

Franchisors beware: amendments to the Competition Act criminalize no-poach and no-hire provisions

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Pending amendments to the *Competition Act* will soon criminalize no-poach and no-hire provisions (including non-solicits) in certain circumstances. This is an important development for franchisors as provisions relating to hiring and solicitation are common in franchise agreements in Canada. While many such provisions will continue to be defensible once the new law takes effect in June 2023, franchisors will want to carefully review their agreements in light of this new legal framework.

Competition Act amendments

Currently, no-poach and wage-fixing agreements are only addressable under the *Competition Act* on a civil basis if they may substantially prevent or lessen competition. However, effective June 23, 2023, amendments to the *Competition Act* will expand the criminal conspiracy provision in section 45 of the legislation by making it a criminal offence for unaffiliated employers to enter into an agreement not to solicit or hire each other's employees (i.e., no-poach and no-hire agreements). The amendments also make it a criminal offence for unaffiliated employers to enter into an agreement to fix, maintain, decrease or control salaries, wages or terms and conditions of employment.

The current penalty for a violation of section 45 is imprisonment of up to 14 years and/or a fine of up to \$25 million; however, as of June 23, 2023, the fine will be uncapped. The application of the expanded section 45 to any particular agreement will depend on the scope of any restraint and its rationale in the overall context of the relationship between the parties to the agreement.

The defences found in section 45, including the ancillary restraints defence, will continue to be available when the amendments come into force. Specifically, section 45(4) provides that there is no offence if a party to an agreement captured by section 45 can establish, on a balance of probabilities, that the agreement is ancillary to, and reasonably necessary for giving effect to, a broader or separate legitimate agreement or arrangement.

Timeline

The amendments were part of the *Budget Implementation Act, 2022*, which received Royal Assent on June 23, 2022. The 12-month delay between Royal Assent and the in-force date was intended to give businesses the opportunity to take any action necessary to avoid being offside the *Competition Act* when the provisions come into force.

Once the amendments are in force, they will apply to any agreements in effect at that time,

regardless of whether they were executed before June 23, 2023. In other words, existing agreements are not “grandfathered” under the new provision, and will be subject to the same scrutiny as an agreement signed after this date.

The Competition Bureau has not yet issued any guidance on its approach to enforcement or interpretation of the newly expanded criminal conspiracy provision, but is expected to do so before the end of 2022.

Franchisors should consult with their legal counsel to evaluate their franchise agreements in light of the *Competition Act* amendments.