

June, 2023

Competition Act Amendments:

Wage-Fixing and No-Poaching Agreements Prohibited

Employers should be prepared to comply with new criminal offence provisions of the *Competition Act* that prohibit wage-fixing and no-poaching agreements. These provisions were enacted in 2022 and come into effect on June 23, 2023. The Competition Bureau has now issued guidelines¹ to provide information to businesses about how it will interpret and enforce the new provisions.

Designed to protect competition in labour markets, the new conspiracy provisions (s. 45.(1.1) (a) and (b)) target agreements:

- a) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or
- b) to not solicit or hire each other's employees.

In addition, although the existing conspiracy provisions of the Act were previously subject to terms of imprisonment of up to 14 years and/or fines of up to \$25 million, the 2022 amendments remove the limit on fines, and s. 45 offences, including the new employment-related offences, will be subject to terms of imprisonment of up to 14 years and/or to fines in the discretion of the court.

As is the case for conspiracies generally, the conduct is *per se* illegal. The court may infer the existence of an illegal agreement or arrangement from circumstantial evidence,

¹ Competition Bureau, May 30, 2023, "Enforcement Guidelines on wage-fixing and no poaching agreements" (the "Guidelines") posted on the Competition Bureau website at <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements>. The Guidelines complement the Bureau's "Competitor Collaboration Guidelines" (the "CCGs") which describe the Bureau's approach to assessing collaborations between competitors under the criminal conspiracy and civil agreements provisions of the Act. The CCGs are posted at: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/competitor-collaboration-guidelines>.

with or without direct evidence of communication between or among the alleged parties. The conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

The Bureau has indicated that it will update its immunity and leniency programs to include the new wage-fixing and no-poaching provisions. In general, these programs provide incentives for participants in potentially illegal agreements to obtain immunity or leniency in prosecution in exchange for providing information that might not otherwise become available to the Competition Bureau and to the Director of Public Prosecutions.

Details About the Employment-Related Prohibitions

“Employers”. While the existing conspiracy provisions of the Act are directed at agreements between or among competitors, the new provisions prohibit agreements between unaffiliated “employers”, whether or not they compete with one another in their respective businesses. However, the Guidelines state that the Bureau expects to prioritize its enforcement on agreements between “employers that would otherwise compete in the purchase of labour.”² The term “employer” includes the business’ directors, officers, employers and agents.³ An exception (s. 45(6)(a)) permits agreements to be entered into by affiliates, such as where two or more entities are controlled by the same parent company.

Employment Relationship. Whether an employer-employee relationship exists “will depend on the nature of their interactions and applicable provincial and federal laws”, and that these contractual relationships can evolve over time.⁴

“Wage-Fixing” Agreements. Paragraph 45(1.1)(a) prohibits agreements between unaffiliated employers to “fix, maintain, decrease or control” salaries, wages and terms and conditions of employment. The latter include the “responsibilities, benefits and policies associated with a job. This may 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

² Guidelines, footnote 11.

³ Guidelines, s. 1.2.3.

⁴ Guidelines, s. 1.2.4.

opportunities.” The Bureau will focus on the terms and conditions “that could affect a person’s decision to enter into or remain in an employment contract.”⁵

“No-Poaching” Agreements. This prohibition applies broadly to agreements to not solicit or hire each other’s employees. “Limitations designed to prevent employees from being solicited or hired by another party to the agreement could include, for example, restrictions on the communication of information related to job openings and the adoption of biased hiring mechanisms.”⁶ Since it applies to agreements that relate to “each other’s” employees, this provision does not apply to one-way restraints where an employer agrees not to hire the employees of another business. However, “when there are separate agreements between two or more employers that result in reciprocating promises not to poach each other’s employees, then the Bureau may take enforcement action.”⁷

Pre-Existing Agreements. Agreements entered into after June 23, 2023 must comply with the new provisions. Pre-existing agreements with other employers should also be reviewed to ensure compliance. According to the Guidelines, the new provisions will also apply to “conduct that reaffirms or implements agreements that were made before that date.”⁸

Collective Bargaining. Section 4 provides an exemption for agreements between employers with respect to collective bargaining with their employees over salaries or wages and terms or conditions of employment.

“Ancillary Restraints” Defence. As with the other conspiracy provisions, and as explained in more detail in the CCGs, the Bureau’s enforcement focus is on “naked restraints” on competition, and it recognizes that “certain desirable business transactions or collaborations require restraints on competition to make them efficient, or even possible.”⁹ An “ancillary restraints defence” (“ARD”) is available (under s. 45(4)) where

⁵ Guidelines, s. 2.1.

⁶ Guidelines, s. 2.2.

⁷ Guidelines, s. 2.2.

⁸ Guidelines, s. 1.2.1.

⁹ Guidelines, s. 3.1.

the business can establish, on a balance of probabilities, that (a) the agreement is ancillary to a broader or separate agreement that includes the same parties, (b) the restraint is directly related to and reasonably necessary for achieving the objective of the other agreement, and (c) the other agreement, when considered without the restraint, does not violate the Act's conspiracy provisions. Consistent with the CCGs, 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. Similarly, it recognizes the role that these types of restraints can play in certain business arrangements, for example in franchise agreements and certain service provider-client relationships, such as staffing or IT service contracts."¹⁰ Agreements may nevertheless be reviewed under the civil agreements provision, as further described in the CCGs.

"Regulated Conduct" Defence. As is the case for the other conspiracy provisions, a defence is available under s. 45(7) for "conduct required or authorized by or under another Act of Parliament or the legislature of a province".

Additional guidance on these new provisions will become available through Competition Bureau news releases, which will be issued as it undertakes enforcement activities.

If you have questions about these amendments, or any other competition law matters, contact Carol Anne O'Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O'Brien's law practice is focused on regulatory matters including competition law, advertising and marketing, communications law (broadcasting and telecommunications), and privacy.

¹⁰ Guidelines, s. 3.1.