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Wage fixing and no-poach provisions in the Competition Act: backgrounder and frequently asked questions

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On June 23, 2023, the criminal no-poach and wage fixing provisions added to the Competition Act (Act) in June 2022 will come into effect. The Competition Bureau (Bureau) released its much-anticipated official guidance on the new provisions (Guidelines) earlier this week. The Guidelines build upon a prior draft released for consultation in January and provide helpful direction from the Bureau on its anticipated enforcement approach and priorities for the new criminal provisions. The Guidelines also provide a handful of example scenarios and analysis.

The Guidelines confirm that there will continue to be scope for commercially justifiable agreements between employers affecting the hiring and treatment of employees under a range of circumstances, including in the context of corporate transactions, franchise networks, and outsourcing and other services agreements. On the other hand, the Guidelines clearly outline the wide range of circumstances in which businesses will need to anticipate and manage increased risks, including in relation to no-poach agreements, benchmarking activities and communications between human resource professionals.

The Guidelines are not binding on a court or the Bureau, but nevertheless provide useful guidance on interpretation of the new provisions and expected enforcement approach.

Building on our prior discussions,[1] this Update provides a refresher on the new provisions and answers the most frequently asked questions (FAQs).

Backgrounder: new criminal offences and penalties

As of June 23, 2023, it will be a criminal offence under section 45(1.1) of the Act for unaffiliated employers to agree to fix or control wages or other terms of employment (Wage Fixing Provision), and a criminal offence for unaffiliated employers to agree to not solicit or hire each other's employees (No Poach Provision). The provisions will apply to agreements entered into by employers on or after June 23, 2023, and to conduct that reaffirms or implements older agreements which contravene the provisions. Importantly, the criminal offences apply to agreements between employers, regardless of whether they compete and do not require that an agreement have any market impact to be illegal.

Similar to the existing criminal conspiracy offence under section 45(1) of the Act:

- the prosecution must prove the elements of these new offences beyond a reasonable

doubt; however, the court may infer the existence of an agreement from circumstantial evidence;

- existing defences and exemptions will continue to apply, most importantly in this context, the ancillary restraints defence and the collective bargaining exemption;
- prescribed penalties are fines with no statutory limit and determined at the court's discretion, imprisonment of up to 14 years, or both; and
- additional liabilities include exposure to civil actions by private parties (on an individual or class basis) for civil damages regardless of whether the Commissioner or the Attorney-General take any action, debarment under the Federal Integrity Regime or provincial equivalents, and reputational damage.

The following FAQs concern the application, administration, and enforcement of the new criminal provisions. These FAQs are of a general nature and should not be regarded as legal advice.

Frequently asked questions

Who is subject to the new criminal provisions?

The new criminal provisions capture agreements between unaffiliated employers to:

- fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or
- not solicit or hire each other's employees.

The new criminal provisions are aimed at agreements between unaffiliated employers that impose "naked restraints" on competition in labour markets, including restraints on wages, job mobility or opportunities. It is illegal for unaffiliated employers to enter into such agreements, regardless of the effect or impact of the agreement, and regardless of whether the employers are competitors.

Who is considered an employer?

"Employer" is interpreted broadly in the Guidelines as including directors, officers, and agents or employees, such as human resource professionals. The Guidelines confirm that individuals entering into an agreement may be subject to prosecution, as would the corporations the individuals or employees were acting on behalf of, if those employees are acting as "senior officers".

The Bureau's interpretation of who is a "senior officer" is informed by the term's definition in the *Criminal Code*, which includes representatives who play an important role in the establishment of an organization's policies or are responsible for managing an important aspect of the organization's activities and, in the case of a corporation, includes directors, the CEO and the CFO.

Who are 'unaffiliated' employers?

The new criminal provisions only capture agreements between "non-affiliated" employers. No-poach and wage fixing agreements between affiliated employers are permissible.

Under the Act, one entity is affiliated with another entity if: (a) one of them is the subsidiary of the other; (b) both entities are subsidiaries of the same entity; or (c) each of them is controlled by the same entity or individual. Further, if two entities are affiliated with the same entity at the same time, they are deemed to be affiliated with each other, and an individual is affiliated with an entity if the individual controls the entity. Under the Act, an entity controls a corporation if it owns a majority of its voting shares. For a non-corporate entity, one entity controls another entity if it is entitled to more than 50% of the profits of the entity or more than 50% of its assets on dissolution.

Where the relationship between employers does not fall into one of the above prescribed categories, the employers are considered non-affiliated for the purposes of the Act and therefore the new criminal provisions will apply.

Who is considered an 'employee'?

The Act does not define employee. The Guidelines indicate that employee status will be assessed as a question of fact and applicable law.

What evidence is needed to find an 'agreement' between employers?

Similar to the sell-side criminal conspiracy offence in section 45(1), whether an "agreement" exists between unaffiliated employers turns on the facts and whether the evidence establishes an implicit or explicit "meeting of the minds" to engage in the conduct prescribed by the new criminal provisions. For greater certainty, the Act explicitly provides that "the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties". Regardless of how the existence of the agreement is proven, it must be proven beyond a reasonable doubt.

Entering into the agreement is itself the offence. Similar to the existing criminal conspiracy offence, the new criminal provisions do not require evidence or proof that the agreement was implemented, or that the agreement had any anti-competitive effect.

What types of agreements are covered by the Wage Fixing Provision?

The Wage Fixing Provision captures agreements between unaffiliated employers to fix, maintain, decrease, or control salaries or wages, as well as "terms and conditions of employment".

"Terms and conditions of employment" is interpreted broadly in the Guidelines to include terms and conditions that could affect a person's decision to enter or remain in an employment contract. Examples provided include job descriptions, allowances (e.g., per diems or mileage reimbursements), non-monetary compensation, working hours, location, and non-compete clauses.

What types of non-solicit/no-hire agreements between employers are covered?

The No-Poach Provision prohibits agreements between unaffiliated employers to not solicit or hire each other's employees.

Consistent with the wording of the provision, the Guidelines confirm the No-Poach Provision only prohibits reciprocal agreements between the employers not to solicit or not to hire and provide the following example:

Company A is a consulting company who embeds its employees in its clients' businesses for a set period of time. As part of a consulting contract, Company B agrees to not hire Company A's embedded employees. Company A does not make the same agreement regarding Company B's employees.

The Guidelines confirm that this agreement would not violate the No-Poach Provision because there is no reciprocity between Company A and Company B. The no-hire agreement applies only with respect to Company B not hiring Company A's employees, and Company A does not make the same agreement with respect to Company B's employees.

Also, note that the Guidelines state that where an agreement limits an employee's job opportunities, the Bureau may examine whether the limitation is in furtherance of a no-poaching agreement. Examples of such limitations include restrictions on the communication of information relating to job openings and the adoption of biased hiring mechanisms. Under such circumstances, there must still be evidence of an agreement to not hire or solicit each other's employees.

What if an agreement has no negative impact on competition or affected employees?

The new criminal provisions are *per se* illegal. This means that entering into the agreement itself is sufficient to establish the offence, regardless of whether the agreement is implemented and regardless of whether there are anti-competitive effects, or effects on employees.

When does the ancillary restraints defence apply?

The ancillary restraints defence (ARD) is available when a party proves on a balance of probabilities that a restraint that would otherwise violate section 45 is: (a) ancillary to a broader or separate legitimate agreement that includes the same parties, and (b) directly related to, and reasonably necessary for giving effect to, the objective of the broader or separate agreement.

By way of example, the Guidelines state that the Bureau will generally not investigate no-poach agreements that are ancillary to merger transactions, joint ventures, strategic alliances, as well as business arrangements such as franchise agreements and certain service provider-client relationships, under the new criminal no-poach provisions, unless the agreements are "clearly broader than necessary in terms of duration or effected employees", or where the broader agreement is a "sham".

To determine whether a restraint is ancillary, the Bureau will examine the terms and form of

the agreement, the relationship between the restraint and the broader agreement, and how the restraint furthers the broader agreement's purpose. The Bureau will consider the restraint's duration, subject matter, and geographic scope (e.g., whether it applies to employees unrelated to the collaboration). Similar to the Bureau's analysis undertaken in the context of the criminal conspiracy provision in section 45(1), the Guidelines indicate that, while the Bureau will not generally "second guess" the parties, the Bureau will be prepared to conclude that an agreement was not reasonably necessary where the parties could have achieved an equivalent or comparable arrangement through practical and significantly less restrictive means that were reasonably available to the parties.

As with the criminal conspiracy provision in section 45(1), where the Bureau determines that an agreement does not violate section 45(1.1), the Bureau may still review the agreement under the reviewable practices provisions found in Part VIII of the Act and, if the Bureau determines that the agreement is likely to result in a substantial prevention or lessening of competition, the Commissioner may apply to the Competition Tribunal for a remedy.

What is an example of a provision to which the ancillary restraints defence would apply?

Non-solicits are routinely entered into in the context of joint ventures, as such clauses are usually intended to protect trade secrets/goodwill or protect (and therefore incentivize) investments in employee training. Such provisions, when reasonably drafted, are unlikely to raise concerns under section 45(1.1).

What is the difference between a non-solicit and a no-hire?

A no-hire is substantively different from a non-solicit, as a no-hire imposes a higher degree of restriction on an employee's mobility and job opportunities. Accordingly, a no-hire will likely require a more compelling justification for it to be found to be reasonably necessary, such that the ARD would apply.

Is information sharing and benchmarking still permissible?

Sharing information covered under the new provision, such as wages or terms of employment, is not itself illegal. However, as is the case with sharing competitively sensitive information with downstream competitors, sharing of information by employers, if not carried out very carefully, carries the risk of facilitating an illegal agreement and may be viewed as circumstantial evidence of an agreement contrary to section 45(1.1). Accordingly, while employment benchmarking activities amongst employers are permissible, care must be taken in how such information is exchanged to avoid the risk of facilitating or suggesting an agreement between employers on the relevant subject matter.

Benchmarking best practices include ensuring that:

- a neutral third party under confidentiality obligations manages all aspects of the information exchange;
- the information exchange involves only historical information;
- the information exchange involves enough participants such that specific data points cannot be reverse-engineered or connected to the original source; and

- the information is anonymized (and, in some cases, aggregated) prior to being shared with the participants.

Do the new criminal provisions apply retroactively to conduct that occurred in the past?

No. Section 45(1.1) only applies to new agreements entered into by unaffiliated employers on or after June 23, 2023, and to conduct taken on or after June 23, 2023, that reaffirms or implements older agreements.

What should I do about no-poach or non-solicitation provisions in existing agreements that are still in force?

The Bureau's position set out in the Guidelines is that existing agreements with no-poach or non-solicitation provisions will not attract scrutiny provided that no steps are taken to reaffirm or implement the provision on or after June 23, 2023. While employers therefore are not required to amend existing agreements, depending upon the circumstances, it may be advisable to document the fact that the employer does not intend to abide by or enforce the provision. In addition, significant care should be taken before taking any action that may be interpreted as enforcing an existing non-solicit or no-hire provision. The Guidelines helpfully clarify that at least two parties to a pre-existing agreement need to reaffirm or implement the restraint to establish that there was the required "meeting of the minds".

How do the new provisions apply in the franchise context?

Provisions relating to hiring and limiting solicitation are common in franchise agreements, such as where, as a condition of participating in the franchising system, the franchisee will agree with the franchisor that the franchisee will not solicit or hire the employees of other franchisees within the system. The Guidelines acknowledge that certain restraints can play a legitimate and important role in the franchise context, and that the Bureau will not take issue with such restraints as long as they are not broader than necessary.

Importantly, the Guidelines clarify that, where a franchisor enters into agreements with each of its franchisees that the franchisee will not poach the employees of other franchisees, and the franchisees have a common understanding that each franchisee has entered into a similar agreement, this will not be viewed as an agreement amongst the franchisees unless there is evidence of an intention between franchisees to enter into a no-poaching agreement with each other.

Are there special rules that apply to collective bargaining?

Yes. Pursuant to section 4 of the Act, nothing in the Act applies with respect to certain collective bargaining activities, including agreements entered into between employers in a trade, industry, or profession in the course of collective bargaining with their employees. The collective bargaining activities can relate to salary/wages or terms or conditions of employment, and such agreements are exempted regardless of whether the agreement was entered into directly between employers or through a member association.

[1] See Osler Updates, "First round of proposed amendments to the Competition Act revealed" (May 2, 2022), "First round of amendments to the Competition Act now in effect" (June 24, 2022), "Franchisors beware: amendments to the Competition Act criminalize no-poach and no-hire provisions" (November 24, 2022). Refer also to Osler's Legal Year in Review, "Big changes to competition and foreign investment law and policy in Canada" (December 2022).