Member's Quarterly Summer 2022 Edition

Feature

The Working For Workers Act, 2021

Ontario passes employee-friendly legislation

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On December 2, 2021, a suite of employment-related changes that will affect employer policies, agreements and recruitment partnerships took effect. Notably, amendments to the Ontario *Employment Standards Act, 2000* (the "ESA") made Ontario the first Canadian province to legislate the "Right to Disconnect" and to generally prohibit non-compete agreements. The province also restricted the use of recruiting services that charge foreign nationals a recruitment fee. Pending amendments will impose licencing requirements on recruiting agencies.

The Right To Disconnect

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The ESA now includes the "Right to Disconnect" which is defined to mean "not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages." The amendments to the ESA will require that employers with more than 25 employees by January 1st of each calendar year implement a written policy on disconnecting from work for "all employees" by March 1st. For the purposes of determining whether an employer meets the 25-employee threshold, officers and full time, part-time and casual employees are to be included. Note that in 2022, employers with 25 or more employees on January 1st must implement a written policy by June 2nd and must provide each of their employees with a copy of the written policy within 30 days of preparing the policy.

Currently, the ESA requires that disconnecting from work policies contain "such information as may be prescribed." As of January 2022, the province has not yet released any directives or regulations that specify the information that employers must include in their written policies. However, the language that defines the Right to Disconnect suggests that policies will apply to a limited range of communication-based tasks, and the Ministry of Labour has commented that such policies could include "expectations about response time for emails and encouraging employees to turn on out-of-office notifications when they aren't working."

Takeaways for Employers

All employers who meet the 25-employee threshold should begin creating their new policies. This might include consideration of reviewing and revising existing "work from home" and "work time" policies, assessing critical industry and business specific needs that require communications outside regular work hours and consulting with legal counsel to draft a disconnecting from work policy. We also encourage monitoring for additional government directives and regulations specifying the information that must be included in written policies.

A Prohibition of Non-Competition Agreements

Retroactive to October 25, 2021, the *ESA* now generally prohibits employers and prospective employers from entering into non-compete clauses and agreements. In short, any non-competes that violate the *ESA* will be considered void.

As defined, a non-compete agreement includes any agreement 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 ends.

However, two key exceptions have been contemplated. First, the ban on non-competes does not apply to an "executive," defined to include any person who holds the office of CEO, President, CAO, COO, CFO, CIO, CLO, CHRO, CCDO, or "any other chief executive position." Second, when a business or part of a

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business is sold or leased, the ban does not apply to agreements that prohibit a "seller" from competing with a purchaser if, "immediately following the sale, the seller becomes an employee of the purchaser."

It is important to note that the prohibition applies retroactively to October 25, 2021; however, it would appear that the changes will not automatically void non-competition agreements entered into before October 25, 2021. The Ministry of Labour notes in its "Your guide to the Employment Standards Act" (Updated January 27, 2022)" that the "prohibition does not apply to non-compete agreements entered into before October 25, 2021;" however, it is possible that future case law and regulations may modify this policy position. We also note that while non-competition agreements entered into prior to October 25, 2021 may not automatically be void due to the amendments to the ESA, they will remain subject to the stringent tests applied by the Court.

Takeaways for Employers

In light of these amendments, employers should review their employment-related agreements to identify and remove any non-competition clauses except where one of the exceptions apply. Notably, non-competes that pre-date October 25, 2021 will likely be void if the material terms of the employment agreement subsequently change. In other words, if an employee is asked to sign a new employment agreement after October 25, 2021, any non-competition clause that may have existed in a prior agreement will be void.

To protect their business interests, employers should also collaborate with legal counsel to consider incorporating other types of contractual provisions. This might include confidentiality agreements, non-solicitation agreements, intellectual property and garden leave clauses.

Recruiting Agency Licencing & Restrictions

Although it did not come into force with the passing of Bill 27, amendments to the ESA will require temporary help agencies and recruiters to apply for and obtain a licence to operate, and prohibit clients from "knowingly" engaging the services of an unlicensed agency or recruiter. To obtain a licence, among other requirements, recruiters will have to state that they have not breached the *Employment Protection for Foreign Nationals Act, 2009 (the "EPFNA")* by charging foreign nationals a fee for services, goods and benefits, and applicants who retain recruiters will be required to make statements to similar effect. A breach of the EPFNA in this respect will constitute grounds for the Director of Employment Standards to revoke a licence, or refuse to issue or renew a licence. Notably, these amendments, once in force, will also require agency clients and recruiters to maintain specified records.

Additionally, amendments to the *EPFNA* which came into force on December 2, 2021 prohibit recruiters and employers from "knowingly" using recruiting services that have contravened the *EPFNA* by charging foreign nationals a fee. If a recruiter contravenes this prohibition by using the services of other recruiters that have charged foreign nationals a fee, the recruiter and their directors share the responsibility to repay the fee with the other recruiter and can be subject to recovery proceedings.

Takeaways for Employers

For employers that engage temporary help agencies and recruiters, particularly to employ foreign nationals, these amendments carry significant implications that create potential liability. As such, employers should review their recruiting partnerships to ensure that partner agencies are properly licensed so as to ensure compliance with the new requirements.

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