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Employment Update: New guidance - Ontario's "disconnecting from work" policy and non-competes

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The Ontario Ministry of Labour (the "MOL") recently issued new guidance to fill in some of the gaps around recent changes to the Ontario *Employment Standards Act, 2000* (the "*ESA*").

As we wrote in our previous Employment Update, in late 2021 the Ontario government passed Bill 27, *Working for Workers Act, 2021*, which (i) introduced a new requirement for most Ontario employers to establish a "disconnecting from work" policy, and (ii) prohibited the use of non-compete provisions in Ontario employment agreements (subject to limited exceptions).

The legislation left some unanswered questions that have now partially been addressed by the MOL in two new guides:

- The "Written policy on disconnecting from work" guide
- The "Non-compete agreements" guide

A summary of the guides is set out below:

Disconnecting from work

As previously noted, Ontario employers with 25 or more employees (as of January 1, 2022) are required to have a written policy on disconnecting from work in place for all employees by **June 2, 2022**. The *ESA* defines "disconnecting from work" 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 MOL's guide provides the following information and clarification:

- **No new "right" to disconnect:** The legislative changes do not require the 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. In other words, there is no new "right" to disconnect.

- **Written policy requirements:** The employer has significant latitude about what it includes in its policy. The only formal requirement is that the policy must deal with "disconnecting from work". The policy also must state when it was prepared and/or changed. Beyond that, the *ESA* does not specify the information that the employer must include in the policy or even the length of the policy. As stated by the MOL, "[t]he employer determines the content of the policy itself".

- **Written policy suggestions:** The MOL has provided suggestions about items that the employer "may" consider including in its policy. These include:
- 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
- How the employer's expectations about disconnecting from work may vary based on:
- the time of day of the communication
- the subject matter of the communication
- 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

- **Scope:** The policy must apply to all of the employer's employees in Ontario, including executives, managers and shareholders who are also employees. However, the employer can have different policies for different groups of employees.

- **Number of workers:** Employers are only required to have a written policy on disconnecting from work if they employ **25 or more employees** in Ontario on January 1 of any year. For employers that are in or around that threshold, the MOL has provided detailed guidelines about who needs to be included for purposes of the count.

- **Existing *ESA* requirements:** The MOL points out that the right not to perform work is already addressed in existing *ESA* requirements, such as:
- Hours of work and eating periods
- Vacation with pay
- Public holidays
- Regulations that establish when work is "deemed" to be performed by an employee (which gives rise to an obligation to be paid for that work)

- **Administrative requirements:**
- Timeline for providing copy to employees: Once the employer has implemented its written policy, it must provide a copy of the written policy to its employees within **30 calendar days** of the policy being prepared or subsequently changed. New employees must receive a written copy of the policy within 30 days of being hired.
- Method of delivery: The employer can provide the written policy to its employees as a printed copy, an attachment to an email, or a link to the document online. The MOL also emphasizes that the employer should ensure that employees have the ability to print a copy of the policy, presumably so that an employee can have a hardcopy of the policy for their own records.
- Retention: If the employer changes or updates its policy, it must retain a copy of the previous policy for at least 3 years after it is no longer in effect.

- **Caution about creating contractual rights:** The MOL notes that a provision in a policy that exceeds the minimum requirements of the *ESA* may create a contractual or common entitlement that can be enforced under the *ESA*.

Non-Compete Agreements

Bill 27 also amended the *ESA* to introduce a prohibition on employers entering into employment contracts or other agreements with an employee that include a non-compete agreement. The *ESA* includes limited exceptions to this prohibition for (i) situations involving a sale of a business, and (ii) senior executives (e.g. those who hold an office with "chief" in the job title).

The prohibition on non-competes was made effective as of October 25, 2021. There was initial uncertainty as to whether the prohibition applied retroactively to existing agreements. The MOL's guide states that this is not the case, and confirms that non-compete agreements entered into before October 25, 2021 are not prohibited under the *ESA*.

A recent decision of the Superior Court of Justice (*Parekh et al v. Schecter et al*, 2022 ONSC 302) came to the same conclusion, holding that the relevant provisions of the *ESA* do not apply to contracts of employment with non-compete clauses entered into before October 25, 2021.

The MOL guide confirms that the *ESA* does not prohibit non-solicit agreements or non-disclosure agreements. However, in determining whether an agreement falls within the definition of a non-compete agreement, it is the substance of the agreement, not the description or title, that will matter.

Finally, the MOL guide notes that individuals may file a claim with the MOL if they believe they have entered into a prohibited non-compete agreement on or after October 25, 2021. The employer is prohibited from penalizing the individual for doing so, or for refusing to enter into such an agreement.

Employer Takeaways

Despite the headlines heralding significant change as a result of these amendments to the ESA, neither does much at this time to significantly change the law in Ontario on either topic. The lack of specifics around employee "disconnecting from work" policies leaves the issue to be largely determined by individual employers. Whether this motivates employers to consider how to utilize this requirement as a springboard for various human resources purposes like recruitment and employee retention remains to be seen.

In respect of the banning of non-competes, this change is consistent with the existing and longstanding approach taken by Ontario courts against restrictive covenants that are generally seen as an unreasonable restraint of trade. This may lead employers to place an increasing emphasis on incorporating well-drafted and clearly articulated non-solicitation provisions in their employment agreements.

For specifically tailored advice on the impact of these amendments to the *ESA* on your business, please reach out to a member of the Labour and Employment Group.