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Ontario passes *Working for Workers Act, 2021*

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On November 30, the Ontario government passed the *Working for Workers Act, 2021* (the Act), which includes, among other things, prohibitions on the use of non-compete obligations in employment agreements and requirements for most employers in Ontario to develop "disconnecting from work" policies.

What you need to know

- Non-compete obligations in employment agreements (non-compete agreements) are now prohibited (and, if applicable, voided) in most employment contracts entered into after October 25, 2021. Exceptions are made for non-compete agreements with the highest-ranking executives of a company and in the context of a sale of a business.
- Any employer with 25 or more employees is required to develop a written policy in respect of "disconnecting from work".
- Other notable changes introduced by the Act: i) requiring recruiters and temporary help agencies to be licensed in Ontario; and ii) requiring businesses to allow truckers and delivery couriers to access washrooms in the businesses they serve.

Prohibition on non-compete agreements

Legislative amendments

The Act prohibits employers from entering into non-compete agreements with most employees. The prohibition is effective as of October 25, 2021. Subject to the exceptions discussed below, any non-compete agreements entered into since that date are voided by the legislation.

A "non-compete agreement" is defined in the Act to include "an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends".

There are two exceptions to the prohibition on non-compete agreements:

1. The prohibition does not apply to an "executive", which is defined as "any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position".

2. The prohibition does not apply in the context of a sale of all or part of a business if i) the purchaser and seller enter into an agreement that prohibits the seller from engaging in any business, work, occupation, profession, project or other activity that is in competition with the purchaser's business after the sale, and ii) immediately following the sale, the seller becomes an employee of the purchaser.

Questions and implications for employers

Although the prohibition on the use of non-compete provisions places limitations on an employer's ability to protect its business interests, importantly, the Act does not prevent employers from entering into non-solicitation or confidentiality agreements. Accordingly, employers still have tools at their disposal with which to attempt to prevent disruptions to their business following the departure of employees. Employers should carefully review their existing non-solicitation and confidentiality agreements to ensure they are sufficiently protected.

There are a number of issues that remain unclear and are not specifically addressed by the Act:

- While the Act voids any non-compete agreements entered into after October 25, 2021, it does not expressly void any previously entered into agreements. Arguably, those agreements could potentially be enforceable, however, courts have historically been reluctant to enforce non-compete agreements in the employment context (particularly in the absence of exceptional circumstances, such as where the employee is a fiduciary). It is possible that the Act will result in courts taking an even stronger stand against existing employment non-compete agreements or refusing to enforce them entirely.

- Given the specific definition of an executive, it is unclear whether companies that utilize different naming conventions (for example, "Head of People and Culture" as opposed to "Chief Human Resources Officer") will be able to take advantage of the exception. Businesses may wish to consider including "chief executive" language in their senior executive position descriptions to avoid any uncertainty, in addition to considering the "usual" common law limitations on the enforceability of non-compete agreements in the employment context.

- Finally, we note that it is unclear how the prohibition on non-compete agreements may apply in some types of plans and contracts that do not neatly fit within the conventional employment contract model. For example, if a non-executive employee is party to a limited partnership contract or shareholder agreement, will a non-compete agreement in that contract be prohibited by the Act? None of the parties to the contract is an "employer" or "employee", and the contract does not govern an employment relationship, but it could arguably form part of the "employment contract" under a broad interpretation of that term in some contexts.

Disconnecting from work policies

Legislative amendments

The Act requires all employers who employ 25 or more employees as of January 1 of any year to have a written policy in place by March of that year for all employees with respect to disconnecting from work. "Disconnecting from work" is defined as "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".

Questions and implications for employers

The Act does not include any specific requirements for a disconnecting from work policy. For example, there is nothing in the legislation that prohibits employees from working (or being asked to work) outside of their "usual" business hours. Further, there are no exceptions made for executive or other higher-ranking employees (who are often expected to work, or at least check their e-mail, off hours). We would anticipate, however, that the Ontario government will promulgate a Regulation to prescribe the contents of a disconnecting from work policy pursuant to the Act.

Temporary help agency licensing requirements

The Act prohibits persons from operating as a temporary help agency or acting as a recruiter without a license and prohibits knowingly engaging or using the services of an unlicensed temporary help agency or recruiter. The Act sets out specific license application requirements for recruiters and record-keeping requirements for recruiters and clients of temporary help agencies.

The Act further prohibits recruiters from intimidating or penalizing a prospective employee who asks the recruiter to comply with the *Employment Standards Act, 2000*, gives information to an employment standards officer, testifies or participates in a proceeding under the *Employment Standards Act, 2000*, or makes inquiries regarding the license of a recruiter or temporary help agency.

To discuss these issues, please contact the author(s).