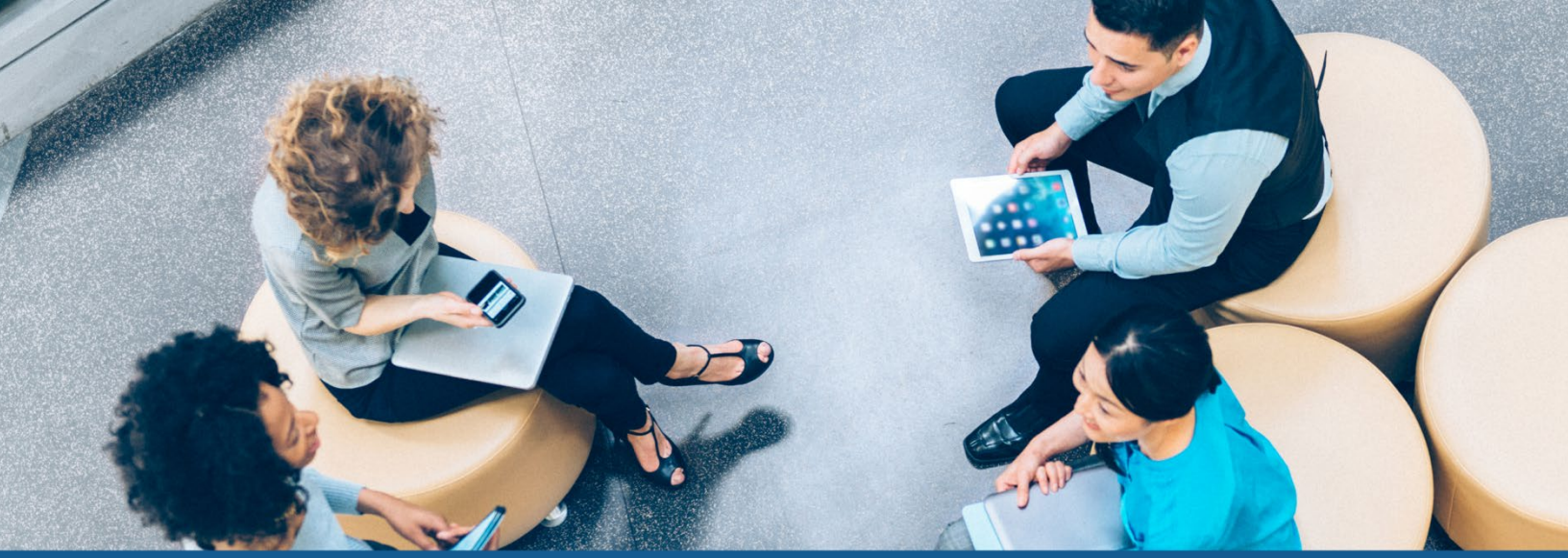

What's New in HR Law

Competition Bureau Releases Guidelines on Anti Wage-Fixing and No-Poaching Agreement Legislation

June 15, 2023 | By Natalie Garvin

Bottom Line

On May 30, 2023, Canada's Competition Bureau released its Enforcement Guidelines (the "Guidelines") on the Federal Government's recent amendments to the *Competition Act* which, commencing on June 23, 2023, will prohibit wage-fixing and mutual no-poaching agreements between employers.

The Competition Bureau is responsible for administering and enforcing the *Competition Act*. Its Guidelines provide assistance to employers in navigating and applying this new prohibition. While not legally binding, the Guidelines illustrate how the Competition Bureau is likely to interpret and enforce subsection 45(1.1) of the *Competition Act*.

What does subsection 45(1.1) prohibit?

In June 2022, the Federal Government amended the *Competition Act* and added a new subsection 45(1.1) to protect competition in labour markets. Subsection 45(1.1) of the *Competition Act* makes it a criminal offence for an employer to agree, conspire or arrange with another employer to:

a) fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or
b) not solicit or hire each other's employees.

More simply, subsection 45(1.1) prohibits an employer from entering into a wage-fixing or no-poaching agreement with another employer. By implementing these prohibitions and encouraging competition among employers, the Federal Government seeks to foster an overall increase in wages and benefits as employers must offer attractive employment terms to entice and retain workers.

Who is affected by subsection 45(1.1)?

Subsection 45(1.1) applies to unaffiliated employers. This means there are no restrictions imposed on corporate entities that are controlled by the same parent company.

The Guidelines state that "employers" includes any directors, officers, agents, and employees of a company. Thus, an employer cannot escape prosecution under subsection 45(1.1) by having one of these individuals sign the wage-fixing or no-poaching agreement. In the event one of these individuals does enter into an agreement prohibited by subsection 45(1.1), the corporation and the individual in their personal capacity may be subject to prosecution.

Employers should also be aware that subsection 45(1.1) applies to employment relationships. Contracts for services with independent contractors are therefore not subject to subsection 45(1.1). However, the demarcation between dependent contractor (i.e., employee) and an independent contractor may be hard to distinguish and may overtime evolve to become an employment relationship, and thus subject to the prohibitions under subsection 45(1.1).

As always, care should be given when enlisting the services of a contractor to ensure the relationship does not constitute an employment relationship in substance. Regular review of independent contractor relationships and agreements should be conducted to ensure compliance, not only with subsection 45(1.1) of the *Competition Act*, but the *Employment Standards Act, 2000* and other labour laws that set standards for employment relationships.

Wage-Fixing Agreements

The prohibition against wage-fixing agreements is fairly straight-forward: unaffiliated employers cannot agree to fix their employees' terms of conditions, including wages. The Guidelines have described "terms and conditions" under subsection 45(1.1)(a) fairly broadly by stating that "terms and conditions" may include job descriptions, per diem allowances, mileage reimbursements, non-monetary compensation, working hours, location and non-compete clause. However, the Guidelines provide some reassurance in stating that the Competition Bureau's interest is in the terms and conditions that could affect an individual's decision to become or remain employed by the employer.

Furthermore, while the Guidelines note that information sharing is not in itself prohibited, the Competition Bureau warns that an inference may be made that an agreement exists or employers are attempting to communicate for the purposes of reaching an understanding through information sharing. It is yet to be determined how the Competition Bureau will treat information sharing between employers and human resources departments for the purposes of conducting market research.

No-Poaching Agreements

The specific wording of subsection 45(1.1)(b) requires reciprocity in an agreement between unaffiliated employers to not solicit or hire "each other's employees". Thus, the Guidelines acknowledge that subsection 45(1.1)(b) does not apply to one-way or unilateral non-solicitation agreements. This may

include agreements between an employer and client that prevents the client from soliciting the employer's employees.

However, mutual non-solicitation agreements are likely to infringe subsection 45(1.1)(b) unless a defence can be established. For example, in the above scenario, if the agreement between the employer and client prohibit the employer from also soliciting the client's employees, the agreement would run afoul of subsection 45(1.1).

Defences

The main defence discussed in the Guidelines is the ancillary restraints defence (ARD), which permits restraints on competition where it is necessary for business transactions or collaborations (i.e., merger transactions, joint ventures, strategic alliances, franchise agreements and some provider-client relationships like staffing or IT service contracts).

The ancillary restraints defence is available when it is likely that:

a) the restraint is ancillary to, or flows from, a broader or separate agreement that includes the same parties;
b) the restraint is directly related to and reasonably necessary for achieving the objective of the broader or separate agreement referred to in (a) above; and
c) the broader or separate agreement referred to in (a) above, when considered without the restraint, does not violate subsection 45(1.1).

In other words, wage-fixing and no-poaching agreements are permitted when they are a component of a larger agreement between the parties that has a purpose separate and apart from the wage-fixing or no-poaching agreement (e.g., there has been a sale of a business).

It is important to note that invoking the ancillary restraints defence does not save an employer from scrutiny. The Competition Bureau may conduct an investigation into both the restraint agreement and principal agreement — particularly, their terms and form, the functional relationship between them, and how the restraint agreement makes the principal agreement more effective.

In considering whether the ancillary restraints defence applies, the Competition Bureau may consider:

- whether the restraint is "directly related and reasonably necessary" to give effect to the purpose of the principle agreement;
- the duration and geographic scope of the ancillary restraint; and
- whether, in the absence of the restraint, the agreement could only be implemented under considerably more uncertain conditions, at substantially higher cost or over a significantly longer period.

The Competition Bureau may also review documentation and other evidence created during the evaluation and negotiation of the agreement for the purposes of determining the intention behind the ancillary document and in determining if other, less restrictive options were considered.

If parties intend to rely upon the ancillary restraint defence to implement a wage-fixing or no-poaching agreement, it may be beneficial for the parties to limit the duration of the wage-fixing or no-poaching agreement to minimize the impact of the restraint agreement.

Other exemptions, exceptions and legal defences include collective bargaining agreements, which invariably involves negotiating wages and terms and conditions, and conduct required or authorized under other legislation.

When does subsection 45(1.1) apply?

The Guidelines clarify that agreements made between employers on or after June 23, 2023 are captured by subsection 45(1.1).

Subsection 45(1.1) also applies to conduct that reaffirms or implements agreements made before June 23, 2023. However, the Competition Bureau states it is "unlikely to find a wage-fixing or no-poaching agreement problematic when the parties take no steps to reaffirm or implement the restraint on or after June 23, 2023". Therefore, if an agreement terminates by June 23, 2023 and the parties enter into a new agreement that applies on and after that date, subsection 45(1.1) would apply to the new agreement, but is unlikely to apply to the prior agreement.

Nevertheless, if the parties take steps to reaffirm or implement a restraint from a prior agreement after June 23, 2023, subsection 45(1.1) may apply. Since subsection 45(1.1)(b) only applies to mutual agreements, it's likely that both parties must take steps to reaffirm or implement a restraint from a prior agreement after June 23, 2023 to trigger subsection 45(1.1)(b). Furthermore, the steps must be prospective (i.e. applying to events on or after June 23, 2022), as opposed to applying to events that may have arisen before that date. In order to avoid any confusion over parties' intentions, the Guidelines recommend that employers update existing records and agreements accordingly.

Check the Box

Employers should review the Competition Bureau Guidelines and their existing agreements with other unaffiliated employers to ensure any existing wage-fixing and mutual no-poaching agreements will cease by June 23, 2023.

Going forward, employers should refrain from implementing new wage-fixing and no-poaching agreements unless such agreements are exempted by a legal defence like the ancillary restraints defence. However, where possible, it is best practice to avoid entering into such agreements as a violation of s. 45(1.1) of the *Competition Act* is a criminal offence and may result in significant fines or even imprisonment. Further, even if the high standard of proof of a criminal offence is not met, employers may face liability in civil lawsuits, including class actions.

Need More Information?

For more information about subsection 45(1.1) of the *Competition Act* or assistance with compliance issues, contact Natalie Garvin at ngarvin@filion.on.ca or your regular lawyer at the firm.

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