Guidance For Ontario Employers On Disconnecting From Work Policies And Non-Compete Agreements

On December 2, 2021, the *Working for Workers Act, 2021* (the "**Act**") received royal assent. As we discussed in an earlier update, the Act, among other things, amends the *Employment Standards Act, 2000* ("**ESA**") by requiring employers in Ontario to implement a disconnecting from work policy and prohibits, subject to narrow exceptions, non-compete agreements.

On February 18, 2022, the Ministry of Labour, Training, and Skills Development (the "**Ministry**") provided guidance with respect to disconnecting from work policies and non-compete agreements.

Disconnecting from Work Policy

By June 2, 2022, employers with 25 or more employees in Ontario are required to have a written policy in place for all employees with respect to disconnecting from work. Beginning in 2023, and in the years that follow, employers with 25 or more employees on January 1 of any year are required to have a written policy in place before March 1 of that year.

Under the Act, "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."

The 25-Employee Threshold

To determine the number of employees, the employer must count the number of employees it employs in Ontario on January 1. If the number of employees changes at a later date in the year, the employer is not required to have a written policy in place for that calendar year. However, if the employer meets the 25-employee threshold on January 1 of the following calendar year, the employer would be required to have a policy in place for that calendar year.

Part-time and casual employees each count as one employee, irrespective of the number of hours they work. The following employees must also be included in the count:

- homeworkers

- probationary employees
- some trainees
- officers of a corporation who perform work or supply services for wages
- employees on definite term or specific task contracts of any length
- employees who are on lay-off, so long as the employment relationship has not been terminated and/or severed
- employees who are on a leave of absence
- employees who are on strike or who are locked-out
- employees who are exempt from the application of part(s) of the ESA

Content of the Policy

Importantly, the requirement to implement a policy does not create any new rights for employees to disconnect from work and be free from the obligation to engage in work-related communication. The ESA currently establishes employee rights regarding not performing work. Rather, it is the employer that determines the content of the policy. A policy only needs to include:

1. the employer's expectations on disconnecting from work;
2. the date the policy was created; and
3. the date of any changes made thereafter.

The Ministry's guidance sets out the following examples of what a policy may address:

- The employer's expectations, if any, of employees to read or reply to work-related emails or answer work-related phone calls after their shift is over.
- The policy may set out employer expectations for different situations. For example, the policy may contain different expectations depending on:
    - the time of day of the communication;
    - the subject matter of the communication; and
    - who is contacting the employee (for example the client, supervisor, colleague).
- The employer's requirements for employees turning on out-of-office notifications and/or changing their voicemail messages, when they are not scheduled to work, to communicate that they will not be responding until the next scheduled work day.

Application of the Policy

The policy must apply to all of the employer's employees in Ontario, including management, executives, and shareholders if they are employees under the ESA. However, an employer can implement different policies for different groups of employees, provided that all other requirements are met.

Copy of the Written Policy

Employers must provide a copy of the written policy to all employees within 30 calendar days of the policy being prepared or changed (if an existing policy is revised). New employees must also be provided with a copy of the written policy within 30 calendar days of being hired.

A copy of the written policy may be provided to employees as:

- a printed copy;
- an attachment to an email if the employee can print a copy; or
- a link to the document online if the employee has a reasonable opportunity to access the document and a printer.

Record-Keeping Requirement

Employers must retain a copy of every written policy on disconnecting from work that was required by the ESA for three years after the policy is no longer in effect.

Non-Compete Agreements

Employers are prohibited from entering into an employment contract or other agreement with an employee that includes a non-compete agreement. The ESA defines "non-compete agreement" as "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."

The prohibition only applies to non-competition agreements entered into after October 25, 2021. Thus, while a non-competition agreement may be challenged under common law, non-competition agreements entered into before October 25, 2021 are not captured under the ESA.

Exceptions

There are two exceptions to the prohibition of non-compete agreements

First, non-compete agreements are not prohibited where all of the following occur:

- there is a sale or lease of a business or a part of a business that is operated as a sole proprietorship or a partnership;
- immediately following the sale, the seller becomes an employee of the purchaser; and
- as part of the sale, 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.

Second, employers are not prohibited from entering into non-compete agreements with executives. "Executive" 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."

Non-Solicit and Non-Disclosure Agreements

The Ministry's guidance states that non-solicit agreements or non-disclosure agreements are not prohibited provided that the agreement is not in substance a non-compete agreement.

Takeaways for Employers

Employers have until June 2, 2022 to implement a disconnect from work policy. Employers will also want to review and update their employment agreement templates to reflect the ban on non-compete agreements, if any. Importantly, employers should not enter into non-compete agreements with employees unless the employee is an executive, as defined by the Act, or the agreement is in the context of the sale of a business.

The content of this article is intended to provide a general guide to the subject

matter. Specialist advice should be sought about your specific circumstances.

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