



# Competition Act changes and their impact on employers

by Liisa Kaarid

Important amendments to Canada's Competition Act will come into force on June 23, 2023. Given the serious ramifications of violating the new provisions, all employers should be aware of the changes.

## What are the changes?

A new subsection on criminal conspiracies makes it an indictable offence for unaffiliated employers to agree:

- on wage rates or other terms of employment (“wage-fixing agreements”)
- to not hire or poach each other's employees (“non-poaching agreements”)

The prohibition against wage-fixing is broad; it applies not only to wages but to other terms of employment too. The draft guidelines described below explain that it could cover any “terms and conditions that could affect a person's decision to enter into or stay in an employment contract,” such as job descriptions, work hours, location, reimbursements and non-compete clauses.

There is no need to show an anticompetitive effect – and the court can make a finding based on circumstantial evidence alone. The employers need not be competitors for there to be an offence. Finally, there is no need for the agreement to be in writing; it could be a verbal or informal understanding.

## Why were the changes made?

The Competition Bureau has stated that the changes were made to protect workers against agreements to fix wages and restrict job mobility. The move is widely attributed to adverse publicity sparked by certain grocery chains' simultaneous cancellation of COVID “hero pay” bonuses in 2020.

## What are the penalties?

On conviction: imprisonment for up to 14 years, a fine at the court's discretion, or both. Before the amendments, the maximum fine was \$25 million per offence but that cap has been removed.

Employers may also face lawsuits for damages because the Act gives a private right of action to recover damages caused by breaches of its criminal provisions. This means employees could sue the violating employer for wage-fixing or non-poaching. If many complainants share the same type of loss, there is a risk of class actions, which could drastically multiply the damages involved.

## Are there exceptions?

Yes, but we don't yet have clarity on how they will be applied. The Bureau published draft guidelines on interpretation of the new provisions on January 18, 2023, which are open for consultation until March 3, 2023. They are subject to change and, even once finalized, will not be binding. Depending on circumstances, legal counsel can advise if the following apply....

**Ancillary Restraints:** The Act provides an “ancillary restraint defence” if the wage-fixing or non-poaching agreement is:

- ancillary to a separate and otherwise lawful agreement between the employers; and
- directly related to and reasonably necessary for that separate agreement.

## Takeaways

Employers should:

- Ensure all contracts entered into with other employers after June 23, 2023 comply with the new provisions.
- Examine their information-sharing practices – and change them as necessary. Any sharing of wage, bonus or other employment-related information or steps taken to monitor each other’s employment practices could be circumstantial evidence of a criminal agreement.
- Ensure that conduct after June 23, 2023 does not reaffirm or implement older, non-compliant wage-fixing or non-poaching agreements.
- Have an effective compliance program. Thoughtful policies and training will help ensure that your staff knows the rules and abides by them.

Employers should take all necessary steps to avoid criminal liability under the new provision.

As such, a non-poach provision in the sale of a business could be defensible. Occasions that warrant wage-fixing are more difficult to identify.

**Affiliated Employers:** The offence applies only to agreements between unaffiliated employers. This means employers related via share ownership can make such agreements. Affiliates are parents and subsidiaries, and employers that are subsidiaries or controlled by the same entity or individual. Franchisors and franchisees are not generally corporate affiliates; they are independently and separately owned. As such, franchisors and franchisees cannot rely on this exception.

**Existing Agreements:** The draft guidelines suggest the provision will not be enforced against agreements entered into before June 23, 2023 – but it will apply to conduct that reaffirms or implements older agreements.

**One-Way No-Poach Agreements:** The draft guidelines indicate it is acceptable if only one party agrees to not poach another’s employees because the offence applies to reciprocal agreements not to poach “each other’s” employees. However, if separate arrangements result in mutual agreements, that could result in Bureau enforcement.

**Collective Bargaining:** The Act states its provisions do not apply to arrangements between two or more employers pertaining to collective bargaining with their employees respecting salary, wages or conditions of employment. Therefore, multiple employers under one collective agreement are free to confer. However, other activities relating to bargaining with unions should be closely assessed. For example, some grocery chain collective agreements only bind the franchisee store owners and not the franchisor. In such cases, it would be risky for the franchisor to participate in the bargaining process, as such involvement could attract criminal liability. ■

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