Ministry Of Labour Provides Guidance On Disconnecting From Work Policies And Non-Compete Agreements

In late January 2022, our firm presented a webinar discussing the prohibition of non-compete agreements and the requirement for 'disconnecting from work' policies under the *Working for Workers Act, 2021*, S.O. 2021, c. 35 (the "*WFWA*").

On February 18, 2022, the Ontario Ministry of Labour, Training and Skills Development (the "Ministry") updated its online resource, *Your Guide to the Employment Standards Act* (the "*Guide*") , to elaborate on the legislative changes effected by the *WFWA*. While the Guide does not have the force of law, it is often considered by adjudicators when interpreting and applying the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"), and, accordingly, is an important resource for employers.

The Prohibition on Non-Competition Agreements

When Is Restraining Competition Prohibited Under the ESA?

The *Guide* confirms that, effective October 25, 2021, employers are prohibited from entering into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement. Examples of prohibited non-compete agreements include non-competes entered into by:

- a potential employer and an applicant for employment before an employment relationship begins;
- an employee with their employer during the employment relationship; and
- a former employee and their former employer after the end of the employment relationship.

As the examples from the *Guide* indicate, the *ESA* amendments prohibit agreements that prevent employees from competing **after** the employment relationship comes to an end, regardless of when the agreement was entered into (i.e., before the employment relationship commences, during the employment relationship, or after the employment relationship ends). Agreements preventing competition **while** the employee is employed are likely still permissible under the *ESA*.

Consistent with the *ESA* and recent jurisprudence , the *Guide* confirms that non-competition agreements entered into prior to October 25, 2021, are not voided by

the *WFWA*.

Exceptions to the Prohibition Against Non-Competition Agreements

The *Guide* confirms that the *ESA* does not prohibit employers from entering into non-competition agreements with executives (being "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").

The *Guide* also confirms that non-competition agreements are **not** prohibited in some circumstances involving a sale of business. In its discussion of this "sale of business" exception, the *Guide* states that the exception will not apply unless **all** of the following criteria are met:

- 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.

This commentary from the MOL differs from section 67.1 of the *ESA*, which does not require the vendor business to be any particular type of business organization in order for the sale of business exception to apply.

The Requirement for a Disconnecting from Work Policy

Technical Requirements Regarding the Implementation of a Disconnecting from Work Policy

Ontario employers with more than 25 employees are required to implement a written "disconnecting from work" ("DFW") policy. For employers that employ 25 or more employees as of January 1, 2022, the deadline for compliance is June 2, 2022. Thereafter, employers who meet the 25-employee threshold as of January 1st of a particular year must comply with the policy requirement by March 1 of that year.

The *Guide* outlines a number of key rules for determining whether an employer meets the 25-employee threshold. For instance:

- Each employee is counted regardless of the number of hours that they work and the location at which they work (so long as that location is in Ontario).
- If two or more employers are deemed to be a related employer for the purposes of the ESA, then all employees employed in Ontario by these employers are included in the count.
- Assignment employees of temporary help agencies are employees of the agency and are included in the count to determine if the ***temporary help agency*** has met the 25-employee threshold. Assignment employees of temporary help agencies are **not** included in the count to determine whether the ***client*** to whom the employee is assigned meets the threshold.

The *Guide* confirms that each employer's DFW policy must apply to **all employees**. This does not mean that an employer must hold all of its employees to the same standard; rather, different rules can apply to different groups or classes of employees so long

as the employer's DFW policy covers all employees.

The *Guide* also confirms the distribution and record-keeping requirements in respect of DFW policies. A copy of the DFW policy must be provided to all employees within 30 calendar days of its creation or amendment. New employees must be provided a copy of the DFW policy within 30 calendar days of their hire. Each employer must retain a copy of every written DFW policy required by the *ESA* until three years after the DFW policy is no longer in effect.

The *Guide* provides employers with a checklist for compliance with the *ESA*'s DFW requirements, which may be useful to review before any DFW policy is prepared and implemented.

Each Employer Determines the Content of Its Disconnecting from Work Policy

With respect to the required substance of DFW policies, the *Guide* states that a DFW policy must include the date on which it was prepared, the date(s) of any amendment(s) to the policy, and content addressing the subject of "disconnecting from work."

The *Guide* then states that, because the *ESA* does not otherwise specify the information that must be included in a DFW policy nor a required length for a DFW policy, individual employers are to determine the content of their DFW policies by themselves. In other words, employers can decide whether they will provide any right to disconnect from work in excess of what is already provided to employees under the *ESA* (*i.e.*, under the provisions in respect of hours of work, overtime, vacation, public holidays, etc.). The *Guide* expressly states that "the *ESA* does not require an employer to create a new right for employees to disconnect from work and be free from the obligation to engage in work-related communications in its policies."

Check the Box

We continue to strongly recommend that all employers obtain legal advice before implementing a DFW policy and before taking action with respect to existing or new non-competition agreements.

If an employer decides to provide employees with specific rights to disconnect from work when the *ESA* would otherwise permit work to be performed, this greater right or benefit may be enforceable under the *ESA*, under contract, and/or at common law. Accordingly, it is very important that, before implementing a DFW policy, employers fully understand the potential liability that they may face.

Employers should also closely review their existing employment contracts to ensure that any non-competition clauses only used where permitted by law.

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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