Cassels

What Employers Need to Know About the New Wage-fixing and No-poach Offences

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Wage-fixing and no-poaching agreements will be outlawed from June 23, 2023, as a result of the *Competition Act* amendments contained in the implementation bill for Canada's 2022 federal budget. Employers who are parties to wage-fixing or no-poach agreements (such as franchisors and franchisees) will need to examine their agreements in light of the new provision.

Wage-fixing and No-poaching Among Unaffiliated Employers Prohibited

The new provision prohibits two kinds of agreements between unaffiliated employers:

- Agreements to fix wages or terms and conditions of employment; and
- Agreements not to solicit or hire each other's employees.

The new provision will be added to the *Competition Act's* existing conspiracy offence in section 45. Section 45 makes it a criminal offence for competitors to fix prices, allocate customers, or restrict output. Prior to the amendments, this provision only applied to agreements relating to the supply, and not the purchase, of a product. Because wage-fixing and no-poach agreements are "buy-side" agreements, they were not covered by the existing conspiracy provision.

An important difference between the new wage-fixing offence and the existing price fixing offence is that the wage-fixing offence applies to agreements between *employers* that are *not affiliated* with each other, whereas the price fixing offence applies to agreements between *competitors* with respect to a product. In other words, employers do not need to be competitors with each other for there to be an offence; it is enough that they are not affiliates of each other. Under the *Competition Act*, an entity is affiliated with another entity if one controls the other, they are under common control, or they are both affiliated with the same entity.

It also does not matter whether the employers are fixing wages or agreeing not to poach employees in the same job categories.

As a result, for example, it would be an offence for a doughnut shop and a drycleaner to agree to fix the starting wage for their respective employees, even though they are not competitors and may look for different skills in their employees.

No Limits on Fines or Damages

The penalty for wage-fixing and no-poach agreements will be imprisonment for up to 14 years, a fine at the discretion of the court, or both. Before the amendments, the maximum fine under section 45 was $25 million per count, but the amendments remove that cap. To date, the highest ever fine under the *Competition Act* was $40 million, in an auto parts bid-rigging case.

Employers also face damages claims. The *Competition Act* contains a private right of action to recover damages caused by breaches of its criminal provisions. These provisions are frequently used by class action plaintiffs to extract multi-million dollar settlements from defendants. To date, Canadian plaintiffs have collected well over $1 billion in price-fixing class actions.

Some Wage-fixing Clauses May be Saved

Not all wage-fixing and no-poach agreements will be unlawful under the new provision. The so-called ancillary restraints defence in section 45 exempts restraints that are found in a broader or separate (and lawful) agreement between the same parties, and that are directly related to, and reasonably necessary for giving effect to the objective of the broader or separate (and lawful) agreement. The defence was designed for business transactions that need explicit restraints on competition to work. For example, parties might not want to form a joint venture unless they each agree not to compete with the joint venture. Similarly, the sale of a business almost always needs an agreement by the seller not to compete with the business being sold.

Any no-poach or employee non-solicitation clauses will need to be examined in light of the ancillary restraints defence. The parties will need to determine whether the clause is directly related to and reasonably necessary for giving effect to the broader agreement between the parties. In other words, is the restraint needed to make the agreement work efficiently or at all?

In a prosecution, the accused bears the onus of establishing the ancillary restraints defence. The same is true in a class action or another civil action for damages. The defence has yet to be tested in any proceeding, however. The Competition Bureau says that it will not second-guess business judgment. However, if the parties could have implemented their arrangement with significantly less restrictive means that were reasonably available to them at the time that the agreement was entered into, then the defence will not be available.

Employment or Competition Law?

The impetus for the wage-fixing and no-poach amendments came from the outcry generated when several

grocery store chains cut a $2 per hour pandemic premium they had been paying their workers. As well, American antitrust authorities have been prosecuting wage-fixing cases (so far, with little success).

Nevertheless, the case for dealing with wage-fixing and no-poach agreements in the *Competition Act* is far from clear. Competition law distinguishes between conduct that always harms competition and thus should be *per se* illegal, and conduct that may, or may not, cause harm, depending on the circumstances. Price fixing between competitors is considered to be conduct that always harms competition, and is thus *per se* unlawful.

The rationale for banning wage-fixing and no-poach agreements seems not to be that this conduct harms competition, but that it harms workers. The budget itself describes the measure as “tacking practices harmful to workers.”

This suggests that the new provision is really employment legislation, not competition legislation. It will undoubtedly be challenged on the basis that it is outside of Parliament’s legislative competence since employment law is a provincial jurisdiction (except in federally-regulated industries).

What Should Employers Do?

Most businesses have employees. Any business that is a party to an agreement with another business that relates in any way to employees must examine that agreement to determine whether or not it is within the scope of the new prohibition, and if so, whether it is saved by the ancillary restraints defence.

Businesses have one year to do this, as the new wage-fixing and no-poach provision comes into force on June 23, 2023.
