DECEMBER 6, 2021

Ontario Legislation Prohibits Non-Competition Provisions and Introduces Employees' Right to Disconnect

Authors: Seann D. McAleese and Guy-Étienne Richard

The Ontario government's Bill 27, *Working for Workers Act, 2021*, received royal assent on December 2, 2021. The bill contains a broad range of amendments to the *Employment Standards Act, 2000* (ESA), including non-competition provisions and the "right to disconnect" from work. The prohibition against non-compete agreements is effective retroactively to October 25, 2021.

Ontario is the first province in Canada to enact legislation restricting the use of non-competition agreements and requiring employers to have policies allowing employees to "disconnect" from work. Bill 27 mirrors a recent trend in some U.S. states to limit the use of non-compete provisions to certain employee classes. It also follows the European trend to introduce limits on employer expectations regarding employee availability during non-core business hours. The federal government is currently exploring a similar right-to-disconnect amendment to the *Canada Labour Code*.

Two Key Features of the Ontario Legislation

1. Non-Compete Provisions

The amendments enacted by Bill 27 prohibit employers from entering into employment contracts or other agreements with an employee that include or consist entirely of non-compete provisions. A non-compete agreement is defined as follows:

> [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.

Bill 27 allows for the use of non-competes in the context of a business acquisition and for a defined class of "executives." Specifically, the use of non-competes will be statutorily permissible only as follows:

- Acquisitions:
    a. There is a sale (including a lease) of a business or a part of a business.
    b. 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.
    c. Immediately following the sale, the seller becomes an employee of the purchaser.
- Executive Exemption:
    - 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 statutory exemption for business transactions is consistent with the prevailing case law in Canada, which generally enforces non-competition agreements in the merger/acquisition context, but will carefully consider the overall reasonableness of such restrictions in the case of more standard employment relationships. It is also important to note that amendments to the ESA introduced by Bill 27 do not prohibit or limit the use of other restrictive covenants such as non-disclosure, non-solicitation, assignment of intellectual property and confidentiality provisions.

2. Disconnecting from Work

Bill 27 also amends the ESA by requiring employers with 25 or more employees to have a written policy with respect to disconnecting from work. The term "disconnecting from work" is defined to mean not engaging in work-related communications, including emails, telephone calls, video calls or sending or reviewing other messages, so as to be free from the performance of work. To facilitate this right to disconnect from work, an employer must implement a written policy for all employees before March 1 of the year in which the employer meets or exceeds 25 employees as of January 1 of that year. Bill 27 contemplates a transition period of six months for employers to roll out their policies from the date the bill comes into effect.

No details are available at this stage regarding the content of such a policy other than it must set out the date it was prepared, note any dates on which it was amended, and be distributed to employees within 30 days of being created or amended, or when a new employee begins work. Further policy requirements will be set out in a future regulation under the ESA. At this time, it appears the existing exemptions from ESA hours-of-work provisions may continue to apply so this policy should not pertain to certain employee classifications (e.g., lawyers and articling students, public accountants, professional engineers, certain health practitioners, managers and supervisors, etc.).

Next Steps for Employers

Employers will need to amend any employment contracts or stand-alone agreements that contain non-compete language. Further, non-solicitation and gardening clauses (i.e., long resignation windows) should also be carefully reviewed to ensure that they are not caught by the restrictions on non-competition agreements as statutorily defined.

Other than the broad definition noted above, the contents of the right-to-disconnect policy are to be prescribed in the future pursuant to regulation. We will continue to follow the legislative and legal developments, and provide further guidance on interpreting the scope of non-competition agreements and drafting policy language to implement an employee's right to disconnect.

Key Contacts: Seann D. McAleese and Louise Patry