Wage-fixing and no-poach agreements: next steps for employers

SPEAKERS

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Prohibitions against wage-fixing and no-poach agreements will come into force in June 2023. To help employers prepare, Rebecca Wagner and Eric Patenaude of our Competition and Foreign Investment Review group explain how employers can assess their current agreements and draft new ones to stay compliant.

In this video:

- How the Competition Bureau will enforce wage-fixing and no-poach rules
- Which agreement clauses are exempt from the new law
- How to protect your organization from wage-fixing and no-poach penalties
- Why some questions remain unclear—and how they might be resolved

To learn how you can tailor your organization's policies and processes to meet the new wage-fixing and no-poach rules, reach out to our Competition and Foreign Investment Review group.

04:49

Video transcript

Eric Patenaude (00:05): Hi everyone. Thanks for joining us today. I'm Eric Patenaude, an associate in Torys' Competition and Foreign Investment Review Group, and this is my colleague Rebecca Wagner, a Senior Associate in the Group. Today we will be discussing the new Competition Act criminal prohibition against wage-fixing and no-poaching agreements, which was introduced earlier this summer and will come into force on June 23rd, 2023. We will focus on some key considerations around this new prohibition and also weave in relevant commentary from the Competition Bureau's recent public information session. Rebecca, can you tell us about the specifics of this new offence?

Rebecca Wagner (00:44): Absolutely. The new law makes it a crime for any employer in Canada to enter into an agreement with another employer, even informally, to "fix, maintain, decrease or control salaries, wages or any terms and conditions of employment", or agree "not to solicit or hire each other's employees". Employers who violate this law could face imprisonment for up to 14 years or an uncapped fine in the discretion of the court, or both. Given these significant penalties, the new law provides for a 1-year grace period to give employers time to become compliant.

Eric Patenaude (01:21): The 1-year grace period is also important because of the uncertainty around how this new law will be interpreted and enforced. For example, some key terms and phrases such as "employee" or "terms and conditions of employment" are left undefined. It is not clear whether a contractor or those that are self-employed would be considered an "employee", or whether "terms and conditions of employment" would prohibit employers from agreeing to worker-friendly terms unrelated to competition between them. So what do we know about potential enforcement?

Rebecca Wagner (01:55): Great question. The bureau's recent information session provided some insight. For example, the bureau confirmed that no pre-existing agreements that violate the law will be "grandfathered" in. All offending agreements or provisions must go when the law comes into force. The bureau also confirmed that the "ancillary restraints defence" will apply to wage fixing and no-poach clauses that are reasonably necessary for a broader, legitimate agreement.

Eric Patenaude (02:23): That's good news for M&A agreements where non-solicitation clauses are common and often considered commercially necessary in the context of a business sale.

Rebecca Wagner (02:32): Overall, it was clear from the session that the Bureau is still in the early stages of evaluating its enforcement approach, including many of the important details. However, the Bureau did commit to releasing standalone guidelines, but is first planning to seek stakeholder input this fall.

Eric Patenaude (02:48): That's right. And in addition to seeking stakeholder input, the Bureau may look to what has been happening south of the border. In 2016, the US government announced that it would consider wage fixing and no-poach agreements as per se illegal and start criminal track prosecutions. US courts have since held that naked wage fixing and non-solicitation agreements that allocate markets are inherently unreasonable and illegal under American antitrust law. However, courts have also found that not every non-solicitation agreement will necessarily allocate markets. US juries have yet to convict anyone of these offences, but investigations have resulted in costly and burdensome consent agreements and additional cases are still ongoing.

Rebecca Wagner (03:35): Whatever the ultimate enforcement approach in Canada, companies who engage in wage fixing and no-poach agreements will be exposed to criminal prosecution and civil litigation for damages. Civil class actions often follow on the heels of criminal proceedings, and plaintiffs can sue for civil damages under the Competition Act, and mere suspicion of a violation can on its own be costly. Investigations often distract management and lead to substantial expenditures of time and money.

Eric Patenaude (04:04): Thanks. The Bureau reiterated that employers can also mitigate risk by ensuring that they have a credible and effective compliance program in place that incorporates training around this new prohibition. Employers can also protect themselves by being careful when creating documents or sharing them with third parties. For example, sharing wage scale or bonus pay information may be used as circumstantial evidence that a criminal agreement was reached. Employers should use the 1-year grace period to conduct a review of their business practices and any active agreements, and consider working with experienced legal counsel to ensure compliance.

To discuss these issues, please contact the author(s).