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# Business Law Information Memo

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## SALARY SURVEY MAY VIOLATE ANTITRUST LAW

Companies sometimes participate in salary and wage surveys with other companies in their industry. A recent decision by the United States Court of Appeals for the Second Circuit has called into question the legality of some salary surveys among competitors under federal antitrust law. *Todd v. Exxon* (decided December 20, 2001).

### Background of *Todd v. Exxon*

Roberta Todd commenced a class action lawsuit against Exxon and thirteen other major oil companies alleging an unlawful arrangement involving the exchange of salary information by employers in the oil and petrochemical industry. She brought the class action on behalf of herself and other current and former Exxon nonunion managerial, professional and technical (MPT) employees. It was further alleged that the fourteen companies account for 80-90% of the industry's revenues and employees. The fourteen companies regularly shared information regarding compensation paid to MPT employees and allegedly used the information to set the salaries of those employees at artificially low levels.

It was alleged that as a result of the surveys Exxon was able to lower its annual MPT salaries by \$20 million.

The fourteen companies used an outside consultant to compile and distribute the salary information. The information included past and current salary information, and company Human Resource personnel participated in regular meetings at which current and future salary budgets were discussed.

Ms. Todd alleged that her employer, Exxon, used the salary data to maintain Exxon's MPT salaries slightly above the so-called "Six Majors" and below three higher-paying competitors. Furthermore, she alleged that Exxon used the data to adjust its salary levels only by those percentages needed to maintain alignment with salaries offered by its competitors. Among the alleged negative impacts on MPT employees was their inability to obtain employment at significantly higher salaries at other companies in the oil and petrochemical industry; it was alleged that the data stabilized salary levels at the fourteen companies within narrow ranges.

The lower court dismissed Ms. Todd's claim. The Court of Appeals reinstated her claim deciding that she has adequately alleged a violation of Section 1 of the Sherman Antitrust Act for an unlawful information exchange. Sherman Act Section 1 prohibits unreasonable agreements which limit competition.

### Legal Problems With Survey

Although the fourteen major oil companies took the advisable course of hiring an outside consultant to compile and distribute the salary information, the Court of Appeals found several problems with how the survey was conducted and the information was used. Among the problems identified by the Court of Appeals was that company specific information was distributed so that the participating companies could easily identify the results with specific companies. Furthermore, the data was not only past salary information but included current information as well as future salary budgets. The Court of Appeals

was also troubled by the allegation that the fourteen companies exchanged massive amounts of extremely detailed information. Human Resource personnel at the companies held regular meetings at least three times per year to exchange and discuss salary and salary related information; these meetings included discussions of individual company's current and future salary budgets for MPT employees. The data exchanges were accompanied by assurances that the information would be used in setting the salaries of MPT employees. In addition, the Court of Appeals was troubled that the results were kept private by the fourteen companies, and the results were not available to the employees whose salaries were the subject of the survey or to the public.

## Lessons Learned

When the courts and federal antitrust enforcement agencies, the U.S. Department of Justice and the Federal Trade Commission, examine an information exchange among competitors to determine whether the conduct, like a salary survey, is reasonable (legal) or unreasonable (illegal), there is a broad factual inquiry into the nature, scope and effect of the conduct. No one factor is determinative. However, from the Second Circuit's opinion in *Todd v. Exxon*, factors can be identified which will reduce or increase risk of an adverse determination under federal antitrust law. Those risk factors are outlined in the chart below.

<b>Risk Factors – Salary Surveys With Competitors</b>	
<b>Reduce Risk of Illegality</b>	<b>Increase Risk of Illegality</b>
1. Third party used to obtain, compile and distribute information	1. Information provided directly to competitors
2. Past information only	2. Current information and future plans
3. Aggregated averages only distributed	3. Detailed company specific results distributed
4. No discussions or meetings with competitors about information	4. Frequent discussions and meetings with competitors about information
5. No understanding about use of information	5. Assurances among competitors about use of information
6. Publicly available results	6. Privately kept results

## Conclusion

Salary and wage surveys can be legally conducted. However, the recent decision in *Todd v. Exxon* is a warning to companies that unless the surveys are carefully structured and implemented, there can be risks that the surveys will be found to violate federal antitrust law.

If you would like legal advice on your salary and wage survey practices, please contact our firm. We can help you structure salary and wage surveys to comply with federal antitrust law. If you would like additional

information regarding *Todd v. Exxon*, salary and wage surveys or antitrust compliance programs, please contact your BS&K attorney or one of the attorneys listed below.

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