An overview of the Competition Bureau's enforcement guidance on wage-fixing and no-poaching agreements

January 31, 2023

This insight has been updated on March 1, 2024.

Overview

The criminalization of wage-fixing and certain no-poach agreements in Canada took effect in mid-2023. The Canadian Competition Bureau (the Bureau) has finalized its enforcement guidelines on wage-fixing and no-poaching agreements (the Guidelines) that describe how it plans to enforce these new provisions (subsection 45(1.1)) of the *Competition Act* (the Act) that make wage-fixing and no-poaching agreements amongst any[1] two or more unaffiliated employers[2] criminal offences. This change has moved the Canadian approach to such matters closer that to that taken in the U.S.

What you need to know

- As of June 23, 2023, it is a criminal offence for two or more employers to agree to fix salaries/wages or terms and conditions of employment, or to agree not to poach each other's employees.
- These agreements may remain legal under certain circumstances, specifically if they are ancillary restraints that are directly related to and reasonably necessary for achieving the objective of a broader, otherwise legal agreement, including legitimate collaborations, strategic alliances, or joint ventures.
- The Bureau states it is unlikely to find wage-fixing or no-poaching agreements problematic when parties take no steps to reaffirm or implement the restraint on or after June 23, 2023. At least two parties must reaffirm or implement the restraint for the Bureau to find the requisite intent or "meeting of the minds".
- Employers should review and update pre-existing company records and agreements to accurately reflect their policies and intentions regarding wage-fixing and no-poaching, avoiding any conduct that reaffirms or implements problematic terms.

Prohibited agreements

a. Wage-fixing agreements

The new criminal wage-fixing provisions prohibit agreements among any two or more employers[3] to fix, maintain, decrease or control salaries, wages or terms and conditions of employment subject to some limited defences and exceptions.

As a starting point, it is important to note that even tacit or unwritten agreements or arrangements among employers to wage-fix or not to poach employees will be caught by these new provisions. Further, circumstantial evidence suggesting the existence of such an agreement or arrangement can be sufficient to convict. From a compliance perspective, this means that employers must be mindful of the risks of informal communications with other employers with respect to terms of employment for workers and take steps to discourage contacts (especially, but not limited to, HR professionals) that may present issues under the new provisions.

The Bureau considers "terms and conditions of employment" to be any terms or conditions that could affect a person's decision to enter into or remain in an employment contract. It provides examples including job descriptions, allowances, mileage reimbursements, non-monetary compensation, working hours, working location and non-compete clauses or other directives that may restrict an individual's job opportunities. This means that a broad range of terms and conditions are potentially caught – for example, an agreement among employers to require employees to work on-site for a certain duration per week, or to limit reimbursement for employees' home office expenses, could be problematic.

b. No-poaching agreements

The new criminal no-poaching provision prohibits agreements between employers not to solicit or hire each other's employees. Where an agreement limits an employee's job opportunities, the Bureau may examine whether the limitation is designed to prevent employees from being poached or hired by another party to the agreement. Such limitations may include restrictions on sharing information about job openings and the implementation of biased hiring processes.

The Guidelines clarify that the no-poaching provision applies only to "each other's" employees. When a restraint only applies to one employer, it is viewed as "one-way" and not subject to enforcement. However, when separate agreements result in reciprocal promises not to poach, enforcement action may be taken. Therefore, it will not be an offence when only one party agrees not to poach another's employees. Rather, where there are separate agreements that result in two or more employers agreeing not to poach each other's employees, the Bureau considers the separate agreements to amount to one no-poaching agreement between the employers. This statement of enforcement policy provides some comfort to employers about the risk of agency scrutiny of no-poach agreements under the criminal provision. Having said that, however, the Guidelines are not law, and it remains a theoretical possibility that plaintiffs in civil damages cases may seek a broader reading of the provision, particularly in competition class actions.

Defences

a. The new provisions do not apply where wage-fixing or no-poach terms are ancillary to a broader agreement

The "ancillary restraints defence" applies, allowing wage-fixing or no-poach agreements as part of broader agreements if they are directly related to and reasonably necessary for the broader agreement's objectives, without violating subsection 45(1.1). This defence is like the U.S. concept of ancillarity under section 1 of the Sherman Act and means that wage-fixing or no-poach agreements which would otherwise violate the new provisions will not be offences if they are both directly related to and reasonably necessary to give effect to a broader, otherwise legal agreement.

The Guidelines state that the Bureau will generally not consider wage-fixing or no-poaching clauses that are entered into in the context of mergers, joint ventures or strategic alliances to violate the new provisions. However, the Bureau will not automatically apply the defence to franchises and certain service provider-client relationships (*i.e*., staffing or IT service contracts) to, for example, not hire or solicit each other's employees. Whether the defence applies to no-poaching agreements these latter types of business arrangements will be case-specific and depend on the whether the employers can prove that the no-poaching clause is necessary and flows from the broader franchise agreement.

Certain other legal defences or exceptions, such as the regulated conduct defence[4] and the collective bargaining exemption may apply to wage-fixing and no-poaching agreements. Parties should consult counsel to determine whether any of these defences may apply.

b. The new provisions will not apply to old, unenforced agreements

The Guidelines state that the Bureau will not consider terms in old (pre-June 23, 2023) agreements that remain in force to violate the new provisions. Therefore, old terms in agreements that might violate the new provisions do not need to be removed by explicit amendments; they just cannot be enforced.

However, the new provisions will apply where problematic terms in old agreements are enforced or reaffirmed. Whether a post-June 23, 2023 extension or other amendment of an old agreement with terms that violate the new provisions could be seen as a "new agreement" in the Bureau's eyes remains unclear.

Penalties for failing to comply

The new provisions are criminal offences, punishable by imprisonment for up to 14 years or a fine to be set at the discretion of the court (with no statutory maximum), or both.

Additionally, people who are harmed as a result of parties entering into criminal wage-fixing and no-poaching agreements may seek to recover damages suffered from such conduct, including through class actions, which are now an established method of collective redress in Canada.

Third party salary benchmarking

The new provisions do not mean that third parties, such as data service providers and/or industry associations, cannot collect information on wages, salaries and terms of employment from various parties in a sector for purposes of disseminating reports on trends. While the Guidelines do not specifically reference this, the same principles outlined in the Bureau's bulletin on trade associations that apply to sharing pricing information amongst such associations will apply.

This means that parties can share salary, wage or terms of employment information with third parties for purposes of benchmarking reports provided that the following safeguards are observed:

- Information on any party's salaries, wages and terms of employment may only be shared with the third party conducting the survey, not with any other employer
    - Absent special circumstances, only past or present information should be shared – not information on future intentions
- The third party must aggregate the information and anonymize it before disseminating a report on trends/benchmarks to the contributing parties
    - Enough parties' information should be aggregated to prevent ensure that no party can link any data to a particular source

Conclusion and key action items

Practically speaking, businesses should ensure compliance with these provisions and implement risk reduction strategies and policies. These steps should include the following:

- HR, competition compliance and other relevant policies should explicitly prohibit any coordination with other employers that could be construed as wage-fixing or no-poach agreements. They should also prohibit any contact with other employers that could support an inference of such agreements.
    - Policies must be clear that the prohibition applies to any terms and conditions that could affect a person's decision to become or remain an employee.
    - Policies should explicitly provide that existing terms in agreements entered prior to June 23, 2023 that would violate the new provisions may not be enforced.
- All employees that could be in a position to engage in discussions with other employers, including senior executives, HR and recruitment professionals, should be trained regularly on adherence to the above policies.
- Sharing of current/historical information on salaries and other terms and conditions of employment with third parties who aggregate this information and provide anonymized benchmarking reports may remain acceptable. However, counsel should be consulted prior to providing any such information to a third party or receiving results.

For more information on compliance with these new criminal provisions, please contact any of the key contacts listed below.

[1] There is no requirement that the employers compete with each other for the sale of products or services. All employers are considered to compete with each other for employees under the new provisions.

[2] The Guidelines state that the Bureau considers "employers" to include directors, officers, as well as agents or employees, such as human resource professionals. Therefore, for example, an agreement between an officer of a corporation and a director of another company would be considered an agreement between employers under the new provisions. The individuals who entered into the agreement would be subject to prosecution, and if those employees are senior officers, their companies could also be subject to prosecution.

[3] Franchisors and franchisees, as well as separate franchisees of the same franchisor, are not affiliated, so the new provisions apply to agreements amongst them.

[4] This is a narrow exception to the application of certain provisions of the Act, including the new provisions, with respect to certain conduct that is regulated by another federal, provincial or municipal law or legislative regime. We have previously written about one application of the defence.

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