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Ontario Government Seeks to Protect Workers by Proposing Unique Changes to Employment Standards Legislation

By Daniel Pugen

Every Provincial Government seeks to enact reforms to labour and employment legislation. However, usually those reforms deal with traditional minimum standards of employment (e.g. hours of work, overtime, holidays, vacation, leaves of absence, etc) or the process for unionization. This time, the Ontario Government opted for a different approach by proposing 3 unique changes to employment standards legislation via the *Working for Workers Act, 2021*.

This legislation would amend the *Employment Standards Act, 2000* ("ESA") by banning non-compete agreements with employees and by requiring employers with 25 employees to adopt "disconnecting from work" policies. According to the Government's press release, the goal is to "promote healthy work-life balance" and "enable competitiveness by banning unfair non-compete agreements that are used to restrict work opportunities, suppress salary increases and wage growth." The legislation would also amend the ESA to require recruiters and temporary help agencies to become licensed with the Province with the goal of protecting "vulnerable employees from being exploited."

Banning Non-Compete Agreements

While non-competition agreements can vary in design and scope, generally speaking these agreements preclude a former employee from being employed or otherwise competing in the same industry as their former employer for a certain length of time and within a certain geographical area. These agreements seek to protect the employer from the economic harm that can sometimes result from employees moving to a competitor. Given that these agreements restrict one's livelihood, they are subject to common-law rules which require, amongst other things, that the clauses are reasonable and narrow in scope in order to be enforceable.

The proposal from the Government is simple and bold. Employers would be precluded from entering into these types of agreements with employees. This includes a restrictive covenant agreement or an

employment agreement with a non-compete clause. There is only one exception. Employers would still be permitted to enter into non-compete agreements with employees in the context of the sale of their business. Accordingly, if an individual sells a business and then becomes employed by the purchaser, the purchaser may enter into a non-compete agreement with that individual.

It remains to be seen whether further exemptions will be added before the legislation passes. For example, the Government could consider exemptions that would permit non-compete agreements for executives/senior managers or where the employer provides a separate payment to the employee (e.g. a severance payment that matches the non-compete period). The Government could also clarify that the prohibition would only apply on a go-forward basis.

Notably, the legislation would not preclude non-compete agreements with independent contractors, consultants or partners of a business. The prohibition applies to employees only. The legislation also does not ban non-solicitation agreements.

Disconnecting from Work

The pandemic and remote working has highlighted a common issue facing many – that is, the need to be constantly 'plugged in', connected or 'logged on' to work. Whereas 'punching out' at the physical workspace would signal the end of the work day, the lines between personal and work time have been blurring for years.

The Government's approach to this issue is to require employers with 25 or more employees to draft a policy on "disconnecting from work". The phrase "disconnecting from work" is defined as "*not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work*". Essentially, shutting down one's computer, tablet or cell phone from work.

Employers must provide a copy of the policy to employees within 30 days of preparing the policy or 30 days from hire.

Employers will have 6 months from the date the legislation is passed to draft the policy.

Currently, there are no requirements as to the form of policy or what must be contained in the policy, though the Government may add such requirements by Regulation.

Licensing of Agencies and Recruiters

The legislation would require temporary help agencies and recruiters to be licensed by the Government in order to operate their business. The Government would have broad authority to grant or not grant the license and can consider whether the business is in compliance with the ESA or if the business "will not carry on business with honesty and integrity and in accordance with law." Businesses have appeal rights if their license application is refused, suspended or revoked.

Businesses would be prohibited from knowingly engaging or using the services of an unlicensed temporary help agency or recruiter.

Obligations on recruiters to keep records have been added as well as prohibitions on recruiters committing reprisals against prospective employees who use the services of a recruiter and who, for example, ask the recruiter to comply with the ESA.

The legislation will be debated and we expect that changes may occur. In the meantime, employers should begin to consider the content of any "disconnection" policies, the use of non-compete agreements and business dealings with recruiters and temporary help agencies.

We will continue to monitor any developments in the progress of this legislation. If you have any questions, please contact any member of our Employment & Labour Law Group.

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