Competition Act amendments are about to come into force – What businesses need to know following the release of the official Enforcement Guidelines

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On June 23, 2023, major amendments to section 45 of the *Competition Act*[1] (the "**Act**") are set to come into force. Adopted in 2022 by the Parliament of Canada, these amendments are primarily designed to harmonize Canadian non-competition law with legislation in various other countries, particularly the U.S., which restricts certain business practices regarded as harmful to workers. The amendments to the Act will have an impact on employers across Canada, whether or not they operate in an area of federal or provincial jurisdiction.

Beginning on June 23, 2023, the Act will prohibit "unaffiliated" employers from entering into agreements aimed at: i) fixing wages or employment conditions; or ii) restricting the job mobility of employees by means of reciprocal non-solicitation and no-poaching agreements. In this regard, it should be noted that agreements between affiliated companies (e.g., controlled by the same parent company) do not violate the Act.

This bulletin seeks to provide a summary of various amendments of interest to employers in light of the official version of the related enforcement guidelines (the "**Guidelines**"), which were published by the Competition Bureau (the "**Bureau**") on May 30, 2023.[2] Although the Guidelines do not have the force of law, they set out the Bureau's approach when interpreting applicable prohibitions and defences.

AGREEMENTS FIXING WAGES AND EMPLOYMENT CONDITIONS

Paragraph 45 (1.1) (a) of the Act prohibits agreements between unaffiliated employers aimed at fixing, maintaining, decreasing or controlling wages and other employment conditions.

In this regard, the Bureau's Guidelines state that "terms and conditions of employment" typically refer to any condition that could affect a person's decision to enter into, or remain in, an employment contract. 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*".

Citing an example of a problematic case in light of the Act's new provisions, the Bureau describes a situation in which two unaffiliated employers hold a lunch meeting during which they agree to limit the annual bonuses of their employees to 5% of their gross salary. This type of agreement would, in all likelihood, be prohibited under the Act.

NON-POACHING AND NON-SOLICITATION AGREEMENTS

Paragraph (1.1) (b) of the Act also prohibits agreements between unaffiliated employers that could limit the prospects of their employees being hired by the other employer.

This new provision concerns reciprocal non-solicitation and non-poaching agreements between employers. These agreements are found fairly frequently in commercial contracts covering mergers/acquisitions, joint ventures, partnerships, sales, procurement/supplies of goods and services, franchises, recruitment and personnel placement, etc.

However, as discussed below, it should be noted that these types of agreement would only violate the Act if the parties had reciprocal non-poaching obligations in place. In other words, if the obligation is only "one-way", i.e., only one of the parties is subject to the obligation not to solicit or poach the employees of the other employer, there is no infraction.

POTENTIAL EXEMPTIONS AND DEFENCES

The main defence against proceedings initiated under subsection 45 (1.1) is based on the ancillary restraints defence ("**ARD**"). To use it, employers must demonstrate that:

> The restraint is ancillary to a broader or separate agreement between the parties;
> The restraint is directly related to and reasonably necessary for achieving the objective of the broader or separate agreement; and
> The broader or separate agreement does not otherwise violate subsection 45 (1.1) of the Act (when considered without the restraint).

For example, it is reasonable to expect that an agency specializing in temporarily placing personnel with its clients would want to prevent its clients from hiring said personnel for the duration of their agreement. In that case, the ARD defence could be used.

The agreement, however, must be carefully drafted so the employer can demonstrate that it was reasonably necessary for achieving the desired objective. In this regard, the Bureau notes that the duration, objective and geographical scope of the restraint, among other factors, will be examined when determining whether the agreement is in fact "reasonably necessary".

The Guidelines states that the Bureau "*will generally not assess wage-fixing or no-poaching clauses that are ancillary to merger transactions, joint ventures or strategic alliances under the criminal provisions*". However, the Bureau "*may start an investigation under subsection 45(1.1), where those clauses are clearly broader than necessary in terms of duration or affected employees, or where the business agreement or arrangement is a sham*."

Other exemptions and defences may also apply, such as the defence based on regulated conduct[3] or the exemption with respect to collective bargaining.[4]

APPLICABLE SANCTIONS

Violations of the new subsection 45 (1.1) could lead to criminal charges. A person found guilty of an offence could be subjected to a fine at the discretion of the court or may be imprisoned for up to 14 years, or both.

In addition, under section 36 of the Act,individuals (in all likelihood workers) who suffer losses or damages due to violations of provisions of the Act, including section 45 (thus including the new subsection 45 (1.1)), can claim from the person engaging in such misconduct (in this case, the employer) a sum corresponding to the amount of the losses or damages suffered. Therefore, violations of these provisions could lead to civil suits and possibly, in certain cases, to a class action suit.

SPECIFICATIONS REGARDING EXISTING AGREEMENTS AND NEXT STEPS

The Guidelines specify that the prohibitions set in out subsection 45(1.1) apply not only to agreements entered into on or after June 23, 2023, but also to conduct that reaffirms or implements agreements that were entered into before that date. In this respect, at least two of the parties to these prior agreements must reaffirm or implement the restraint. This may include, for example, the renewal by two or more parties of an agreement containing a prohibited undertaking.

The Bureau also notes that it will be focusing on the intent of the parties on or after June 23, 2023. In that context, companies are advised to review their contract templates and to update their pre-existing agreements in the normal course of business.

We therefore recommend that all companies, whether operating in an area of provincial or federal jurisdiction, examine the contracts currently in effect to which they are party and identify any clauses that might constitute violations under the new provisions of the Act. Various strategies or corrective measures aimed at limiting business risks could then be evaluated and implemented depending on the necessity and reasonableness of the undertakings in question are (e.g., renegotiating an undertaking or adopting a directive confirming that the employer will not apply an undertaking on or after June 23, 2023, etc.).

Please feel free to contact the members of our teams for further details or for ad

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1. R.S.C. 1985 c. C-34, as amended by Bill C-19, *Budget Implementation Act 2022,* No. 1, S.C. 2022, c. 10.
2. Competition Bureau. *Enforcement guidelines on wage-fixing and no-poaching agreements* on line, May 30, 2023.
3. Subsection 45(7) of the Act.
4. Section 4 of the Act.