Cassels

Competition Bureau's Final Wage-Fixing and No-Poaching Enforcement Guidelines Provide Some Comfort to Franchisors Before the New Criminal Provisions Take Effect on June 23, 2023

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As we reported and discussed in previous issues of this newsletter (found here and here) 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-Poaching Agreements).

The amendments come into force in less than a month, 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-Poaching Agreements will expose the parties to those agreements to significant criminal penalties (i.e., prison sentences of up to 14 years and/or 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).

On May 30, 2023, the Bureau published its final wage-fixing and no-poaching enforcement guidelines (the Final Guidelines). As detailed below, while the Final Guidelines are hardly a model of transparency or clarity, the Bureau has made certain revisions to the Draft Guidelines which provide the franchise community with some comfort with respect to the scope and application of the new prohibitions.

Final Enforcement Guidelines

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

- The Final Guidelines expressly acknowledge the importance and legitimacy of labour-related restraints in many business arrangements and correct the Draft Guidelines' omission of franchise

agreements from the list of business agreements and arrangements (namely, merger transactions, joint ventures and strategic alliances) where the Bureau will "generally not" pursue a criminal investigation unless the wage-fixing and no-poaching clause in such an agreement is "clearly broader than necessary in terms of duration or affected employees, or where the business agreement or arrangement is a sham." While the Final Guidelines are an improvement relative to the Draft Guidelines, it is clear from the language quoted in the preceding sentence and other statements in the Final Guidelines that the Bureau is prepared to second-guess the parties' business judgement regarding the reasonable necessity of a given restraint and to take criminal enforcement action to the extent that the Bureau concludes that an impugned restraint is "clearly" broader than reasonably necessary.

- 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. Usefully, the Final Guidelines clarify that "at least two parties must reaffirm or implement the restraint for the Bureau to establish the […] consensus or 'meeting of the minds'" required to ground liability.

Accordingly, existing agreements need not be formally terminated in order to avoid criminal liability under the Act, but employers should be careful to avoid any conduct that could be seen as reaffirming or giving effect to pre-June 23, 2023, agreements. The Final Guidelines also suggest that "employers may wish to update pre-existing company records and agreements, as they arise in the ordinary course, to ensure they accurately reflect its policies and intentions, and avoid unnecessary confusion."

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"). Moreover, 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-Poaching 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 controlled 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 (although the Bureau notes that it will prioritize its enforcement on Wage-Fixing and No-Poaching Agreements between employers that would otherwise compete in the purchase of labour). 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. The Final Guidelines include a reminder to employers that, “depending on applicable legislation, their relationship with independent contractors could evolve over time. For example, if an employer treats an independent contractor as an employee, the business contract between them could transform into an employment relationship.”

- “Conscious parallelism” on its own will not be a violation of subsection 45(1.1). 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 commercially sensitive employment information, such as employment terms) may be sufficient to prove that an illegal agreement was concluded.

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

1) No-Poaching Agreements

In section 2.2 of the Final Guidelines, the Bureau confirms that the no-poaching 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-poaching prohibition, and “one-sided” or “one-way” agreements, where only one party agrees not to poach another’s employees, will not be an offence. 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. 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. In this regard, the Final Guidelines note that “[t]he courts are responsible for the final interpretation of the law.”

Further, the Bureau cautions that “separate agreements between two or more employers that result in reciprocating promises not to poach each other’s employees” may trigger liability.

The Final Guidelines reflect an important change of position by the Bureau (as reflected in the Draft Guidelines) regarding the circumstances in which franchisees could face criminal liability in connection with clauses or terms and conditions agreed to between a franchisor and a franchisee that may affect the interactions *between franchisees*. Specifically, the Draft Guidelines took the position that where a franchisor enters into separate franchise agreements with each franchisee (who are not ordinarily affiliated with the

franchisor) that prohibit the franchisees from poaching other franchisees' employees and the separate agreements between the franchisor and each of its franchisees result in the franchisees (who are not ordinarily affiliated with one another) not poaching each other's employees, this would likely constitute a breach of the new no-poaching prohibition. The Final Guidelines abandon this position, clarifying that "a franchisee's mere awareness of parallel standard franchise agreements, which include no-poaching restraints, ordinarily will *not* raise concerns under subsection 45(1.1), *unless there is evidence of an intention between franchisees to enter into a no-poaching agreement with each other* […] For example, steps taken by two or more franchisees to enforce a franchise agreement's no-poaching restraints could provide evidence of a no-poaching agreement among them and give rise to an offence under paragraph 45(1.1)(b)". [*emphasis added*] In this regard, the Bureau notes that "[i]n determining whether an agreement exists between franchisees, [it] will consider whether the parties reached a consensus, *either explicitly or tacitly*". [*emphasis added*]

Finally, the Final Guidelines (generally) confirm that franchisees may "establish a system among themselves to recoup training costs from a 'poaching' employer, instead of relying on the franchisor's enforcement of the no-poaching restraint," provided that "the compensation is reasonably related to the costs incurred for training and does not disadvantage employees' opportunities relative to external candidates.

2) Wage-Fixing Agreements

The new prohibitions also criminalise so-called "wage-fixing." This is 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."

In its Draft Guidelines, the Bureau specified that "'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.*" [emphasis added] Despite extensive criticism of the overbreadth and unhelpfulness of this guidance, no clarification was provided in the Final Guidelines.

In the preface to the Final Guidelines, the Bureau states that it "may revisit these Guidelines in the future in light of experience, changing circumstances and legal developments." As time passes and experience with the new prohibitions grows, one hopes that the Bureau will indeed revisit its enforcement approach vis-à-vis the franchise sector and, consistent with a proper appreciation of the franchise model, the role of franchisors in managing franchise systems and the economic and procompetitive benefits generated by those systems, will limit the application of the no-poaching and wage-fixing prohibitions exclusively to circumstances where

the broader agreement between the parties is a sham.
