JUNE 22, 2023

Employers Beware: Amendments to the Canadian *Competition Act*'s Criminal Conspiracy Provisions Take Effect

Authors: Anita Banicevic and Alysha Manji-Knight

Amendments to the Canadian *Competition Act* (Act), taking effect on June 23, 2023, will make it a criminal offence for unaffiliated employers to agree, conspire or arrange to

- "fix, maintain, decrease or control salaries, wages or terms and conditions of employment" (wage-fixing agreements); or
- "not solicit or hire each other's employees" (no-poach/non-solicit agreements).

For the purposes of the new offences, employers are "affiliated" with one another if they are under common control, such as parent, subsidiary and sister companies.

The penalties associated with a breach of these offences are significant and include imprisonment of up to 14 years and/or unlimited fines at the discretion of the court. In addition, the Act provides a statutory cause of action to any person who has suffered loss or damage arising from a breach of these provisions, creating significant employer exposure to class actions.

By enacting these new offences, Canada joins other jurisdictions, most notably the United States, in placing new emphasis on protecting employees from allegedly anticompetitive conduct in labour markets. According to the Competition Bureau (Bureau), maintaining and encouraging competition among employers will lead to higher wages and salaries, as well as better benefits and employment opportunities for employees.

To assist Canadian employers with compliance, the Bureau has issued Enforcement Guidelines that, while non-binding, set out the Bureau's position regarding the enforcement of these offences.

We review key aspects of the new wage-fixing and no-poach prohibitions and the Bureau's Enforcement Guidelines, and provide tips and considerations to help businesses manage compliance risk.

Key Aspects of the New Wage-Fixing and No-Poach Provisions

New Prohibited Agreements Need Not Be with Competitors

The wage-fixing and no-poach offences apply regardless of whether employers engaging in the prohibited conduct compete with one another, whether in the provision of goods and services or as purchasers of labour. As a result, the scope for liability with respect to these provisions is much broader than for the existing cartel provisions in the Act. However, the Bureau notes in its Enforcement Guidelines that it expects to "prioritize its enforcement on wage-fixing and no-poaching agreements between employers that would otherwise compete in the purchase of labour."

Do the New Provisions Apply to Existing Agreements?

The new offences clearly apply to agreements entered into on or after June 23, 2023. In addition, the Bureau takes the position that any reaffirmation or implementation of an existing agreement after June 23 by more than one party will also be caught by the new provisions if it is sufficient to constitute a continuing agreement or arrangement between such parties.

Prohibited Wage-Fixing Agreements Extend to "Terms or Conditions of Employment"

The new offences prohibit agreements or arrangements between unaffiliated employers relating not only to wages and salaries but also to "terms or conditions of employment." According to the Enforcement Guidelines, the Bureau takes the position that "other terms or conditions of employment" should be broadly interpreted to include "job descriptions, allowances such as per diem and mileage reimbursements, non-monetary compensation, working hours, location and non-compete clauses, or other directives that may restrict an individual's job opportunities."

While it remains to be seen whether courts will agree with the Bureau's interpretation of the scope of "terms or conditions of employment," employers should be prudent and consider seeking counsel in respect of proposed agreements with other employers that may fall within the Bureau's broad interpretation.

*All***Reciprocal** *Non-Solicit Agreements Should Be Carefully Reviewed*

The new offences could capture non-solicitation arrangements and other employee-related provisions in common commercial agreements such as joint ventures, mergers, and purchases and sales of businesses that involve some restrictions on hiring or changes to salaries, wages and/or employment terms and conditions.

The application of the non-solicit provision is, however, limited to agreements to "not solicit or hire *each other's employees*" (emphasis added), meaning that only reciprocal agreements by at least two parties will be prohibited. As a result, when only one party agrees not to solicit the other's employees (as is often the case as part of a purchase and sale transaction) there will generally not be an offence under the no-poach provision.

Potential Application of New Provisions to Mergers, Joint Ventures and Strategic Alliances

The Enforcement Guidelines also say that the Bureau will not "generally assess wage-fixing or no-poaching clauses that are ancillary to merger transactions, joint ventures or strategic alliances under the criminal provisions." However, the Enforcement Guidelines go on to state that the Bureau may initiate an investigation where those clauses are clearly "broader than necessary in terms of duration or affected employees or where the business agreement or arrangement is a sham." However, for such agreements to be pursued criminally, the agreements would need to fall within either the scope of the new wage-fixing/non-solicit provisions or the existing criminal conspiracy provisions (which apply only to certain types of agreements between competitors).

The Bureau also notes in its guidance that, even if they are outside the scope of the criminal offences, such agreements may still be examined under the reviewable matters provisions of the Act (including the civil competitor agreements provision), which consider the impact of the conduct on competition. Consequently, businesses should carefully evaluate the justifications for the scope of any covenants that restrict employment-related matters, even when they are negotiated as part of a broader lawful commercial transaction.

Exchanges of Employment Information May Create New Risks

As with the general criminal conspiracy offence, the new offences do not expressly prohibit the exchange of information regarding salaries, wages and other terms and conditions of employment. However, the Bureau's view is that information exchanges can serve as circumstantial evidence of the existence of unlawful agreements. As a result, the sharing of confidential information about hiring practices, compensation and other terms of employment, such as may occur with respect to human resources (HR) benchmarking exercises and hiring/compensation surveys, could be used as evidence to support allegations of illegal wage-fixing and no-poach agreements. It is therefore important for employers to exercise caution when sharing potentially sensitive employment information, in much the same way they have done historically with respect to sensitive price and cost information.

How the New Provisions Apply to Franchise Agreements

The Bureau acknowledges that employment-related restraints may have a legitimate role in franchise agreements. Nonetheless, the Enforcement Guidelines signal that there could be significant risk associated with any coordinated attempt by two or more franchisees to enforce a franchise agreement's no-poaching restraints against another franchisee.

Ancillary Restraints Defence Is Available for the New Offences

Defences may be available under certain scenarios. Most significantly, the Act's ancillary restraints defence (ARD) will apply where the restraint is both ancillary to a broader lawful agreement between the same parties and is directly related and reasonably necessary to achieve the objective of that broader agreement. Application of the ARD will involve considerations such as

- the duration of the ancillary restraint;
- the subject matter of the restraint;
- its geographic scope;
- whether the parties could have achieved an equivalent/comparable arrangement through practical, significantly less restrictive means;
- whether in the absence of the restraint, the broader agreement could be implemented only under considerably more uncertain conditions at substantially higher costs or over a significantly longer period; and
- the reasons for the adoption of the restraint.

The Enforcement Guidelines provide helpful, although limited, specific examples of when the ARD may be available, including where a staffing/recruitment contract contains a reciprocal non-solicitation clause that remains in force only for the duration of the contract. However, the Enforcement Guidelines indicate that application of the ARD will need to be assessed on a case-by-case basis to determine whether the restraint and its terms are reasonably necessary.

Practical Tips and Considerations

Given the potentially significant consequences of contravening the new wage-fixing and no-poaching provisions, businesses operating in Canada and their HR and legal professionals should review their practices and take steps to ensure compliance with these provisions. These steps may include

- **Reviewing HR practices.** Conduct an HR practices audit to help identify any red-flag conduct, including whether a business is involved in wage-fixing or no-poaching agreements with other parties or is engaging in discussions or exchanges of information on these topics – for example, through industry organizations that may share employment-related information as part of benchmarking exercises. Such an audit could include legal review of existing agreements with unaffiliated employers to assess risk and to restructure where needed.
- **Updating internal compliance and training.** Ensure that internal competition law compliance materials and training include a discussion of potential HR risks arising from the new offences, and that HR personnel as well as senior executives who participate in hiring or determining terms of employment are included in such compliance training.
- **Exercising caution with employee-related and reciprocal non-solicit restraints.** Carefully evaluate the use of reciprocal non-solicit clauses or other employee-related provisions in broader commercial agreements that may go beyond what would be considered reasonable or typical (in duration, scope and subject matter). It may also be helpful to document the rationale for any such non-solicits, non-competes or other employee-related restraints, and be prepared to demonstrate that they are reasonably necessary to give effect to the broader lawful transaction between the parties.

Key Contacts: John Bodrug, Mark Katz, Anita Banicevic, Charles Tingley, Alysha Manji-Knight and Louise Patry