



155 Wellington Street West
Toronto ON M5V 3J7
dwpv.com

October 13, 2016

Adam Fanaki
T 416.863.5564
F 416.863.0871
afanaki@dwpv.com

File No. 249883

PRIVILEGED AND CONFIDENTIAL

BY E-MAIL

ACSESS
2233 Argentia Road, Suite 100
Mississauga, ON L5N 2X7

Dear Sirs/Mesdames:

Our client, Randstad Canada, has requested that we provide our views regarding the *Changing Workplaces Review Special Advisors' Interim Report* (the "**Report**") released on July 27, 2016. The Report proposes to require THAs to disclose the mark-up¹ to the assignment worker (i.e., share pricing information) and limit the amount of the mark-up. As detailed below, both of these proposals are in our view contrary to Canadian competition law principles.

1. Sharing Pricing Information

The Report notes that the specifics of the staffing industry business model are "opaque (e.g., percentage of the mark-up charged to clients by agencies)".² Mark-up is the only source of revenue for THAs, as Bill 139 (*Employment Standards Amendment Act (Temporary Help Agencies), 2008*) which received Royal Assent in 2009, prevents THAs from charging other fees to assignment workers, including fees for training and placements. Mark-up thus represents the gross profit margin of each THA, and this information is commercially sensitive and highly confidential.

Competitors generally avoid sharing information that is competitively sensitive in order to preserve their competitive advantage. Sharing commercially sensitive information also runs the risk of breaching Canadian competition laws. In its administrative *Competitor Collaboration Guidelines* (the "**Guidelines**"), the Canadian Competition Bureau notes explicitly that the disclosure or exchange of "information that is important to competitive rivalry between the

¹ Mark-up is the difference between what the client company pays for the assignment worker and the wage the agency pays the assignment worker.

² Report, section 5.3.9.

parties can result in a substantial lessening or prevention of competition. For example, exchanging pricing information". A requirement to disclose the mark-up to the assignment worker provides a requirement to disclose highly confidential and commercially sensitive pricing information to competitors. The Guidelines state:

"unilateral disclosure or exchange of information between competitors can impair competition by reducing uncertainties regarding competitors' strategies and diminishing each firm's commercial independence".

Pricing information can be shared by THAs in an aggregated form through a trade association or another similar medium, but to require individual disclosure of pricing information to competitors is in our view anti-competitive and contrary to Canadian competition law principles.

2. Limiting Amount of Mark-up

The Report also proposes to limit the amount of the mark-up, noting that a "private member's bill (PMB) 143, *Employment Standards Amendment Act (Temporary Help Agencies), 2015* was recently introduced on November 18, 2015 that would (if passed [in the current form]) require that agencies pay assignment workers 80% of the fee charged to clients."

A proposal to limit the amount of mark-up is anti-competitive in nature. Such a measure has not been implemented in any other jurisdiction to our knowledge, likely recognizing the anti-competitive implications of such measures. Section 45(1) of the Canadian *Competition Act* provides that it is an offence to agree or arrange "to fix, maintain, increase or control the price for the supply" of a product. Agreements under section 45(1) are *per se* unlawful, meaning that prosecution does not require actual anti-competitive effects, and are subject to significant criminal sanctions. The Guidelines state:

"activities that assist competitors in monitoring one another's prices or conduct otherwise consistent with the existence of an agreement may be sufficient to prove that an agreement was concluded between the parties for the purpose of subsection 45(1) of the [Competition] Act".³

³ *Competitor Collaboration Guidelines* (23 December 2009), Canadian Competition Bureau, available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html#cgg-1.2>.

Limiting the amount of the mark-up (particularly in parallel to a required disclosure of the mark-up) is akin to maintaining and controlling the price for the supply of assignment workers, and in our view is contrary to Canadian competition law principles.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Adam Fanaki', with a long horizontal stroke extending to the right.

Adam Fanaki

cc: Lara Speirs, Randstad Canada

AF/blj