Million Poultry Processor Wage-Fixing Settlement Provides Valuable Antitrust- and Privacy-Related Compliance Lessons for HR Professionals

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Key Points

- As part of the antitrust agencies' public commitment to investigate and prosecute competitive harm in labor markets, the DOJ Antitrust Division fined three major U.S. poultry processors and a data consulting company a total of $84.8 million for violating federal antitrust laws by allegedly conspiring to fix employee wages and benefits.
- According to DOJ's civil complaint, for more than 20 years the poultry processors collaborated secretly in determining compensation and other benefits and—directly with one another and indirectly with the help of a data consultant—exchanged detailed, identifiable, current and forward-looking information about employee wages and benefits. DOJ asserted that both the information exchange and direct collaboration constituted independent violations of the Sherman Act.
- DOJ alleged harm in the market for primary poultry processing plant employment, a cluster of workers that may perform different tasks for poultry processors but, according to DOJ, have common attributes and skills that separate them from workers outside of poultry processing. In this alleged market, DOJ appears to have measured market shares by determining the relative shares of total jobs in this space employed by the processors and concluded that these processors had more than 90 percent of poultry plant workers in the United States and, in some geographic regions, at least 80 percent of these types of jobs.
- If approved by the court, in addition to prohibiting the offending conduct, the proposed settlement would ban data consulting firm, WMS, including its president individually, from distributing or otherwise facilitating the exchange of competitively sensitive information in any industry. The defendants would be required to grant both the court-appointed monitor and the DOJ broad access to their records and facilities for 10 years to ensure compliance with the terms of the settlement and to prevent future violations.

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- This settlement came on the heels of Wayne Farms completing its $4.5 billion acquisition of Sanderson Farms, which was also reviewed by DOJ. Although it seems that a private action about alleged wage-fixing may have triggered DOJ's investigation into the labor issues, the broad-based document production associated with DOJ's investigation of the merger undoubtedly enhanced DOJ's position. This case makes clear that companies engaging in M&A should make sure to assess the potential impact to workers in addition to their typical competitive analyses. Companies also should add labor and employment issues to their standard antitrust compliance programs and provide antitrust training to HR and other personnel that set worker compensation.
- While this was an antitrust case, the settlement also serves as a reminder to companies of the risks that they face when managing employee personal data. In particular, the sharing of disaggregated, unblinded information regarding company employees can open up a company to data privacy risks.

The Alleged Poultry Processor Conspiracy and DOJ Settlement

On July 25, 2022, the Department of Justice (DOJ) filed a civil antitrust complaint against three of America's largest poultry processors and a data consulting firm and at the same time filed a proposed consent decree resolving the claims in the complaint. Cargill, Sanderson Farms and Wayne Farms (the processors), which employ over 90 percent of all poultry plant workers in the U.S., agreed to pay a combined $84.8 million fine to settle allegations that they conspired to suppress poultry plant workers by secretly sharing wage and benefit information in violation of the Sherman Act.[1]

According to the complaint, the processors engaged in a 20-plus-year long conspiracy to share confidential employee wage and benefit information, and collaborated on decisions about current and future worker compensation.[2] A data consulting firm, WMS, and its President G. Jonathan Meng, both named in the complaint, facilitated the exchange. Specifically, DOJ alleged that the defendants and unnamed co-conspirators shared "current or future, disaggregated, or identifiable in nature," which enabled processors to collaborate on salaries and bonuses paid for specific salaried position by plant and location, including planned future increases.[3]

To remedy the alleged violations, in addition to the collective $84.8 million fine, the settlement prohibits the processors from engaging in any of the offending conduct, including sharing competitively sensitive information about employee compensation. The settlement provides DOJ and a court-appointed monitor broad-based access to company facilities, records and personnel for 10 years, including the submission of periodic compliance reports. The parties must also submit compliance reports to a court-appointed monitor, who may hire consultants to help ensure that the parties comply with the settlement and antitrust laws, all at the parties' cost.

The settlement also forbids WMS and its President, Jonathan Meng, from offering services that would facilitate the exchange of competitively sensitive information, including through surveys, in any industry, not just primary poultry processing. As background, WMS is a national data consulting firm that specializes in human resource consulting.

Labor & Employment Issues Are in the Antitrust Cross-Hairs

The current leaders at both antitrust agencies have promised to investigate and enforce antitrust violations involving labor and employment as vigorously as other antitrust violations. DOJ Assistant Attorney General Kanter, for example, warned recently that "[H]arm to workers is an antitrust harm."[4] Likewise, Federal Trade Commission Chair Lina Khan promised heightened scrutiny: "[W]e are redoubling our commitment to investigating potentially unlawful transactions or anticompetitive conduct that harm workers. In particular, we must scrutinize mergers that may substantially lessen competition in labor markets, recognizing that the Clayton Act's purview applies to product and labor markets alike."[5]

The agencies have not been shy about pursuing labor market antitrust violations *criminally* either. Since the start of 2021, DOJ has obtained several indictments for wage fixing (i.e., agreeing among competitors to fix employee compensation) and "no poach" agreements (i.e., agreeing to not solicit and/or hire competitors' employees). These cases have implicated a variety of industries including aerospace engineers, senior-level health care executives, therapists, school nurses and home health care workers.

All this is to say that companies should treat antitrust issues on the labor and employment side with the same seriousness that they do on the business side. To that end, here are practical take-aways from the poultry processor case:

Parties that have parallel employees should evaluate labor-related antitrust issues as part of mergers and acquisitions (M&A)-related antitrust diligence. Companies doing strategic deals should evaluate the potential impact to competition for employees as part of their standard pre-deal antitrust analyses. Theoretically, a merger could harm any type of employee from executives down to low-skilled temp workers. Practically, though, the risks may be greatest at the lower rungs of the wage scale. The poultry processor conspiracy, for example, implicated lower-paid, skilled processing plant employees such as "live hangers" (who grab, lift and hang chickens for slaughter), butchers and plant mechanics, *not* white collar managers. While we have yet to see the antitrust agencies challenge a merger based solely on harm to employees, DOJ's challenge to the Penguin Random House/Simon & Schuster merger (the trial of which began on August 1) comes close.[6] There, DOJ alleged that the merger would lead to lower fees and advances paid to authors (who are independent contractors), but, importantly, did not allege that the prices of books would increase. It is not hard to imagine a future merger challenge premised exclusively on harms to employees.

DOJ's complaint offers insight about how the agencies may define antitrust labor markets. In its complaint, DOJ clustered all poultry processing jobs—whether salaried or hourly and regardless of whether these workers performed different tasks within the supply chain—into a single market for primary poultry processing labor. In these situations, the allegations focus on buyer (or monopsony) power, not market power in the sale of goods or services, but still relies fundamentally on substitution. But testing "substitution" in labor is complicated by factors such as location, family, broader macroeconomic conditions, company- or industry- specific conditions, and the relative infrequency of switching jobs. DOJ justified its approach for three primary reasons: First, from the workers' perspective, they would view another poultry processor as a close substitute because the working conditions, tasks and skills are

similar. Second, conversely, from a poultry processor's perspective, it would likely consider a candidate working a similar job at a different poultry processor as a close substitute. Third, DOJ clustered all of these jobs into a single alleged market much like the treatment of groceries into a market for supermarkets. In this case, DOJ's case was easier because it had a body of specific information exchanges covering repeated but common ranges of jobs.

This approach may be more difficult in a merger context, though. DOJ cited to a version of the traditional product market test: could a single employer of all primary processing jobs profitably lower wages or benefits by a small but significant amount? But skills acquired in one industry may be transferrable to other industries. This is common with managers and C-suite executives, among others. Here, DOJ focused on workers involved in poultry processing, which excluded workers outside of this supply chain (including workers in beef and pork processing plants). But it would not be difficult to imagine a situation where, in response to a reduction in wages, a worker takes a job that requires lesser included skills but offers a better working environment, or where a worker invests in training to take a higher-paying job in a different industry. Consequently, employers may want to conduct departure interviews, consistent with applicable laws, to learn where departing employees take their next post.

Merging parties' documents in merger investigations can be scrutinized for other antitrust violations. Notably, this action came only days after Wayne Farms completed its acquisition of Sanderson Farms. DOJ closely scrutinized the deal, including by investigating whether the deal would result in lower wages and benefits for poultry plant workers. DOJ closed its investigation at the last minute despite reports that it was considering bringing a suit.[7] While reports indicate that a 2019 private wage-fixing suit—and not the Wayne Farms/Sanderson Farms deal—brought this conduct into light and that DOJ did not condition the approval of Wayne Farms/Sanderson Farms on the settlement,[8] the timing is hard to ignore.

Whether the settlement was connected to the Wayne Farms/Sanderson Farms merger investigation or not, this close connection serves as a reminder that the agencies can and will scrutinize merging parties' documents for existing, independent antitrust violations. In in-depth merger investigations that are subject to the Hart-Scott-Rodino (HSR) Act, the merging parties are required to submit voluminous documents from a range of key company decision-makers, including, among other things, presentations, analyses, reports, emails, text messages, chats and other similar documents. The agencies have always scrutinized party documents for evidence of cartel behavior such as price-fixing and bid-rigging. Now, merging parties can expect the same scrutiny for labor issues, including wage fixing, anticompetitive benchmarking or information sharing activities, and overly-restrictive non-compete agreements with employees.

HR professionals and other employees who set wages should receive antirust guidance and training just like employees who set pricing and quantity receive. Employees responsible for pricing often receive antitrust guidance and training about a range of topics, including price-fixing and bid-rigging, communicating with competitors, trade association meetings, information-sharing and benchmarking, competitive intelligence, mergers and acquisitions and competitor collaborations. These topics also apply to HR professionals and other employees responsible for setting wages, and perhaps more-so. And the importance of antitrust training may be greater because the issues are newer and may not be familiar for those employees.

Compensation benchmarking remains an area of risk. Compensation benchmarking has long been a source of antitrust risk; this is just a recent example. While there are some good rules of thumb—e.g., use a third party to manage the benchmarking study, include five or more competitors, none of which can represent 25 percent or more of the data, aggregate and blind the output, etc.—these approaches are not panaceas. Indeed, the alleged conspirators in the poultry processing conspiracy used some of these elements to create the outward appearance that they were complying with the antitrust laws. When in doubt, it is best to consult antitrust counsel before embarking on a compensation benchmarking study.

Data Privacy Risks Can Arise Too When Sharing Employee Data

While this may be an antitrust action, it contains some important lessons for handling personal data that companies should pay close attention to. In general, companies can only collect and process personal data of employees that is necessary and relevant to their job. This can include resumes, references, payroll information, medical files, employment contracts, compensation and benefits, and performance reviews. Various state laws extend specific privacy protections to employee data, such as Connecticut's law for workstation and email privacy, and federal agencies may have recommended guidance for handling employee data, such as the Equal Employment Opportunity Commission's (EEOC) recent guidance to help employers ensure their employee assessment algorithms avoid violating the Americans with Disabilities Act (read more on this guidance here).

By sharing disaggregated, unblinded employee data, the poultry processors in this case also ran the risk of violating data privacy laws. Depending on the jurisdiction, the processors might have separate obligations to safeguard employee data, likely requiring either the consent of the employees themselves or a legitimate business purpose. Some states have passed comprehensive data privacy laws, namely: the California Consumer Privacy Act (CCPA), Virginia Consumer Data Privacy Act (VCDPA), Colorado Privacy Act (CPA), Utah Consumer Privacy Act (UCPA) and the Connecticut Data Privacy Act (CTDPA). Businesses may also find themselves subject to international data privacy regulations, such as the European Union's General Data Protection Regulation (GDPR). These laws may impose additional obligations, such as requiring businesses to enter into contracts with service providers with whom they disclose their employees' and other individuals' personal information. Laws like the CCPA might require a business to provide notice to employees at collection of their personal information, and may also hold obligations for third parties a business shares information with, limiting what that third party is able to do with the information. At the time of this writing, these CCPA requirements for employee data are set to expand after January 1, 2023. Violations could mean enforcement from agencies (such as the California Privacy Protection Agency), state attorneys general or, in some cases, individual private actions. Companies that have not already done so should conduct an assessment to find out what types of data they hold and what data privacy laws they may be subject to, as part of their data management and benchmarking practices.

[1] *U.S. v. Cargill Meat Solutions Corp. et al*, 1:22-cv-01821 (D. Md. 2022), available at https://www.justice.gov/opa/press-release/file/1521611/download.

[2] *Id.* at 2.

[3] *Id.* at 6.

[4] J. Queen, DOJ Antitrust Head: No 'Chickenshit Club' Despite Losses, *Law360* (Apr. 21, 2022), https://www.law360.com/competition/articles/1486196/doj-antitrust-head-no-chickenshit-club-despite-losses?nl_pk=262ac0d4-bcda-41ec-974b-3eb6fff15803&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2022-04-22.

[5] Lina Khan, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598791/remarks_of_chair_lina_m_khan_at_the_joint_labor_workshop_final_139pm.pdf.

[6] https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon.

[7] Continental Grain-Cargill/Sanderson Farms: As Investigation Nears 11-Month Mark, DOJ Still Weighing Whether to Sue to Block the Deal, The Capitol Forum (Jun. 29, 2022).

[8] M. Acton, Comment: With $85 million poultry-processing settlement, US DOJ scores much-needed win in labor markets, mLex (Jul. 25, 2022).

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