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News Legal

Competition Act amendments will prohibit no-poach, wage-fixing agreements across Canada

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On June 23, 2023, amendments to section 45 of the *Competition Act* will come into force prohibiting an employer from entering into a mutual "no poach**"** agreement to not solicit or hire employees from another employer, or to wage fix to control salaries, wages, or terms of employment.

The prohibitions do not apply to an agreement between affiliated employers — for example, corporate entities controlled by the same parent company.

The prohibitions apply to employers across Canada, regardless of whether they are regulated federally or provincially.

The Competition Bureau – the independent law enforcement agency responsible for enforcement of the *Competition Act* – recently published draft enforcement guidance on wage-fixing and no poaching agreements which is open for public consultation until March 17, 2023. Feedback on the draft guidelines can be provided here.

No poaching

Under section 45(1.1)(b) of the *Competition Act,* it will be an offence for an employer to agree with an unaffiliated employer to not solicit or hire each other's employees. A "one-way" agreement — where only one employer agrees not to hire the other's employees — will not be an offence. Thus, a standard non-solicitation agreement in an employment contract would not be prohibited.

No wage fixing

Under section 45(1.1)(a) of the *Competition Act,* it will be an offence for an employer to arrange with an unaffiliated employer to fix, maintain, decrease or control salaries, wages or terms and conditions of employment.

Conscious parallelism

Under the draft guidelines, "conscious parallelism," when an employer acts independently but is aware of the likely response of a competitor, or acts in response to the conduct of a competitor, is not a violation. However, even if an employer acts independently, if the parties engage in any practice designed to facilitate parallel conduct (*e.g.*, share sensitive

employment information or monitor each other's employment practices) this may be considered a violation of the Act. Accordingly, employers should take care when sharing information during any industry-related collaborative activity so as not to inadvertently violate the Act.

Defences and exemptions

The Act contains defences and exemptions two of which are of particular relevance to employers:

1. **Ancillary restraint defence**. This applies when a no-poach or wage fixing agreement is ancillary to and reasonably necessary to give effect to a broader agreement. This defence is only available if the broader agreement would not violate the Act.
2. **Collective bargaining exemption.** There is a general exemption under the Act for any agreement reached between two or more employers in a trade, industry or profession that pertains to collective bargaining with their employees regarding salary, wages or terms or conditions of employment.

The draft guidelines provide examples to aid in the interpretation of s. 45(1.1), which are summarized at the end of this briefing note.

Penalties

A person found guilty of an offence under section 45(1.1) may be imprisoned for up to 14 years or subject to a fine at the discretion of the court, or both. In addition, an employee may bring a civil claim against an employer for an alleged breach of the Act, including a class action in appropriate cases.

Next steps for employers

Now is the time to review any form of agreement, direct or indirect, written or otherwise, or business activity that could possibly violate the new law. This includes any employment agreement, restrictive covenant, workplace policy, transaction documentation, or collaboration with another employer.

Examples

Example 1: "One-way" no-poach agreement

As part of a consulting contract, Company B agrees to not hire Company A's employees for a period of one year following completion of the contract. Company A does not make the same agreement regarding Company B's employees. This agreement would not violate s. 45(1.1) because it is a "one-way" agreement – the restraint only applies to Company A's employees.

Example 2: No-poaching and recruitment agencies

Staffing Company X provides staffing and recruitment services. It has entered into a staffing agreement with Company Y to provide specialized labourers for a short period. As part of the contract, companies X and Y agree not to hire each other's employees while the contract is in effect. This agreement is in violation of s. 45(1.1). The parties may be able to rely on the

ancillary restraint defence if the terms are “reasonably necessary”. However, the Competition Bureau will examine the terms of the agreement including the duration and geographic scope to determine if they are “reasonably necessary”.

Example 3: No-poaching in the franchise industry

Company A is in the business of franchising fast food restaurants across Canada. Company A and each franchisee spend a lot of money and time training new employees. To this end, the franchise agreements entered into by Company A and each franchisee include a no-poaching clause whereby the franchisor and franchisee each undertake to not hire persons who are currently employed by the franchisor or other franchisees. Each franchisee has an understanding that the hiring of its employees by another franchisee or Company A is prohibited.

This no-poaching agreement would likely raise a concern under s. 45(1.1). Franchisors and franchisees are generally not considered affiliated employers. Depending on the facts, the ancillary restraint defence may apply to the agreement between Company A and each franchisee. It is less likely the defence would apply to the agreement between franchisees.

Example 4: Wage fixing

Ms. X owns a private medical laboratory. During a lunch meeting with Mr. Y, who owns a chemical testing laboratory, the employers agreed to limit each employee’s annual bonus to 5% of their respective gross salary. This agreement would likely raise concerns of wage fixing.