Alert

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COZEN O'CONNOR

Getting Ready for Canada's Upcoming Ban on Wage-Fixing & No-Poach Agreements

Wage-fixing and no-poach agreements will be illegal and subject to criminal penalties and damages actions in Canada as of June 23, 2023, as part of a package of amendments to the *Competition Act* passed in 2022. The new provisions target agreements between unaffiliated employers in any sector or industry to fix wages or restrict job mobility and will apply whether or not the agreeing employers are competitors.

Canada's Competition Bureau has published draft guidelines that set out how it plans to interpret and enforce the new laws once they come into force. The Bureau is seeking public feedback on the draft; interested parties have until March 17, 2023, to submit comments.

All employers need to take steps now to ensure that any wage-fixing or no-poach provisions in their agreements will comply with the new laws once they take effect.

Wage-Fixing and No-Poaching Agreements to be a Criminal Offense

The new provisions make it an offense for employers to conspire with one another "to fix, maintain, decrease or control salaries, wages, or terms and conditions of employment" (wage-fixing agreements) or "to not solicit or hire each other's employees" (no-poach agreements). These offenses are *per se* offenses that do not require proof of harm to competition or effect on a market.

Offending employers are subject to a fine of an amount to be determined by the court, a prison sentence of up to 14 years, or both. There will be no maximum fine. This is the result of another amendment to the Act, also coming into effect on June 23, that will remove the current $25 million cap on fines for criminal offenses.

Two defenses may be available:

1. Ancillary restraints defense: This defense applies where the restriction is ancillary to a broader or separate agreement between the employers and is directly related to and reasonably necessary for giving effect to the objective of that broader agreement.
2. Regulated conduct defense: This defense applies where some other law, typically a provincial law, authorizes the conduct in question.

Offending employers are also at risk of civil liability. Anyone who has suffered a loss due to an unlawful wage-fixing or no-poach agreement will be able to sue to recover that loss. Class actions on behalf of employees claiming losses due to these agreements can be expected.

The new provisions will not take effect until June 23, 2023. This delay is intended to give the Bureau time to draft guidance and to give businesses time to prepare for the new provisions.

What's in the Guidelines?

While still in draft form, the guidelines offer insight into how the Bureau intends to apply and enforce the incoming wage-fixing and no-poach provisions. In particular, they help clarify what persons, conduct, and agreements the Bureau believes will be captured by the new provisions.

The guidelines are generally consistent with and meant to supplement the *Competitor Collaboration Guidelines*, which describe the Bureau's approach to the current conspiracy provisions of the Act. There are, however, key components in the guidelines specific to the new provisions.

"Employer"

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"Employer" is not a defined term in the new provisions. According to the Bureau, the term includes a company's "directors, officers, as well as agents or employees, such as human resource professionals."

It remains to be seen whether the courts will agree. In the absence of a defined term, "employer" must be understood to have the same meaning in employment law. While a company's directors and officers might be the directing minds of an employer, they are not employers of that company's employees. The question must always be whether the employer (in this case, the corporation) has entered into a prohibited agreement.

Employees vs. Independent Contractors

The draft guidelines acknowledge that there must be an employer-employee relationship for the new provisions to apply. Whether there is an employer-employee relationship "will depend on the laws and circumstances under which the relationship was entered into." Although the guidelines do not address independent contractors, it follows that the provisions will not impact agreements relating to independent contractors. However, Courts have readily found independent contractors to be employees. The new provisions will likely apply where there is, in reality, an employment relationship.

"Terms or Conditions of Employment"

The Bureau's concern is with terms "that could affect a person's decision to enter into or remain in an employment contract," such as job descriptions, working hours location, expense allowances, mileage reimbursements, other non-monetary compensation, or "other directives that may restrict an individual's job opportunities." We expect this would also include terms such as maternity leave policies, vacation and sick days, and other health and wellness benefits, but the guidelines do not mention these specifically.

No-Poach Agreements

The guidelines state that the no-poach provisions will apply to any form of agreement between employers, whether express or tacit, that limits their employees' ability to be hired by one another. They also clarify that the offense will only apply to two-sided agreements or arrangements. That is, it is not an offense for one employer to agree not to poach or solicit another employer's employees so long as there is no reciprocal arrangement of any form.

Naked Restraints vs. Ancillary Restraints

The new provisions target "naked" restraints on wages or job mobility agreed upon by unaffiliated employers—that is, those that do not operate further to a legitimate collaboration, alliance, or joint venture.

The Bureau says it will not launch criminal challenges to wage-fixing or no-poach agreements that are ancillary to mergers or other strategic business combinations unless the agreements are "clearly broader than necessary in terms of covered employees, territories or duration" or where the merger or business combination "is a sham." The guidelines caution, however, that the Bureau may still examine them under the civil reviewable matters provisions.

This approach mirrors that taken by the Bureau in its *Competitor Collaboration Guidelines*.

Old vs. New Agreements

The guidelines state that the provisions will apply to agreements entered into on or after June 23, 2023, and to any "conduct that reaffirms or implements older agreements." This suggests that the Bureau will not pursue dormant wage-fixing or no-poach agreements. That said, employers should actively terminate any wage-fixing or no-poach agreements that would not be saved by the ancillary restraints defense.

Information Sharing

The guidelines recognize that so-called "conscious parallelism" (a business acting independently with the awareness of a likely response from a competitor) does not violate section 45. Neither

does information sharing, although the guidelines do not mention this. The Bureau notes that "parallel conduct coupled with facilitating practices, such as sharing sensitive employment information or taking steps to monitor each other's employment practices, may be sufficient to prove that an agreement was concluded." In short, information sharing may support an inference that an unlawful agreement exists.

In our view, warning against "taking active steps to monitor each other's employment practices" goes too far. Competitors actively monitor each other's behavior in the marketplace—almost by definition, firms cannot behave independently of competitors in a competitive market. They may have to, for example, decrease prices or improve quality in response to what their competitors are doing. Similarly, employers may have to match improved salaries and benefits offered by other employers competing to attract the same workers.

Implications for Franchises

No-poach clauses are often found in franchise agreements. The draft guidelines make clear that the Bureau is suspicious of no-poach clauses in these agreements.

In a hypothetical, the draft guidelines suggest that even though the no-poach agreement may be found between the franchisor and franchisee, each franchisee will have an understanding that other franchisees cannot hire their employees. The draft guidelines characterize each franchisee's "understanding" as an agreement between franchisees. This is a debatable point, given that there is no communication or privity of contract between the franchisees in this scenario.

The draft guidelines suggest that the ancillary restraints defense would not apply to the understanding or agreement between franchisees. In fact, it could not. The ancillary restraints defense requires a broader agreement between the same parties, but there is no agreement between franchisees in a franchise system; there is only the agreement between the franchisor and franchisees. Because the no-poach clause is found in the franchisor-franchisee agreement (which is not an agreement between the franchisees), it would be difficult to establish that there is a no-poach agreement between the franchisees.

The guidelines do state whether or not the ancillary restraints defense can be applied will be case-specific, depending on "whether the employers can prove the no-poaching clause is necessary and flows from the broader franchise agreement."

Employers, Take Action Now

Once finalized, the guidelines will reflect Bureau policy; they bind neither class action plaintiffs nor the courts. But Bureau guidelines help identify whether conduct will or will not result in an investigation, and they tend to have persuasive force with courts.

Employers that are parties to contracts that include wage-fixing or no-poach provisions have until June 23, 2023, to examine them and determine whether they comply with the new provisions.

We can help. Our Competition & Antitrust team is available to help you understand the impact of these new provisions on your business.

Antitrust Reform Bandwagon Rambles On

The new wage-fixing and no-poach provisions were enacted amid an ongoing debate over how (and even whether) to modernize the *Competition Act* to better deal with the digital economy.

In November 2022, the government launched a consultation process to comprehensively review the Act and published a discussion paper outlining several areas for further amendment. Targeted areas include merger review, unilateral conduct, competitor collaborations, deceptive marketing, and administration and enforcement of the laws. Indeed, the Competition Commissioner has been vocal in calling for further change in these areas since the 2022 amendments.

That consultation process is set to conclude on March 31, 2023, and may very well lead to a larger overhaul of Canada's competition laws.

Meanwhile, in the United States, the Federal Trade Commission has published a draft rulemaking

that would ban non-compete clauses in employment agreements. To learn more, listen to episode VII-123 of Michael Schmidt's Employment Now Podcast.