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Bill 27 – Right to disconnect, a ban on Non-Competes and a New Legal Framework for Temporary Agencies and Recruiters

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Even with the Covid-19 pandemic still at the forefront of our lives, the Ontario government is looking to the future by proposing amendments that will affect employment, and other matters.

The recently passed, Bill 27 - *The Working for Workers Act*, 2021, amends a number of employment and labour related statutes. Of significance, the Bill proposes the following:

- Legislating a "right to disconnect"
- Banning non-compete clauses
- Imposing licensing requirements for recruiters and temporary help agencies
- Requiring washroom availability for delivery workers

Right to Disconnect

During the pandemic, we've seen the line between work and home begin to blur. Whether it's because many of us are in fact working from home, putting in extended hours at home, or feeling added pressure from employers to stay connected at home with our work devices, it can often feel like we never truly "log off" from work.

The Ontario government has recognized that blurring of lines and has come up with a response aimed at promoting a healthy work-life balance for Ontarians.

Bill 27 amends the *Employment Standards Act*, *2000*, imposing a requirement on employers that employ 25 or more employees to have a written policy with respect to disconnecting from work.

The amendment proposes a definition for "disconnecting from work"

> "Disconnecting from work" means not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other message, so as to be free from the performance of work

Employers who have 25 employers on January 1st of any year, will have until March 1st to implement a disconnecting from work policy. Once prepared, the employer will have 30 days to provide copies of the written policy to its employees. Any subsequent changes to the policy have to then be provided within 30 days.

Any new hires must be provided a copy of the policy within 30 days of their start date.

At the moment, the Bill does not prescribe what content has to go into the policy – this will likely come in the form of a regulation.

What are the practical ramifications?

People in sales, lawyers, doctors or other professional jobs are often required to be available outside of the traditional 'working hours'.

There is some fear amongst the employment bar that we might see workforces split into two groups:

- Employees who become disengaged – those who "punch out" at the prescribed time and do just enough to meet their minimum job requirements.
- Overachievers – those who will want the extra work and "choose" to work extended hours

Those "overachievers" may look to obtain extra overtime, or use this as a means to stand out from their peers when it comes time for promotions.

Banning Non-Compete Clauses

Non-compete or non-competition clauses are provisions that some employers include in employment contracts to prevent former employees from working for a competing employer or from starting their own business that provides the same services.

Non-competition is not an implied term of employment contracts in Ontario; thus, employers have to explicitly put it in their contracts to try to enforce them.

A non-compete clause is what is legally referred to as a restrictive covenant – an agreement that "restricts" an employee from doing something. Another often discussed example is the non-solicitation clause, restricting former employees from soliciting clients or employees from their former employer.

Non-solicit clauses don't tend to receive the same negative criticisms as their close relative non-compete clauses. That is because non-solicit clauses still allow employees to work for a competitor, as long as they don't solicit their former employer's customers for a period of time, which seems to balance both sides' interests.

By contrast, non-compete clauses are seen as a barrier to free business and mobility of employees. They have the potential effect, in the harshest of cases, to restrict an individual from working in their field.

For that reason, even before the new law, courts in Canada have been reluctant to enforce non-compete clauses found in employment contracts. And the presumption is that they are unenforceable unless very specific criteria are met.

But even where a non-competition clause is not enforceable, an employee may be subject to a lawsuit, requiring a legal defence. This can be difficult and costly even if the defence is ultimately successful.

So, some employers will incorporate non-compete clauses that they know are unlikely to be enforceable, because it may discourage employees from entering competing business for fear of having to defend a lawsuit.

Bill 27 aims to do away with that!

The Ontario government, with Bill 27, will go a step further and ban non-compete clauses outright.

The amendment provides a definition for "non-compete agreement"

"non-compete agreement" means 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 provides that no employer shall enter into an employment contract or other agreement with an employee that is, or that includes a non-compete agreement.

What does that mean?

It means that at no point during an employment relationship, whether before, during, or after, can agreements contain a non-compete agreement.

It prohibits non-compete clauses in employment contracts and amendments to those contracts, as well as at the time of termination with separation agreements or "severance packages".

It is likely that it also excludes them from settlement agreements with former employees in lawsuits.

Exception – Sale of Business

Where there is a sale of a business or part of a business, and where as part of that sale, the purchaser and seller enter into a non-compete limiting the seller, and immediately following the sale, the seller becomes an employee of the purchaser, the prohibition does not apply.

Exception - Executives

The ban on non-compete clauses will not apply with respect to an employee who is an executive.

The Bill provides for a definition of executive:

> "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"

How is this different from what the case law has established?

Some commentators think that practically the new law won't have much of an effect, as it's just codifying what courts have concluded for some time now: except in rare cases like sales of a business or senior executive employment, non-compete clauses are generally unenforceable.

The problem is, without it being codified in the ESA, employees may still have to defend non-compete lawsuits from their former employers to get clause declared void or unenforceable.

That problem is now gone. Employees will have some peace of mind knowing that they won't have to go through a lawsuit and retain a lawyer to dispel a non-compete clause in their contract. Employees can now have real certainty at the outset that their non-compete clauses are already unenforceable.

Employers, meanwhile, can continue to protect their business interests through confidentiality and non-solicitation clauses. Since non-compete clauses were normally unenforceable anyway, this would not appear to be a significant change for employers.

Licensing Requirements For Recruiters And Temporary Help Agencies

Bill 27 imposes licensing requirements for temporary help agencies and recruiters.

Applying for a License

A person must apply to the Director of Employment Standards for a license or a renewal of a license to operate as a temporary help agency. A fee will apply. Licenses are not transferable.

The Director must refuse the issuing of the license:

- Where the applicant has not complied with an order issued under the ESA or Employment Protection for Foreign Nationals Act, 2009
- Where the applicant fails to meet the requirements
- Or where any other prescribed circumstances exist

An application will also be refused if the Director has reasonable grounds to believe that:

- Based on past or present conduct, the applicant will not carry on business with honesty and integrity in accordance with the law; or,
- The applicant has made a false or misleading statement or provided false or misleading information in an application for a license for a renewal of a license.

Revocations and Suspensions

Bill 27 also gives the Director the power to revoke or suspend a license and in turn reinstate a license that had been suspended.

The Director must serve notice of refusal, revocation or suspension of the license, and shall provide written reasons.

The person whose license is refused, revoked or suspended is then required to provide written notice of the refusal, revocation or suspension to every employer, prospective employer or prospective employee who has engaged or used their services, within 30 days of the notice being served on them by the Director.

A person whose license is refused, revoked or suspended is entitled to a review by the Ontario Labour Relations Board if the person applies in writing for a review within 30 days of the notice being received.

The Bill does not provide the terms and conditions of the license. Those will be set out in future regulations.

Expiry and Reapplication

Licenses expire one year after the date of issue or renewal.

If before the expiration, the licensee applies for a renewal, the license remains valid until the decision about the renewal is served.

Record Keeping and Retention

Bill 27 also imposes a number of requirements for record keeping and retention.

Clients of temporary help agencies are required to record names of employees and their work assignments, as well as the hours worked in each day and each week.

Recruiters are required to keep records of prospective employees and employers. Those records must be retained for 3 years after they provide their services and be readily available for inspection as required by an employment standards officer.

Requiring Washroom Availability for Delivery Workers

Bill 27 creates changes to the Occupational Health and Safety Act requiring an owner of a workplace to ensure that access to a washroom is provided, upon request, to a worker who is present at the workplace to deliver anything to the workplace, or to collect anything from the workplace for delivery elsewhere.

Exceptions:

- Where access would not be reasonable or practical for reasons related to the health or safety of any person at the workplace.
- Where access would not be reasonable or practical having regard to all circumstances, including, the nature of the workplace, the type of work at the workplace, the conditions of work at the workplace, the security of any person at the workplace; or
- If the washroom is in or can only be accessible through a residential dwelling.