

HOW NEW CRIMINAL PROHIBITIONS ON WAGE-FIXING AND NO-POACHING AGREEMENTS UNDER THE *COMPETITION ACT* MAY IMPACT YOUR FRANCHISE AGREEMENT

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Background

On May 30, 2023, following a consultation period, the Competition Bureau (the “Bureau”) released its enforcement guidelines (the “Guidelines”) on amendments to the *Competition Act* (“Act”) prohibiting wage-fixing and no poaching agreements between unaffiliated employers. [\[1\]](#) Section 45(1.1) is intended to protect competition in labour markets by prohibiting “naked restraints” on competition, including restraints on wages or job mobility that are not implemented to further a legitimate collaboration, strategic alliance, or joint venture.

The new criminal offence in Section 45(1.1) will come into force on June 23, 2023, and after such date, violation of same by employers can result in criminal fines and/or up to 14 years imprisonment, as well as potential civil liability through private plaintiff actions. The new offence will apply to any new agreements entered into between unaffiliated employers on or after June 23, 2023 as well as any conduct that reaffirms or implements existing agreements on or after June 23, 2023.

Although the Guidelines do not address all of one’s potential concerns as to how Section 45(1.1) may be enforced in the franchise context, they do include critical insights and improve clarity on certain matters reflected in the Bureau’s previous draft guidelines published on January 18, 2023. The Guidelines are not a definitive statement of law and are not binding on the Bureau and Public Prosecution Services of Canada in their exercise of enforcement discretion, nor are they binding on private plaintiffs seeking civil damages through the courts. They are nevertheless a helpful tool for compliance purposes that may assist franchisors in navigating the new offence and determining best practices to mitigate its potential application to their franchise systems.

For more detailed information on the Guidelines, please see our recent publication [here](#).

No-Poaching Agreements

On its face, the new Section 45(1.1)(b) prohibits all non-solicitation agreements, or non-solicitation clauses in agreements, between unaffiliated employers.

Oftentimes in a franchise agreement between a franchisor and individual franchisees, a franchisee will agree firstly, not to poach the franchisor's employees and secondly, not to poach the employees of other franchisees. There is no privity of contract between individual franchisees in such context (and other franchisees rarely have third party beneficiary status under such agreements that may enable them to enforce such clauses directly against the franchisee that is party to the franchise agreement). Franchisees are, however, likely to be aware that such restrictions exist system-wide, as the terms of franchise agreements are typically more or less dictated by the franchisor.

The Bureau recognizes in its Guidelines that certain restraints, such as the no-poaching provision described above, can play an important role in the franchise model. As to the first restriction imposed on the franchisee (i.e., not to poach the franchisor's employees), the Bureau's Guidelines suggest that it does not view such restriction as being subject to the Section 45(1.1)(b) offence, as it lacks mutuality (i.e. the franchisor has not agreed to not poach the franchisee's employees). As to the second type of restriction (i.e., not to poach other franchisees' employees), the Guidelines indicate that a franchisee's mere awareness or knowledge of parallel standard franchise agreements with no-poach restraints will not raise concerns under Section 45(1.1)(b), unless there is evidence of an intention between the franchisees to enter into a no-poaching agreement with each other. A no poaching "side agreement" between franchisees, through which a consensus is reached between franchisees to not poach each other's employees, would raise concerns under Section 45(1.1)(b). Franchisors should not facilitate such "side agreements" between franchisees, as such facilitation by franchisors could be considered "aiding and abetting" an illegal agreement between franchisees. Further, franchisors should consult with their legal advisors before taking any action requested by a franchisee to enforce the terms of a non-solicitation provision contained in the franchise agreement against another franchisee.

In addition, the Bureau's Guidelines accept that an arrangement whereby a "poaching" franchisee would provide compensation to the affected franchisee generally would not be problematic if the compensation is reasonably related to the costs incurred for training and does not disadvantage employees' opportunities relative to external candidates.

Wage-fixing Agreements

Section 45(1.1)(a) of the Act also creates a new offence where unaffiliated employers agree to fix, maintain, decrease or control salaries, wages or terms and conditions of employment which include the responsibilities, benefits and policies associated with a job. According to the Guidelines, 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 Guidelines indicate that the Bureau's enforcement generally is limited to those "terms and conditions" that could affect a person's decision to enter into or remain in an employment contract.

In the franchise context, franchisors commonly impose standards and requirements that a franchisee must adhere to (and cause its employees to adhere to), either pursuant to terms of the franchise agreement or through operations manuals and directives that the franchisee is required to comply with. For example, franchisee's employees may be required to adhere to a certain dress code standards. Such standards and requirements are typically viewed as necessary in order to preserve brand integrity, which is an essential element to any franchise system. Franchisors will need to take care that system standards do not overstep and contravene Section 45(1.1)(a). In addition to reviewing the relevant provisions in their franchise agreements, franchisors may also look to rely on the "ancillary restraint defence" set out in Section 45(4) of the Act.

In short, Section 45(4) provides that if a wage-fixing (or no-poaching arrangement) is directly related to and reasonably necessary for a broader legitimate agreement, then it is likely to be found to not offend Section 45(1.1). The Guidelines expressly recognize that labour-related restraints can play an important role in stabilizing and protecting parties' legitimate business interests in the course of advancing legitimate pro-competitive objectives, including in franchise agreements. That being said, the Guidelines state that the Bureau may start an investigation under Section 45(1.1) where those clauses are clearly broader than necessary in terms of duration, scope or affected employees and that in appropriate circumstances, the Bureau may engage employers by providing information or seeking compliance through an alternative case resolution, rather than pursuing criminal prosecution.

Conclusion

With the imminent coming into force of the new offence set out in Section 45(1.1) of the Act, franchisors and franchisees alike should revisit their franchise agreements and internal policies and consult with their legal advisors to determine best practices for avoiding contraventions of the Act.

[1] [Enforcement Guidelines on wage-fixing and no poaching agreements \(canada.ca\)](#)

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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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