

Competition Bureau issues enforcement guidance on wage-fixing and no-poaching agreements

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Overview

On Jan. 18, 2023, the Canadian Competition Bureau (the Bureau) issued [draft enforcement guidelines on wage-fixing and no-poaching agreements](#) (the Guidelines) that describe how the Bureau plans to enforce the new wage-fixing and no-poaching provisions (subsection 45(1.1)) of the Competition Act (the Act) that take effect on June 23, 2023. (Please see our [previous article describing other broader changes to the Act](#) that came into force last year on June 23, 2022.) These provisions will make wage-fixing and no-poaching agreements amongst any¹ two or more unaffiliated employers² criminal offences - and largely align the Canadian approach to no-poach agreements with that taken in the U.S.

What you need to know

- As of June 23, 2023, it will be a criminal offence for two or more employers to agree to fix salaries/wages or terms and conditions of employment, or to agree **not to poach each other's employees**.
- There will be circumstances in which these agreements remain legal, including if they are directly related to and reasonably necessary to give effect to a broader and otherwise legal agreement.
- The Bureau says that it will not challenge agreements that were entered into prior to June 23, 2023 which contain terms that would violate the new provisions, so long as the problematic terms are not enforced.
- Businesses need to update policies and training materials to ensure that all representatives of their business are aware of the new provisions and do not engage in any conduct which could give the appearance of violating them.

Prohibited agreements

a. Wage-fixing agreements

The new criminal wage-fixing provisions prohibit agreements among any two or more employers³ to fix, maintain, decrease or control salaries, wages or terms and conditions of employment subject to some [limited defences and exceptions](#).

As a starting point, it is important to note that even tacit or unwritten agreements or arrangements among employers to wage-fix or not to poach employees will be caught by these new provisions. Further, circumstantial evidence suggesting the existence of such an agreement or arrangement can be sufficient to convict. From a compliance perspective, this means that employers must be mindful of the risks of informal communications with other employers with respect to terms of employment for workers and take steps to discourage contacts (especially, but not limited to, HR professionals) that may present issues under the new provisions.

The Bureau considers “terms and conditions of employment” to be any terms or conditions that could affect a person’s decision to enter into or remain in an employment contract. It provides examples including job descriptions, allowances, mileage reimbursements, non-monetary compensation, working hours, working location and **non-compete clauses or other directives that may restrict an individual’s job opportunities**. This means that a broad range of terms and conditions are potentially caught - for example, an agreement among employers to require employees to work on-site for a certain duration per week, or to limit reimbursement for employees’ home office expenses, could be problematic.

b. No-poaching agreements

The new criminal no-poaching provision prohibits agreements between employers to not **solicit or hire each other’s employees**. It prohibits all forms all forms of agreements between employers that limit opportunities for their employees to be hired by each other, such as restricting the communication of information related to job openings and adopting hiring mechanisms such as point systems designed to prevent employees from being poached or hired by another party to the agreement.

The Guidelines provide the important clarification (at least in terms of Bureau enforcement policy) that the no-poaching provision will only apply to two way agreements, that is, where employers agree or arrange to not solicit or hire “each other’s” employees. Therefore, it will not be an offence when only one party agrees not to poach another’s employees. However, where there are separate arrangements that result in two or more employers agreeing not to poach each other’s employees, the Bureau considers the separate agreements to amount to one no-poaching agreement between the employers. This statement of enforcement policy provides some comfort to employers about the risk of agency scrutiny of no-poach agreements under the criminal provision. Having said that, however, the Guidelines are not law, and it remains a theoretical possibility that plaintiffs in civil damages cases may seek a broader reading of the provision, particularly in competition class actions.

Defences

a. The new provisions do not apply where wage-fixing or no-poach terms are ancillary to a broader agreement

The “ancillary restraints defence” applies to the new provisions. This defence is similar to the U.S. concept of ancillarity under section 1 of the Sherman Act and means that wage-fixing or no-poach agreements which would otherwise violate the new provisions will not be offences if they are both directly related to and reasonably necessary to give effect to a broader, otherwise legal agreement.

The Guidelines state that the Bureau will generally not consider wage-fixing or no-poaching clauses that are entered into in the context of mergers, joint ventures or strategic alliances to violate the new provisions. However, the Bureau will not automatically apply the defence to agreements between franchisees to, for example, not **hire or solicit each other’s employees**. Whether the defence applies to no-poaching agreements between a franchisor and franchisees will be case-specific and depend on whether the employers can prove that the no-poaching clause is necessary and flows from the broader franchise agreement.

Certain other legal defences or exceptions, such as the regulated conduct defence⁴ and the collective bargaining exemption may apply to wage-fixing and no-poaching agreements. Parties should consult counsel to determine whether any of these defences may apply.

b. The new provisions will not apply to old, unenforced Agreements

The Guidelines state that the Bureau will not consider terms in old (pre-June 23, 2023) agreements that remain in force to violate the new provisions. Therefore, old terms in agreements that might violate the new provisions do not need to be removed by explicit amendments; they just cannot be enforced.

However, the new provisions will apply where problematic terms in old agreements are enforced or reaffirmed. Whether a post-June 23, 2023 extension or other amendment of an old agreement with terms that violate the new provisions could be seen as a “new agreement” in the Bureau’s eyes remains unclear.

Penalties for failing to comply

The new provisions are criminal offences, punishable by imprisonment for up to 14 years or a fine to be set at the discretion of the court (with no statutory maximum), or both.

Additionally, people who are harmed as a result of parties entering into criminal wage-fixing and no-poaching agreements may seek to recover damages suffered from such conduct, including through class actions, which are now an established method of collective redress in Canada.

Conclusion and key action items

Practically speaking, businesses have until June 23, 2023 to ensure compliance with these new provisions and implement risk reduction strategies and policies. These steps should include the following:

- HR, competition compliance and other relevant policies should be amended to explicitly prohibit any coordination with other employers that could be construed as wage-fixing or no-poach agreements. They should also prohibit any contact with other employers that could support an inference of such agreements.
 - Policies must be clear that the prohibition applies to any terms and **conditions that could affect a person’s decision to enter into or remain an employee.**
 - Policies should explicitly provide that existing terms in agreements entered prior to June 23, 2023 that would violate the new provisions may not be enforced.
- All employees that could be in a position to engage in discussions with other employers, including senior executives, HR and recruitment professionals, should be trained regularly on adherence to the above policies.
- Sharing of current/historical information on salaries and other terms and conditions of employment with third parties who aggregate this information and provide anonymized benchmarking reports may remain acceptable. However, counsel should be consulted prior to providing any such information to a third party or receiving results.

For more information on compliance with these new criminal provisions, please contact any of the key contacts listed below.

¹ There is no requirement that the employers compete with each other for the sale of products or services. All employers are considered to compete with each other for employees under the new provisions.

² **The Guidelines state that the Bureau considers “employers” to include directors, officers, as well as agents or employees, such as human resource professionals.** Therefore, for example, an agreement between an officer of a corporation and a director of another company would be considered an agreement between employers under the new provisions. The individuals who entered into the agreement would be subject to prosecution, and if those employees are senior officers, their companies could also be subject to prosecution.

³ Franchisors and franchisees, as well as separate franchisees of the same franchisor, are not affiliated, so the new provisions apply to agreements amongst them.

⁴ This is a narrow exception to the application of certain provisions of the Act, including the new provisions, with respect to certain conduct that is regulated by another federal, provincial or municipal law or legislative regime. We have [previously written](#) about one application of the defence.

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