

Canada Prohibits No Poaching And Wage-fixing Agreements



On June 23, 2022, the *Competition Act* (the “**Act**”) was amended as a result of the *Budget Implementation Act, 2022* (the “**Amendments**”). Some of the changes to the *Act* are not in effect yet, thus giving firms precious time to adjust and prepare. Of note, these impending changes include the criminalization of wage-fixing and no-poach agreements between employers, which may impact many firms’ current practices.

The impetus for these significant changes likely stems from the 2016 joint statement issued by the U.S. Department of Justice (“**DOJ**”) and U.S. Federal Trade Commission, which indicated that going forward, the U.S. DOJ would criminally investigate no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers.¹

Further, in November 2020, following increased interest from the legal and business communities, the Competition Bureau issued its own statement on the application of the *Competition Act* to no-poaching, wage-fixing and other buy-side agreements. In its statement, the Bureau confirmed that it would not assess such agreements under the *Competition Act*’s criminal conspiracy provisions on the basis that the scope of these provisions was limited to supply-side agreements.

Ultimately, the Government of Canada introduced the Amendments to modernize Canada’s competition laws, and to protect workers from agreements amongst employers that fix wages or restrict job mobility.

Once in force on June 23, 2023, the new employment-related prohibitions will make it an offence for employers to agree “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).² The penalty for any employer or business which violates the new provisions includes a term of imprisonment up to 14 years, a fine set at the court’s discretion, or both.³ Importantly, these new provisions will apply to existing contracts.

As a result, employers will need to review any agreements, formal or otherwise, with other employers that relate to employees. Employers must then determine if such agreements fall within the scope of the new criminal provisions, and if so, whether the agreement is saved by the *Competition Act*’s ancillary restraints defence (“**ARD**”).

Essentially, the ARD states an impugned agreement may be saved if:

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.⁴

However, there are two key issues arising from the ARD. First, the ARD has not been judicially considered yet, meaning that both its scope and application are far from settled. Secondly, the onus falls on the employer to demonstrate the defence is applicable. If ever prosecuted for violating the new provisions, mounting an ARD could be expensive, time-consuming and moreover, risky at this time without any additional guidance from the courts or the Competition Bureau.

Aside from the uncertainty over the applicability of the ARD, there are other concerns for employers. The first is that the new prohibitions are not limited to employers who are actual (or potential) competitors –this means a dry-cleaner cannot have an agreement regarding employee wages or poaching with the neighbouring book store. Where these prohibitions will be of particular concern is between franchisors and franchisees, who will need to be particularly careful in reviewing their agreements to ensure they comply with the new laws.

Also, the wage-fixing agreement prohibition catches any agreement that applies to the “terms and conditions of employment,” however, there is no definition of what falls within the scope of “terms and conditions of employment.” In addition, the term “employer” itself is not defined. As such, it remains unclear whether the provisions apply to traditional employer-employee relationships only, or are broad enough to catch independent contractors as well.

Further, non-solicitation clauses and other interim restrictions arising from business acquisitions and transactions may also be caught within the prohibitions, and as mentioned, relying on the ARD may be risky. However, time-limited employee non-solicitation clauses should be acceptable if they are not between two employers.

With the uncertainty arising from the new prohibitions, it may be difficult to prepare for June 23, 2023. While the Competition Bureau expects to publish guidelines on the Amendments in the coming months,⁵ it would nonetheless be wise to consult legal counsel prior to entering into any agreements that appear to be offside of the new provisions, and to evaluate existing agreements, which may fix wages or impact employee mobility. Employers may also want to create compliance programs, or revise their existing compliance programs, to reflect the impact of the Amendments on their businesses.

Footnotes

1 The United States Department of Justice, News Release, 16-1230, “Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation” (20 October 2016), online: *United States Departments of Justice* <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals> .

2 *Budget Implementation Act, 2022, No. 1*, SC 2022, c 10, s 257 (s 45(1.1) of the *Competition Act*, RSC

1985, c C-34).

3 *Ibid* (s 45(2) of the *Competition Act*).

4 *Competition Act*, RSC 1985, c C-34, s 45(4).

5 Government of Canada, “Bid-Rigging, Price-Fixing and Other Agreements Between Competitors – common Types of Illegal Agreements that Hinder Competition” (last modified 16 June 2022), online: *Government of Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04262.html> .

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