

# THE BUREAU ISSUES FINAL ENFORCEMENT GUIDANCE ON THE NEW CRIMINAL PROHIBITION ON WAGE-FIXING AND NO-POACHING AGREEMENTS

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On May 30, 2023, following a consultation period, the Canadian Competition Bureau (“**Bureau**”) published its much-awaited [Enforcement Guidelines on wage-fixing and no poaching agreements](#) (“**Guidelines**”). The Guidelines set out the Bureau’s approach to enforce the new provisions of the *Competition Act* (the “**Act**”) criminalizing certain agreements between employers, which are set to come into force on June 23, 2023.

The Guidelines offer essential insight to employers who will need to review their agreements to ensure compliance with the new provisions to the Act.

## Overview of the New Criminal Provisions

Subsection 45(1.1) of the Act makes agreements between unaffiliated employers (a) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment (“**wage-fixing agreement**”) and/or (b) to not solicit or hire each other’s employees (“**no-poaching agreement**”) *per se* illegal. It was [enacted in June 2022](#) following concerns raised by the Bureau and Parliament, as well as recent legal developments in the US.

Subsection 45(1.1) is intended to curb so-called “naked restraints” on competition by employers for employees, which would include restraints on wages or job mobility that are not implemented to further a legitimate collaboration, strategic alliance or joint venture.

The penalty for violating these prohibitions includes a fine to be set at the discretion of the court, imprisonment for up to 14 years, or both. There can also be exposure to civil damages, including class actions, for any loss or harm suffered as a result of conduct contrary to subsection 45(1.1).

## Highlights from the Guidelines

The Guidelines set out the Bureau’s interpretation and enforcement approach with respect to the new criminal offence for wage-fixing and no-poaching agreements. In addition, the Bureau comments on when it may review no-poaching and wage-fixing agreements under the civil anti-competitive agreement provision in

section 90.1 of the Act.

While the Guidelines are useful guidance for compliance purposes, they are not definitive statements of law. They are not binding on the Bureau or the Public Prosecution Service of Canada in exercising their enforcement discretion in a particular situation; nor are they binding on courts or private plaintiffs suing for civil damages.

**(a) Scope of the Wage-Fixing Prohibition is Broad**

In addition to prohibiting agreements to fix employees' wages and salaries, subsection 45(1.1)(a) also prohibits agreements to fix "terms and conditions of employment". The Guidelines define "terms and conditions of employment" to include any "responsibilities, benefits and policies associated with a job", such as 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. The Guidelines note that the Bureau will generally limit its enforcement to "terms and conditions" that could affect a person's decision to enter into or remain in an employment contract.

**(b) One-Sided No-Poaching Agreements are not Prohibited**

According to the Guidelines, the Bureau interprets the prohibition against no-poaching agreements in subsection 45(1.1)(b) to extend to only two-way agreements, whereby each employer who is party to the agreement agrees not to hire or solicit the other's employees. Under this interpretation, one-way agreements, whereby only one employer agrees to not solicit or hire another employer's employee without a reciprocal commitment, are not within the scope of the prohibition.

**(c) A "Meeting of the Minds" is Required**

In order to constitute an offence under subsection 45(1.1), there must be an "agreement" between employers to engage in the prohibited conduct. This means that there must be a "meeting of the minds" between the parties, either explicitly or tacitly, to engage in the prohibited conduct, regardless of the degree of formality or enforceability and regardless of whether the agreement has been implemented.

**(d) Pre-Existing Agreements are Problematic Only If Parties Reaffirm Them**

The Guidelines note that, for agreements that existed before June 23, 2023, the Bureau is unlikely to find a wage-fixing or no-poaching agreement problematic provided that the parties take no steps to reaffirm or implement the restraint on or after June 23, 2023. Lack of steps to reaffirm or implement the restraint by at least two parties would be taken to mean a lack of the requisite "meeting of the minds".

The Guidelines further advise that employers may wish to update pre-existing company records and

agreements, as they arise in the ordinary course, to ensure compliance.

**(e) Enforcement Will be Prioritized Where Employers Compete for Labour**

The prohibitions in subsection 45(1.1) apply to wage-fixing and no-poaching agreements between unaffiliated employers, regardless of whether they compete in the supply of a product that they produce. However, the Guidelines clarify that the Bureau expects to prioritize its enforcement on wage-fixing and no-poaching agreements between employers that would otherwise compete in the purchase of labour. In other words, agreements between employers that have requirements for different types of employees, and therefore do not compete for labour, are less likely to attract scrutiny by the Bureau.

**(f) Certain Types of Information Sharing May be Scrutinized**

While information sharing does not ordinarily raise concerns, the Guidelines caution employers to take care when sharing commercially sensitive information with each other in the course of collaborative activities, including the sharing of employment terms. Such sharing of competitively sensitive information, coupled with parallel conduct, could suggest the existence of an illegal agreement.

**(g) The Ancillary Restraint Defence May be Applicable**

The Guidelines recognize the important role that labour-related restraints can play in stabilizing and protecting legitimate business interests in the course of advancing legitimate pro-competitive objectives in many business agreements. Accordingly, the Guidelines clarify 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 in subsection 45(1.1), as the so-called “Ancillary Restraint Defence” available under the Act is likely to apply.

Under the Ancillary Restraint Defence, an otherwise illegal restraint may not be found to be a criminal offence if it is (a) ancillary to a broader or separate agreement that includes the same parties and are not itself an illegal conspiracy and (b) directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement.

While the Guidelines recognize that the Ancillary Restraint Defence can legitimately apply in many common business contexts, including for example in franchise agreements and certain service provider-client relationships, the Guidelines clarify that the Bureau may start a criminal investigation under subsection 45(1.1) where the wage-fixing or no-poaching clauses are clearly broader than necessary in terms of duration, scope or affected employees.

**Conclusion**

With the wage-fixing and no-poaching offence coming into force on June 23, 2023, it is important for businesses to review their existing and ongoing practices to ensure compliance, including considering how to handle pre-existing agreements and the potential application of the Ancillary Restraint Defence. Members of McMillan's Competition Group and Employment & Labour Relations Group are available to assist firms with compliance reviews and to implement any changes required.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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