COMPETITION ACT AMENDMENTS INTRODUCE NEW CRIMINAL OFFENCE AGAINST WAGE-FIXING AND NO-POACH AGREEMENTS

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As part of an omnibus budget bill, the Canadian federal government introduced several amendments to the *Competition Act* on April 26, 2022, including one that will criminalize agreements between employers regarding wages, working conditions and hiring practices. For a discussion of the remaining proposed amendments to the *Competition Act*, please see McMillan's companion bulletin Significant Changes Coming to Canada's Competition Act.

Concerns about Wage-Fixing and No-Poach Agreements

Wage-fixing agreements are agreements between employers who compete for the same types of employees to set or fix those employees' salaries and wages. No-poach agreements are agreements between such competing employers not to hire or poach each others' employees.

Historically, Canada has exempted collective bargaining from competition laws and has not dealt with issues related to the labour and employment market. However, in response to the COVID-19 pandemic, three of Canada's largest grocery chains announced that they would give their store employees a special "hero pay" raise. As the pandemic conditions abated in June 2020, they each announced that their "hero pay" programs would end within a day of each other. This led to media and parliamentary scrutiny, questioning whether the grocery chains may have had an agreement with each other to end their pay raise programs.

In October 2020, the Competition Bureau issued a statement clarifying its view that the existing criminal conspiracy provision in section 45 of the *Competition Act* only prohibits price-fixing, market allocation and supply restriction agreements between competing suppliers; it does not prohibit agreements between competing purchasers of goods or services, including wage-fixing and no-poach agreements between competing employers. Courts subsequently confirmed this interpretation in two cases.[1] The "competitor agreements reviewable practice" in section 90.1 of the *Competition Act* can apply to such agreements between employers, but the Competition Bureau has not made use of this option.

In February 2022, the Minister of Innovation, Science and Industry announced a review of Canadian competition law, with wage-fixing agreements being noted as one of the key issues under consideration.

The Proposed Amendment

The fact that wage-fixing and no-poach agreements are outside the scope of the existing conspiracy offence under section 45 was seen by some, including the Competition Bureau, as a gap in Canadian competition law. This gap is further highlighted by antitrust law developments in the US.

In the US, the Department of Justice (DOJ) and the Federal Trade Commission published the *Antitrust Guidance for Human Resource Professionals* in 2016, which first warned that wage-fixing and no-poach agreements may be prosecuted criminally. In December 2020, the DOJ filed its first criminal indictment of a wage-fixing agreement, which was soon followed by its first criminal indictment of a no-poach agreement in January 2021. Since then, the DOJ has pursued additional prosecutions of these agreements. While jury trials for both the first wage-fixing and first no-poach criminal charges have resulted in acquittals in April 2022, courts in the US have found that wage-fixing and no-poach agreements can be criminally prosecuted on a *per se* basis.[2]

The proposed amendment would introduce an additional criminal conspiracy offence to the *Competition Act*. Once this amendment enters into force, employers that engage in wage-fixing or no-poach conduct could be found criminally liable for up to 14 years imprisonment, a criminal fine with no statutory maximum, or both. In addition, breaches of these provisions could expose employers to private law suits by affected employees (including class actions) seeking significant damages. The amendment provides that it would enter into force one year after it receives royal assent.

Implications for Employers

The proposed wage-fixing and no-poach amendment have several implications for employers:

1. The proposed offence does not appear to be limited to employers that are actual or potential competitors in the labour market (e.g., it could apply to franchisees that operate in geographically distinct territories). This omission is notable, because the existing criminal conspiracy provision in section 45 only prohibits agreements between suppliers that are actual or potential competitors.
2. The proposed wage-fixing provision also applies to agreements regarding "terms and conditions of employment". There is no definition regarding what types of terms and conditions are within the scope of the offence.
3. The proposed no-poach provision, on its face, encompasses non-solicitation clauses commonly found in many types of business transactions, as well as in franchise systems. Such clauses are usually aimed at protecting (and therefore incentivising) investments made in employee training and protecting against losing key employees. While employers may advance the "ancillary restraint defence" applicable to all conspiracy offences, the legal onus would be on the employers to establish this defence if they are

prosecuted for the no-poach offence. Employers would have to show that the non-solicitation clauses are reasonably necessary and ancillary terms of an otherwise legitimate broader agreement; this could involve a detailed analysis of the broader agreement and the relevant labour markets.

4. As a result of this amendment, employers, schools and professional bodies need to review any arrangements for professional and trade internship programs that involve coordination between them.

Since this amendment appears in an omnibus budget bill and the government has secured the support of an opposition party, we anticipate it will become law as early as June of this year. As noted above, businesses will have one year to review their agreements to assess compliance with the new provisions once they enter into force.

Members of McMillan's Competition Group and Employment Group are available to assist firms with compliance reviews and implementation of changes that may be required.

[1] *Mohr v National Hockey League*, 2021 FC 488; *Latifi v The TDL Group Corp*, 2021 BCSC 2183.
[2] *United States v. Jindal*, No. CV 4:20-CR-00358, 2021 WL 5578687, at *5 (E.D. Tex. Nov. 29, 2021); United States v. DaVita Inc., No. 1:21-CR-00229-RBJ, 2022 WL 266759, at *3 (D. Colo. Jan. 28, 2022).

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A Cautionary Note