No Poaching – Upcoming Changes to Canada's Competition Act

June 8, 2023

The federal Canadian *Competition Act* is the principal legislation that aims to deter and prevent anti-competitive practices in the Canadian marketplace. One year ago, the Canadian government made major amendments to the act. These amendments cover a range of areas, including misleading advertising, expanding the "abuse of dominance" protections, and prohibiting employers from using wage-fixing and "no-poaching" agreements.

On **June 23, 2023**, the wage-fixing and no-poach changes will take effect. These changes are of significant importance to businesses operating in Canada. Unaffiliated employers will be generally prohibited from agreeing with one another (a) to fix, maintain, decrease, or control wages and other terms of employment, or (b) to not solicit or hire each other's employees. While this provision applies to new agreements entered into on or after June 23, 2023, its application will extend to conduct that reaffirms or implements older agreements. Failure to comply could result in significant fines and potential criminal penalties.

Here is the new section in its entirety:

45 (1.1) Every person who is an employer commits an offence who, with another employer who is not affiliated with that person, conspires, agrees or arranges

1. *to fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or*

1. *to not solicit or hire each other's employees.*

The use of non-solicitation or "no poaching" clauses and agreements is prevalent in business transactions and business owners are taking note. However, although there is currently no case interpreting this language and no certainty as to how it will be applied, the Government of Canada's guidance[1] suggests that the section will be interpreted as being limited to situations in which the parties mutually agree not to solicit or hire each other's employees.

Using an example, suppose that Company A is considering the purchase of Company B's business, and in the course of reviewing the due diligence, will interact with or will obtain information about the employees of Company B. Oftentimes, a non-disclosure agreement will be entered into (and should be entered into!) which would prevent Company A from soliciting or hiring the employees of Company B. Since the non-solicit or non-hire is being granted by one party (Company A) to the other (Company B), it would not fall within the restrictions in Subsection 45(1.1)(b). If, however, Company A and Company B are considering a joint venture and include a mutual non-solicitation clause, such an arrangement could be in contravention of the law, in which case the parties would need to establish that there is a defence available under Subsection 45(4), referred to as the "ancillary restraints defence" or "ARD". This defence is available when, on a balance of probabilities, it is established that: (i) the restraint is ancillary to, or flows from, a broader or separate agreement that includes the same parties; (ii) the restraint is directly related to and reasonably necessary for achieving the objective of the broader or separate agreement; and (iii) the said broader or separate agreement, when considered without the restraint, does not violate Subsection 45(1.1). There may be additional defences available depending on the particular facts in question.

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If you have any questions about these changes and how they may impact your existing agreements or proposed agreements, please contact your Miller Canfield LLP lawyer or any of the authors of this alert.

[1] Government of Canada, *Enforcement Guidelines On Wage-Fixing And No Poaching Agreements* (June 1, 2023), online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements#sec2-2>.