

First Conduct Rule breaches: not just anti-competitive, but illegal

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On 9 April 2018 the Competition Commission issued an advisory bulletin on the potential risks that could arise under the Competition Ordinance (Cap 619) in the employment context.

Employment marketplace

It is the Competition Commission's view that Hong Kong's free market economy depends on a healthy competitive environment whereby employees benefit from competitive rivalry in the marketplace, just as consumers do. Competition among employers to hire employees often leads to better employment terms (eg, higher salaries and better benefits), thereby resulting in increased opportunities for employees.

Contravention of First Conduct Rule

The Competition Commission considered that employers are more likely to breach the First Conduct Rule of the Competition Ordinance. Specifically, the rule prohibits anti-competitive agreements, under which market participants collude with their competitors on key competitive parameters. Employers should therefore refrain from entering into agreements or engaging in concerted practices regarding terms of employment or the hiring of employees.

The Competition Commission has identified the following practices between employers as being at risk of contravening the First Conduct Rule:

- Wage-fixing agreements – employers that have an agreement on any element of compensation for employees are fixing the price of labour. The definition of 'compensation' is not limited to salaries but includes other benefits and allowances that may be offered to employees.
- Non-poaching agreements – employers that have an agreement in relation to the solicitation or hiring of each other's employees. An example given by the Competition Commission is an agreement between employers to refuse to hire each other's employees.
- Exchange of sensitive information – the sharing of competitively sensitive information between employers about their intentions regarding employees' compensation or hiring, be it reciprocal or unilateral, and whether done directly or through a third party.

In accordance with the commission's guidelines, the term 'agreement' is defined broadly and can include any arrangement, understanding, promise or undertaking, written or oral, whether express or implied and whether or not it is enforceable or intended to be enforceable by legal proceedings.

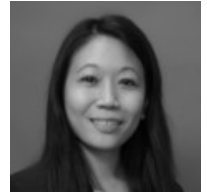
Contravention of the First Conduct Rule can result in financial penalties (up to 10% of the company's turnover for a maximum of three years), director disqualification orders or other sanctions.

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Practical considerations

To ensure compliance with the Competition Ordinance, employers should independently determine their hiring and compensation policies. Human resources personnel should avoid communicating with other employers in this regard or coming to any form of an agreement or understanding that would restrict competition among the employers. They should also avoid sharing any kind of information as to their future intentions with respect to salaries and benefits. Information in relation to employment practices, compensation and benefits should be kept entirely confidential.

The Competition Commission encourages all parties to report suspected anti-competitive arrangements relating to employment.

For further information on this topic please contact [Kevin Bowers](#) or [Patricia Yeung](#) at Howse Williams Bowers by telephone (+852 2803 3688) or email (kevin.bowers@hwbhk.com or patricia.yeung@hwbhk.com). The Howse Williams Bowers website can be accessed at www.hwbhk.com.

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