Canadian Competition Bureau Issues Guidance on “No-Poach” and other “Buy-Side” Employment Agreements Between Competitors

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Introduction

The Canadian Competition Bureau (“Bureau”) has issued a statement (the “Statement”) clarifying its position on “no-poaching”, wage-fixing and other types of “buy-side” agreements between competitors that may affect employees and labour markets.

In the Statement, the Bureau expresses its concerns about the possible anticompetitive consequences of such agreements and states that it would be prepared to initiate civil enforcement proceedings in appropriate cases. Companies operating in Canada need to now take the Bureau’s position into account when assessing competition compliance risks for their businesses.

Background

In October 2016, the Antitrust Division of the U.S. Department of Justice (“DOJ”) and the US Federal Trade Commission jointly issued Antitrust Guidance for Human Resource Professionals (the “HR Guidance”), which addressed the application of U.S. antitrust laws to certain types of agreements between competitors affecting employees, including agreements (i) not to hire each other’s employees (no-poaching agreements); (ii) not to compete on wages/other terms of employment (wage-fixing agreements); and (iii) to share information regarding compensation and other sensitive employment-related matters (information-sharing agreements). The HR Guidance indicated that the DOJ intended “to proceed criminally against naked wage-fixing or no-poaching agreements”.

The HR Guidance was issued in the wake of, and has since precipitated, a variety of proceedings alleging that U.S. employers had illegally suppressed wages by entering into anticompetitive agreements affecting employees. Most notably, these lawsuits alleged anticompetitive conduct in the high-tech sector, but also in a host of other businesses and industries, ranging from academia to fast-food franchises to professional sports.

The high-profile U.S. litigation and HR Guidance sparked discussions in Canada about the potential application of the Competition Act (the "Act") to agreements between competitors affecting terms and conditions of employment. It was not clear if the Bureau had the same interest in investigating such agreements or whether it would regard these as potential criminal or civil violations of the Act. On November 27, 2020, the Bureau finally responded to this interest from the business and legal communities and released the Statement with an outline of its views.

The Statement

First and foremost, the Statement recognizes that agreements between competitors affecting employees may raise "serious competition issues" in labour and related product markets.

The Statement also clarifies that the Bureau regards such agreements as falling within the civil enforcement side of the Act and not as the potential target of criminal enforcement.

There are two principal provisions of the Act that address anti-competitive agreements between competitors: section 45 (the criminal offence prohibiting certain conspiracies, agreements, or arrangements between competitors) and section 90.1 (the civil conspiracy provision). Having received legal advice on the issue, the Bureau confirmed what most observers already believed, namely that section 45 of the Act only applies to anti-competitive agreements between competitors that affect the supply of products and services and thus does not cover anticompetitive agreements affecting the purchase of products and services, such as agreements affecting the "purchase" of employment services.

That does not mean, however, that these types of arrangements are immune from the application of the Act. Rather, the Statement clarifies that the Bureau may proceed against non-poach, wage-fixing and other such agreements under section 90.1 of the Act, which is the civil prohibition against agreements between competitors that prevent or lessen competition substantially. The application of this provision is not limited to agreements affecting the supply of products and services but applies to any type of anticompetitive agreement between competitors, including "buy-side" agreements (as the Bureau calls them).

The Statement concludes by noting that the Bureau intends to provide additional guidance on agreements between competitors that affect employees in its soon-to-be updated Competitor Collaboration Guidelines. The current draft of the updated guidelines, released for public consultation in July, does not include any reference to "buy-side" employment agreements.

What Does This Mean for Businesses in Canada?

There are important differences between criminal and civil enforcement under the Act. For example, the Bureau must show evidence of substantial anticompetitive harm to prevail in civil proceedings under section 90.1 of the Act (as the Bureau notes in the Statement, this is not a low threshold). By contrast, the criminal conspiracy offence is "per se", meaning that the authorities do not have to prove that competition was harmed by the impugned conduct. The potential repercussions for violations are also different. Whereas the criminal conspiracy offence can lead to fines, imprisonment and follow-on civil actions, the only remedy available under section 90.1 (at least without consent of the respondent) is an order prohibiting the impugned conduct going forward.

That said, companies carrying on business in Canada must not be misled into believing that “buy-side” employment agreements are not of concern simply because they are not caught by the criminal conspiracy offence. No one wants to be the target of Bureau civil enforcement proceedings either, given the time, cost, disruption and loss of reputation involved, quite apart from the possibility of intrusive prohibition orders. Accordingly, Canadian businesses are advised to take the Statement as a timely caution from the Bureau to now include employee-related matters in their competition compliance thinking and training.

Here are a few practical compliance steps to consider:

(i) Review the practices and procedures of the company’s HR department to determine whether any of the following red flags exist:
• agreements with other companies about employee salaries or other terms of compensation, either at a specific level or within a range;
• agreements with other companies about soliciting or hiring that other company’s employees;
• agreements with other companies about employee benefits or other terms of employment;
• exchanges with other companies of information about employee compensation or terms of employment; and
• discussions of the above topics with other companies, including during trade association meetings, social events or in other non-professional settings.

(ii) Ensure that internal compliance policies incorporate a discussion of the potential application of the Act to employee-related issues.

(iii) Expand compliance training to include HR personnel.

Finally, it may not always be clear when an agreement touching on employment issues may potentially violate the Act. Accordingly, it is always prudent to seek out the advice of experienced competition counsel to help assess the level of risk involved in proposed conduct that may raise concerns.

With the assistance of Teraleigh Stevenson.