

New criminal provision in the Competition Act presents unique challenges for franchisors

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On June 23, 2023, amendments to the *Competition Act* will take effect (the new criminal provision) which will prohibit the following arrangements/agreements between unaffiliated employers (subject to certain defences):

- arrangements/agreements between employers (whether or not they compete) whereby the employers agree not to hire each other's employees (a two-way, reciprocal no-poach agreement)
- arrangements/agreements between employers (whether or not they compete) that serve to fix, maintain, decrease or control terms and conditions of employment (a "conditions of employment" agreement)

The new criminal provision is *per se* illegal and a violation constitutes a criminal offence punishable by up to 14 years imprisonment or a fine at the discretion of the court, or both. Both individuals and corporations can be found guilty of an offence. Private parties can also commence damages actions based on an alleged violation of the new criminal provision.

The new criminal provision requires that franchisors carefully consider common provisions in many franchise agreements through which the franchisor requires the franchisee to (i) impose certain conditions on its employees and/or to enter into prescribed forms of agreements with its employees and/or (ii) agree not to solicit or hire employees of the franchisor or other franchisees during and following the term of the franchise agreement.

The Competition Bureau (the Bureau) released [updated guidance](#) on May 30, 2023 (the Guidance) on its planned enforcement of the new criminal provision. The Bureau has confirmed that the new criminal provision will apply to

- agreements made between employers (irrespective of whether such employers are considered competitors) *on or after June 23, 2023*
- conduct that reaffirms or implements agreements that were made *before* that due date (including renewals or extensions)

No-poach agreements

The prohibition on no-poach agreements prohibits two-way non-solicit/no-hire agreements between employers, whereby employers agree not to solicit or hire each other's employees. Franchising presents a somewhat unique contractual framework in that the relevant provisions in franchise agreements typically prohibit the franchisee from hiring the employees of the franchisor or of other franchisees.

Based on the Guidance, many common franchise agreement provisions will not be considered no-poach agreements covered by the new criminal provision. First, franchise agreements typically include a one-way prohibition, meaning that the franchisor does not agree not to poach the franchisee's employees. Second, the Guidance has clarified that where a franchisor enters into agreements with each of its franchisees that the franchisee will not poach the employees of other franchisees and the franchisees have a common understanding that each franchisee has entered into a similar agreement, this will not be viewed as an agreement amongst the franchisees unless there is evidence of an intention between franchisees to enter into a no-poaching agreement with each other.

If a franchise agreement contains a no-poach agreement that could be captured by the new criminal provision (i.e., an agreement that is reciprocal) that the franchisor intends to enforce, the franchisor must satisfy itself that the ancillary restraints defence, discussed below, will apply.

'Conditions of employment' agreements

It is important to note that while discussion and commentary regarding the "conditions of employment" agreement has been focused on the prohibition on "wage-fixing", the scope of the new criminal provision goes beyond agreements on wages. The Guidance describes "terms and conditions of employment" to include the responsibilities, benefits and policies associated with a job: "This may include 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 Guidance focuses on whether the terms and conditions imposed on the employee could affect their decision to stay or leave a job.

Again, if a franchise agreement includes a "conditions of employment" agreement, the ancillary restraints defence may apply. This will require a contextual analysis of the restraint as well as its history, purpose and role in the overall relationship.

Ancillary restraints defence

The Competition Act provides for a defence (known as the ancillary restraints defence or ARD) that is available where a person establishes on a balance of probabilities that

- an agreement that is covered by the new criminal provision is
 - ancillary to a broader or separate agreement or arrangement that includes the same parties
 - directly related to or reasonably necessary for giving effect to the objective of that broader agreement/arrangement
- the broader agreement/arrangement considered alone does not contravene the new

criminal provision

The Guidance acknowledges that no-poach agreements and "conditions of employment" agreements can have an important role in stabilizing and protecting parties' business interests in the course of advancing legitimate pro-competitive objectives and expressly references the role these agreements can play in a franchise model. However, the Bureau is careful to point out that it may enforce the new criminal provision where the provisions are clearly broader than necessary.

We would be pleased to assist with the review of your franchise agreement to identify any possible no-poach agreements or "conditions of employment" agreements, discuss the rationale for the provisions with you and provide guidance on whether the ARD may be available.