Cassels

What Franchisors Need to Know About the New Wage Fixing Offence

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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. Because franchise agreements frequently contain no-poach provisions, franchisors will need to examine their franchise agreements in light of the new provision.

Wage Fixing 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
- Agreements not to solicit or hire each other's employees (commonly known as a no-poach agreement)

The new provision will be added to the *Competition Act's* existing conspiracy offence in section 45. Section 45 makes it an offence for competitors to fix prices, allocate customers, or restrict output. This provision only applies to agreements relating to the supply, and not the purchase, of a product, however. Because wage fixing and no poach agreements are buyer-side agreements, they are 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. Absent affiliation by virtue of control, franchise agreements do not give rise to affiliation.

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 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 in the discretion of the court, or both. The maximum fine under section 45 is currently $25 million, but the bill will remove that cap. To date, the highest ever fine under the *Competition Act* was $40 million, in an auto parts bid rigging case.

It is not just the corporation that faces liability; executives and other individuals who are responsible for wage fixing and no-poach agreements face potential criminal charges. A number of executives have been convicted and sentenced in price fixing and bid rigging cases.

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, 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 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 agreement. The provision 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 damages action. The defence has yet to be tested in any proceeding, however. In its guidance on the defence, 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 this change 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, US 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 Franchisors Do?

Franchisors and other employers have until June 23, 2023, to get ready for the new wage fixing and no-poach provision.

During this time, franchisors must examine wage fixing and no-poach clauses their in franchise agreements and determine whether or not they should be kept. The question that franchisors will need to ask themselves is whether the clauses are necessary to the franchise system. Put another way, what would happen in the absence of the clauses?

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.