Client Advisory: Changes to the *Competition Act* – No-poaching and Wage-fixing Prohibitions

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Introduction

Certain amendments to Canada's federal *Competition Act* (the "**Act**"), came into effect on June 23, 2023.[1] The purpose of this advisory is to provide an overview of the: (i) changes under the Act prohibiting wage-fixing, non-solicit, and no-hire agreements; and (ii) requirements for compliance under the Act.

This advisory also discusses the applicability of the recent prohibitions of wage-fixing, non-solicit, and no-hire agreements under the Act to agreements made prior to June 23, 2023, as well as the defences and penalties associated with violating these prohibitions.

Overview

This advisory is divided into the following parts:

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This advisory is not intended to be a complete statement of the law and does not constitute legal advice. As this advisory is for information purposes only, no person should act or rely upon the information contained in this advisory without seeking legal advice.

[1] Bill C-19, *The Budget Implementation Act, 2022,* 1st Sess. 44th Parl, 2022 (assented to 23 June 2022) cl 257(1).

1. Prohibited Agreements

Under Subsection 45(1.1) of the Act, employers **are prohibited** from conspiring, agreeing or arranging with **another unaffiliated employer**:

(a) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment ("**wage-fixing agreements**"); or

(b) to not solicit or hire each other's employees ("**no-poaching agreements**").

These prohibitions apply whether the wage-fixing or no-poaching agreement is the entire subject matter of the agreement or part of a broader agreement.[2]

1.1. Wage-fixing Agreements

Subsection 45(1.1)(a) of the Act prohibits agreements between unaffiliated employers that fix, maintain, decrease or control salaries, wages, or terms or conditions of employment.

Based on the *Enforcement Guidelines on wage-fixing and no poaching agreements* (the "**Guidelines**")[3] from the Competition Bureau (the "**Bureau**"),[4] the phrase "terms or conditions of employment" (as used in subsection 45(1.1)(a) of the Act), refers to the **responsibilities, benefits, or policies associated with a job**.[5] Under the Guidelines, the Bureau states that its enforcement of subsection 45(1.1)(a) will typically be limited to those terms and conditions that could affect a person's decision to enter into or remain in a job.[6]

By way of example, many services agreements have included provisions whereby the customer has required its service provider to consult with the customer before making changes to the compensation (including bonus compensation) of the service provider's account manager who is responsible for overseeing the quality of services provided to the customer. This is precisely the sort of provision that should now be reviewed in light of the restrictions introduced in subsection 45(1.1)(a) of the Act.

1.2. No-poaching Agreements

Subsection 45(1.1)(b) of the Act prohibits agreements between unaffiliated employers to not solicit or hire each other's employees. Agreements which limit the opportunities of an employee to be hired or solicited, (e.g., restrictions on the communication of

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[2] The Competition Bureau. *Enforcement Guidelines on wage-fixing and no poaching agreements*, (May 30, 2023), at footnote 4 [*Guidelines*].
[3] *Ibid.* It is important to the note that the *Guidelines* are not: (i) a restatement of the law; or (ii) a binding statement of how the Commissioner of Competition or the Director of Public Prosecutions (the DPP) would exercise their discretion in any situation. Ultimately, the final interpretation of the law is the responsibility of the courts.
[4] The Competition Bureau is the law enforcement agency responsible for the administration and enforcement of the Competition Act.
[5] *Guidelines, supra* note 2, at Section 2.1. These "terms and conditions of employment" could include working hours, non-monetary compensation, allowances such as mileage reimbursements, job descriptions, non-compete clauses, or other directives which may restrict an individual's job opportunities.
[6] *Ibid.*

information related to job openings or the adoption of biased hiring mechanisms), may also attract the Bureau's scrutiny.[7]

Additionally, in the Guidelines, the Bureau states that the prohibition on no-poaching agreements **does not apply to "one-way"** non-solicit or no-hire agreements.[8] So, if the restriction on solicitation or hiring (set out in an agreement) only applies to one unaffiliated employer and not to the other, the agreement will not violate subsection 45(1.1) of the Act. However, the Bureau **may take enforcement action** when separate agreements, taken together, have the same effect as a mutual no-poaching agreement.[9]

2. Applicability

Subsection 45(1.1) of the Act applies to agreements made **between unaffiliated employers on or after June 23, 2023**, as well as **conduct that reaffirms or implements agreements made before June 23, 2023**.[10] Subsection 45(1.1) of the Act does not apply to agreements between affiliated employers.[11]

2.1. Meaning of "Unaffiliated"

Subsection 2(2) of the Act defines "affiliation". For the purposes of the Act,

(a) one entity is affiliated with another entity if one of them is the subsidiary of the other or both are subsidiaries of the same entity or each of them is controlled by the same entity or individual;

(b) if two entities are affiliated with the same entity at the same time, they are deemed to be affiliated with each other; and

(c) an individual is affiliated with an entity if the individual controls the entity.[12]

Therefore, Subsection 2(2) of the Act defines "affiliation" with reference to control. As a result, where two employers are **controlled** by the same parent company or individual, they are viewed as being affiliated. Entities will be "unaffiliated" where: (i) neither entity is controlled by the other; and (ii) the entities are not controlled by the same parent company or individual.[13]

2.2 Meaning of "Control"

Subsections 2(4)(a) and (c) of the Act defines when an entity or an individual has "control" over a corporation or a non-corporate entity.

Under Subsection 2(4)(a) of the Act, a corporation is controlled by an entity or an individual (other than Her Majesty) if:

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[7] *Ibid,* at Section 2.2.
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid,* at Section 1.2.1.
[11] *Ibid*, at Section 1.2.2.
[12] *Competition Act,* R.S., 1985, c. C-34, s. 2(2) [*Competition Act*].
[13] Ordinarily, franchisors and franchisees are not considered to be "affiliated" for the purposes of the Act (*Guidelines, supra* note 2, at footnote 10).

(i) securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that entity or individual, and

(ii) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation.

Under Subsection 2(4)(c) of the Act, an entity other than a corporation is controlled by an entity or individual if the entity or individual, directly or indirectly, whether through one or more subsidiaries or otherwise, holds an interest in the entity that is not a corporation that entitles them to receive more than 50% of the profits of that entity or more than 50% of its assets on dissolution.[14]

Therefore, under the Act, **an entity or individual controls: (1) a corporation, if it owns a majority of the corporation's voting shares that if exercised, allow it to elect a majority of the directors of the corporation; and (2) a non-corporate entity, if the entity or individual is entitled to, on dissolution, more than 50% of the non-corporate entity's profits or assets**.

2.3 Existence of an Employment Relationship

Whether an employer-employee relationship exists between parties will depend on the nature of their interactions and applicable provincial and federal laws.[15] "Employers" is interpreted broadly in the Guidelines, and includes directors and officers, as well as agents or employees acting on behalf of their employers.[16] The definition of "employee" varies depending on the jurisdiction the organization operates within. [17]

It is important to note that an employer-employee relationship can change over time. Though the relationship between an individual and an employer may begin as independent contractor relationship, it could later evolve into an employer-employee relationship.[18]

2.4 Information Sharing Giving Rise to an Agreement

In certain circumstances, information sharing may give rise to the inference that there is a wage-fixing or no-poaching agreement between parties.[19] "Conscious parallelism" occurs where businesses, acting independently, do so with an awareness of the likely

[14] *Competition Act, supra* note 12, at Subsections 2(4)(a) and (c). Note Subsection 2(4)(b) was omitted as it defines a corporation "controlled" by Her Majesty in right of Canada or a province.
[15] *Guidelines, supra* note 2, at Section 1.2.4.
[16] For example, an agreement between an officer of a corporation and a director of another company is considered to be an agreement between employers under subsection 45(1.1) of the *Competition Act*. In this circumstance, the individuals who entered into the agreement may be subject to prosecution. Furthermore, corporations may be subject to prosecution as a result of an agreement between their respective employees if those employees are acting as senior officers (*Guideline*s, *supra* note 2, at Section 1.2.3).
[17] In Ontario, an employee is defined as: (a) a person, including an officer of a corporation, who performs work for an employer for wages, (b) a person who supplies services to an employer for wages, (c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees, or (d) a person who is a homeworker (*Employment Standards Act,* S.O., 2000, c. 14, s. 1).
[18] *Guidelines, supra* note 2, at Example 3(a).
[19] *Ibid,* at Section 1.2.5.

response of their competitor.[20] Though this is not itself an offence under the Act, **parallel conduct coupled with facilitating practices could be sufficient for a court to infer that a wage-fixing or no-poaching agreement exists**.[21] To avoid this inference, employers should exercise caution when sharing commercially sensitive information with each other in the course of collaborative activities.[22]

2.5 Agreements Made Before June 23, 2023

With respect to agreements made before June 23, 2023, **the Bureau is unlikely to take issue with wage-fixing or no-poaching clauses so long as the parties to the agreement take no steps to reaffirm or implement the restraint on or after June 23, 2023.**[23] Therefore, there is no urgent need to update existing agreements that contain provisions that are now in violation of the Act, provided that such provisions are not being actively enforced. However, the Bureau suggests that employers may want to update pre-existing company records and agreements as they arise in the ordinary course to ensure they accurately reflect the employer's policies and intentions.[24]

It is our recommendation that organizations: **(i) update their policies as soon as possible; and (ii) review their current compensation and hiring practices, (perhaps in consultation with the organization's human resources department), to identify any problematic wage-fixing or no-poaching clauses, and to ensure that such clauses are not being enforced. Additionally, organizations should update their existing records and agreements as they arise in the ordinary course to reflect their policies in order to ensure compliance with the Act**.[25]

3 Defences[26]

3.1 Ancillary Restraints Defence

Although wage-fixing agreements and no-poaching agreements are prohibited under the Act, subsection 45(4) of the Act provides a defence for "ancillary restraints".[27] The ancillary restraints defence is available where it is established (on a balance of probabilities) that:

(1) the restraint is ancillary to, or flows from, a broader or separate agreement that includes the same parties;

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[20] *Ibid,* at footnote 14 of the *Guidelines*.
[21] *Ibid*; Facilitating conduct could include sharing competitively sensitive information or other activities which assist competitors in monitoring one another's prices (The Competition Bureau. *Competitor Collaboration Guidelines,* (May 6, 2021), at Section 2.2 [*Competitor Collaboration Guidelines*]).
[22] *Guidelines, supra* note 2, at Section 1.2.5.
[23] *Ibid,* at Section 1.2.1.
[24] *Ibid.*
[25] It is our recommendation that existing agreements that contain provisions that are prohibited under the *Competition Act* be updated at renewal.
[26] Please note that these defences can be used only to defend against offences under the *Competition Act*. These defences do not protect employers from potential lawsuits or class actions. Subsection 36(1) of the *Competition Act* gives a right of action to any person who has suffered loss or damage as a result of conduct that is contrary to Part VI of the *Competition Act* (which includes the prohibitions against wage-fixing and no-poaching agreements). The *Competition Act* does not require that an organization be found liable of such offences in order for a person to invoke their right of action against the organization (*Competitor Collaboration Guidelines, supra* note 21 at Section 2.7).
[27] *Competition Act, supra* note 12, at Subsection 45(4).

(2) the restraint is directly related to, and reasonably necessary for achieving the objective of the broader or separate agreement; and

(3) the broader or separate agreement, when considered without the restraint, does not violate subsection 45(1.1) of the Act. [28]

Therefore, to rely on the ancillary restraints defence, employers will have to show that the wage-fixing, non-solicitation or non-hire clause(s) are **reasonably necessary and ancillary terms** of an otherwise legitimate broader or separate agreement.

To determine whether a wage-fixing or no-poaching agreement is a valid ancillary restraint, Section 3.1 of the Guidelines states that the Bureau **may examine the terms of the agreement, the form of the agreement, the functional relationship or lack thereof between the restraint and the principal agreement, and how the restraint makes the principal agreement more effective in accomplishing its purpose**.[29]

The Bureau may also consider:

(1) whether the ancillary restraints provision is "directly related and reasonably necessary" to give effect to the objective of the broader agreement. If the parties could have achieved an equivalent or comparable arrangement through practical, significantly less restrictive means, the Bureau likely will not find the restraint to be "reasonably necessary";

(2) the duration of the ancillary restraint, the subject matter of the restraint and its geographic scope (e.g., whether it applies to employees unrelated to the collaboration), to determine whether it is reasonably necessary to give effect to the objective of the broader agreement;

(3) whether, in the absence of the restraint, the agreement could only be implemented under considerably more uncertain conditions, at substantially higher cost or over a significantly longer period; and

(4) what led to the adoption of the restraint, including evidence created during the evaluation and negotiation of the agreement. [30]

Finally, the Bureau **will generally not, under the criminal provisions, assess wage-fixing or no-poaching clauses that are ancillary to merger transactions, joint ventures, or strategic alliances**.[31]

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[28] *Guidelines, supra* note 2, at Section 3.1.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid*. Such clauses may instead be subject to review under Part VIII of the *Competition Act* (that is, under its civil agreements, merger, or (joint) abuse of dominance provisions) when they are likely to substantially lessen or prevent competition (*Competitor Collaboration Guidelines, supra* note 21 at Sections 1.3 and 2.1). This is the case except where the clauses are clearly broader than necessary in terms of duration or affected employees or where the merger, venture, or strategic alliance is a sham (*Guidelines, supra* note 2, at Section 3.1).

3.2 Other Exemptions, Exceptions, and Legal Defences[32]

The new prohibitions against wage-fixing and no-poach agreements do not apply to collective bargaining activities.[33] Therefore, agreements between employers with respect to collective bargaining with their employees over salaries or wages and terms or conditions of employment are exempted from the prohibitions in subsection 45(1.1) of the Act.[34]

Lastly, subsection 45(7) of the Act provides a defence for conduct required or authorized by or under another Act of Parliament or the legislature of a province.[35]

4 Penalties

Subsection 45(1.1) of the Act makes the enforcement of wage-fixing and no-poach agreements *per se* illegal.[36] The new provisions **require proof beyond a reasonable doubt** for a finding of liability, and violations are subject to serious criminal penalties.[37] A person found guilty of an offence under subsection 45(1.1) **may be imprisoned for up to 14 years or subject to a fine at the discretion of the court, or both**.[38]

Conclusion

Except under limited circumstances, organizations are prohibited from entering into wage-fixing and no-poaching agreements (as each term is defined in Section 1 of this advisory). Going forward, we recommend the following:

(1) **Existing Agreements:** Organizations should update existing agreements as they come up for renewal to ensure they accurately reflect its policies and intentions. Typically, this will require removing wage-fixing or no-poach clauses from the agreements, though they may be permitted to remain in the limited circumstances discussed in this advisory. Where such clauses are permitted, these clauses should be drafted as narrowly as possible.

Additionally, organizations should review their current compensation and hiring practices to identify any problematic wage-fixing or no-poaching clauses, and to ensure that such clauses are not being enforced.

(2) **New Agreements:** Organizations should update template agreements to ensure that such agreements are compliant with the Act.

(3) **Conduct and Records:** Organizations should: (i) update existing compliance programs to ensure its personnel are acting in accordance with the new prohibitions under the Act; (ii)

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[32] *Guidelines, supra* note 2, at Section 3.2. It is important to note that when raising an exemption, exception, or defence, the Bureau will examine its validity before deciding whether to refer the matter to the DPP.
[33] *Ibid.* In addition, as stated in Section 4(1)(c) of the *Competition Act*, nothing in the *Competition Act* applies to "contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession, whether effected directly between or among the employers or through the instrumentality of a corporation or association of which the employers are members, pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment."
[34] *Guidelines, supra* note 2, at Section 3.2.
[35] *Competition Act, supra* note 12, at Subsection 45(7).
[36] *Guidelines, supra* note 2, at Section 1.1. That is, the behaviour is deemed to be illegal without requiring proof of anti-competitive effects.
[37] *Competition Act, supra* note 12, at Subsection 45(3).
[38] *Ibid,* at Subsection 45(2).

provide regular training to their relevant personnel on how to remain compliant with the Act; and (iii) exercise caution when sharing confidential information with other employers (especially competitors) to avoid the appearance of an agreement prohibited by the Act.

If you have further questions, or need assistance to remain compliant with the Act, please contact a member of our Technology Group.