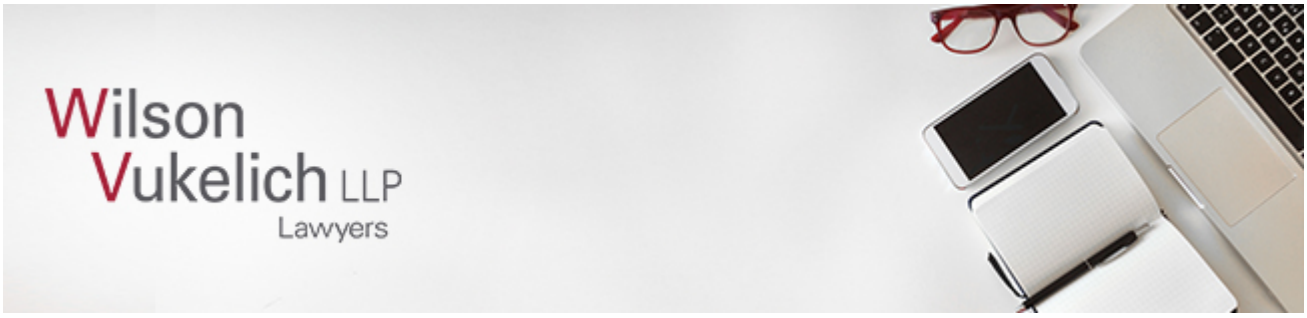

Employers Now Prohibited from Working Together to Address Poaching and Wages

June 2023 Employer Alert

As of Friday June 23, 2023, the *Competition Act* of Canada has been amended to prohibit employers from entering into non-poaching agreements and wage-fixing agreements with their competitors. As such, it is now a criminal offence in Canada to enter into an agreement with an unaffiliated employer not to solicit or hire each other's employees. Similarly, it is now a criminal offence in Canada to enter into an agreement with an unaffiliated employer to fix, maintain, or decrease employee compensation. This ban further extends to agreements entered into before June 23rd, if either party looks to enforce them post-June 23rd. To understand this prohibition, the Competition Bureau of Canada has published enforcement guidelines.

There are several key exceptions to this prohibition. First, the ban on non-poaching and wage-fixing agreements only applies to unaffiliated employers. As such, companies under one umbrella or companies that are related to each other (e.g. a group of companies with overlapping shareholder(s)), can still enter into non-poaching agreements and wage-fixing agreements, Second, the ban on non-poaching and wage-fixing agreements does not apply where the agreement is part of a collective agreement. And finally, the ban on non-poaching and wage-fixing agreements may not apply if the employers can successfully establish that non-poaching/wage-fixing terms were required further to a desirable business transaction to make the transaction possible or to achieve efficiency. This is known as the Ancillary Restraint

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Defence or the ARD. For example, further to an asset sale or settling litigation over poaching, the employers may be able to satisfy the Bureau that the ARD exists.

When an exception to this prohibition does not exist, it will impact the community of employers. In our current economy, many employers are feeling the brunt of labour shortages and demands of compensation packages in keeping with inflation. This has caused for intensified workforce competition between employers. As a result of the amendments to the *Competition Act*, employers will no longer be able to align themselves by reaching a mutually agreed to non-poaching agreement or wage-fixing agreement. As such, employers are now effectively forced to pay market-compensation packages.

Despite the revisions to the *Competition Act*, in various jurisdictions in Canada, employers remain able to enter into with employees both non-solicitation agreements (i.e. you can work for a competitor, but cannot solicit our clients/employees) and non-competition agreements (i.e. you cannot work for certain competitors). These agreements can go a long way to deter and block poaching efforts. The ability to use these agreements vary by jurisdiction. For example, in Ontario, a non-competition agreement is only enforceable if: i) it was in place before October 25, 2021; ii) it is in regards to a member of the executive team (e.g. the CEO, CFO, etc.); or iii) it is entered into further a purchase and sale, where the seller is becoming an employee of the purchaser. To be enforceable, non-solicitation and non-competition agreements in any jurisdictions must be carefully and properly drafted and entered into.

In light of the above, employers who are looking to address intense workforce competition, will now be further limited in their options. However, in certain instances, their options may not be as limited, if an exception can be established. In addition, employers may still be able to address workforce competition issues with non-solicitation and non-competition agreements with their employees.

For more information or to discuss workforce concerns, please speak with one of our employment lawyers.