Cassels

Competition Bureau Releases Draft Guidelines on Enforcement of New Criminal Wage-Fixing and No-Poach Prohibitions – Here's What They (May) Mean for Your Franchise Business

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As we reported in a previous issue of this newsletter, in June 2022, the Canadian government enacted amendments to the *Competition Act* (the Act) intended to prohibit agreements between and amongst unaffiliated employers to fix wages or terms or conditions of employment (Wage-Fixing Agreements) or not to solicit or hire each other's employees (No-Poach Agreements). The amendments come into force on June 23, 2023, as subsection 45(1.1) of the criminal conspiracy provision in section 45 of the Act. Once this occurs, any new Wage-Fixing and No-Poach Agreements will expose the parties to those agreements to significant criminal penalties (i.e., prison sentences of up to 14 years and/or corporate fines with no statutory limit), as well as to potential civil liability (including by way of class actions for damages).

On January 18, 2023, the Competition Bureau (the Bureau), the law enforcement agency that administers and enforces the Act, released draft guidelines for public consultation describing its intended approach to enforcing the new criminal prohibitions (the Draft Guidelines). Interested parties have until March 3, 2023, to submit comments and feedback to the Bureau regarding the Draft Guidelines.

Draft Enforcement Guidelines

The key takeaways for franchisors from the Draft Guidelines are these:

- Subsection 45(1.1) will only apply to new agreements entered into on or after June 23, 2023, except where the parties to agreements entered into before that date engage in *conduct* that reaffirms or implements those older agreements. As such, it appears that existing agreements will not need to be formally terminated in order to avoid criminal liability under the Act, but that employers should be careful to avoid any conduct that could be seen as reaffirming or giving effect to pre-June 23, 2023, agreements. Employers should also be mindful that they can be found liable even if their "agreement" was informal, verbal only or entirely unspoken (e.g., a "wink" or a "nod"). Also, the existence of an "agreement" can be established based on circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it.

- The new prohibitions apply to Wage-Fixing and No-Poach Agreements between unaffiliated employers but do not apply to such agreements between affiliated employers. By way of example, the Bureau states that agreements between two or more corporate entities that are owned by the same parent company do not violate the new prohibitions.
- Subsection 45(1.1) applies regardless of whether unaffiliated employers are competitors in the supply of a product. The definition of "employer" is broad and includes directors, officers, as well as agents or employees, such as human resources professionals. As a result, corporations may be vulnerable to liability if an offending agreement is entered into between an officer of one corporation and a director of the other, for example.
- Whether an individual is characterized as an "employee" for the purposes of subsection 45(1.1) will be evaluated on a case-by-case basis and will depend on the laws and circumstances under which the relationship with that "employee" or "independent contractor" was entered into. Accordingly, the common law tests on whether a person is properly characterized as an employee or independent contractor may be relevant in considering whether the new prohibitions apply.
- "Conscious parallelism" on its own will not be a violation of section 45. According to the Bureau, "conscious parallelism" occurs "when a business acts independently with awareness of the likely response of its competitors or in response to the conduct of its competitors". However, the Bureau also cautions that parallel conduct coupled with facilitating practices (for example, sharing sensitive employment information) may be sufficient to prove that an illegal agreement was concluded.

Potential Implications of the New No-Poach and Wage-Fixing Prohibitions for Franchise Agreements

1. No-Poach Agreements

In section 2.2 of the Draft Guidelines, the Bureau confirms that the no-poach prohibition is limited to instances where unaffiliated employers agree not to poach *"each other's"* employees. Therefore, agreements must be reciprocal or mutual in nature in order to violate the no-poach prohibition, and "one-sided" or "one-way" agreements, where only one party agrees not to poach another's employees, will not be an offence. It bears noting, however, that the Bureau's interpretation of the Act is not binding on the courts and private plaintiffs (including class action plaintiffs' lawyers) may still seek to bring damages claims in respect of one-way agreements.

Further, the Bureau cautions that "separate arrangements [i.e., multiple one-way agreements] that result in two or more employers agreeing not to poach each other's employees" may trigger liability. Applied to the common structure of franchise relationships, where the franchisor typically enters into separate franchise agreements with each franchisee (who are not ordinarily affiliated with the franchisor) that prohibit the franchisees from poaching the franchisor's and other franchisees' employees, the one-way agreement by

the franchisees not to poach the franchisor's employees would not constitute an offence but the separate agreements between the franchisor and each of its franchisees that result in the franchisees (who are not ordinarily affiliated with one another) effectively agreeing not to poach each other's employees will likely breach the new no-poach prohibition. In fact, the Bureau confirms this second point in franchise-specific "Example 4" of the Draft Guidelines.

In that example, the Bureau also comments that *reciprocal* agreements between a franchisor and its franchisees not to poach one another's employees will also likely constitute an offence, subject to the so-called ancillary restraints defence (ARD). In this regard, the Bureau observes that "[w]hether [ARD] applies to the agreement between [the franchisor] and each franchisee will be case-specific and depend on whether the employers can prove the no-poaching clause [prohibiting the franchisor from poaching the franchisees' employees] is necessary and flows from the broader franchise agreement." Notably, in practice, it is the franchisee that almost always covenants with the franchisor not to poach the franchisor's employees. The franchisor usually makes no such promise.

2. Wage-Fixing Agreements

The new prohibitions also criminalise so-called "wage-fixing." This is perhaps a misnomer, as the prohibition deals with more than just wages, also making it an offence for unaffiliated employers to enter into agreements to fix, maintain, decrease or control "terms and conditions of employment."

The Draft Guidelines specify that where "'terms and conditions' include the responsibilities, benefits and policies associated with a job. This may include job descriptions, allowances such as *per diem* and mileage reimbursements, non-monetary compensation, working hours, location and non-compete clauses, or other directives that may restrict an individual's job opportunities" but then unhelpfully undercut this guidance by adding that "[t]he Bureau's enforcement generally is limited to those 'terms and conditions' that *could affect a person's decision to enter into or remain in an employment contract.*"

The typical franchisor often creates franchise system standards that could in some instances be construed as part of the agreement between franchisor and franchisee. So, there is a potential for a franchisor to run afoul of the new wage-fixing prohibition if the Bureau does not appreciate that some of the instances where franchisors set such standards are both necessary and appropriate to protect the franchisor's franchise system, and goodwill in their brand and trademarks.

In fact, the imposition of requirements and standards that a franchisee must follow is a hallmark of most franchise systems. So, it is unfortunate that the Draft Guidelines do not provide assurances that franchisors will not be exposed to criminal prosecution if they engage in conduct typical of a franchisor that imposes standards that the franchisees must adhere to, and which may dictate conditions of franchisees' employees' employment. An obvious example is, for instance, a requirement by a franchisor that every employee sign a confidentiality agreement or, in the case of a restaurant chain, wear a certain uniform. The

franchisees' obligation to impose such requirements on its employees arises from their agreement with their unaffiliated franchisor and one is left to ponder whether the Bureau might conclude that these and other similar requirements constitute a "term and condition" that "could affect a person's decision to enter into or remain in an employment contract," thereby attracting potential criminal liability.

So, it is hoped that the Bureau will amend the Draft Guidelines, following the consultation period, so that the business community can gain some needed certainty with respect to the scope and application of the new wage-fixing prohibition.
