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New Employee-Friendly Changes To Ontario's Employment Laws

Greetings!

My Friends at the Employment Law Group at Koskie Minsky posted this article this morning and for those of you who are employees, it is of significant importance. I am sure that once you read it, you will say, as I did, it's about time!

New Employee-Friendly Changes To Ontario's Employment Laws

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The *Working for Workers Act, 2021*

Recently, the Ontario government introduced significant changes to

workplace laws, intended to provide a wide array of benefits to employees in the province. On December 2, 2021, Bill 27: Working for Workers Act, 2021 ("*Workers Act*") received Royal Assent. Two of the most notable changes are: i) a prohibition on non-compete agreements; and ii) the new right of an employee to disconnect from work.

Below is a brief summary of these two changes:

I. Ban on Non-Compete Agreements

Effective October 25, 2021, employers are prohibited from entering into employment contracts or other agreements with an employee that include a non-compete agreement, with narrow exceptions.

A non-compete agreement is defined as an agreement, or any part of an agreement, between an employer and 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.

Notably, there are two significant exceptions. First, executives are not included in this ban. "Executive" includes any person who holds chief executive positions like Chief Executive Officer, Chief Operating Officer, and Chief Financial Officer. This means C-Suite employees and other executives can still be bound by non-compete agreements.

Second, non-compete clauses or agreements are still permitted as part of the sale of a business where the seller becomes an employee of the purchaser after the sale. This exemption is important, as non-compete agreements (and other restrictive covenants) are often key terms of commercial purchase and sale agreements.

Such clauses have long been difficult for employers to enforce as courts are reluctant to restrict an employee's ability to work for a competing employer; however, an out-right ban on non-compete agreements is a notable development for both employers and employees. This development eliminates the common law enforceability test for non-compete agreements entered into on October 25, 2021 onwards, which considers whether the clause was reasonable in scope, geographical location and duration.

For non-compete agreements entered into before October 25, 2021, these clauses will continue to be presumptively unenforceable unless the clause is deemed reasonable.

II. Mandatory Written Policy on Disconnecting from Work

Following similar legislation in Europe, the new *Workers Act* requires employers with 25 or more employees to have a written policy outlining the "right to disconnect" from work for all employees.

"Disconnecting from work" means 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.

Employers have until June 2, 2022 to implement a written policy that

limits after-hours communications and allows employees to truly be "off the clock" once the workday ends.

The *Workers Act* does not specify what must be included in the policy, only that it must be written. In addition, the *Workers Act* does not change the current rules regarding hours of work, overtime pay, or the maximum limits on hours worked each day/week. As a result, with many people working from home following the pandemic blurring their work and personal lives, a "right to disconnect " policy may be difficult to establish and enforce.

Employers to Disclose Electronic Monitoring

In addition to the changes introduced by the *Workers Act*, on February 24, 2022, the Ontario government announced plans to introduce new legislation that would require employers to tell workers if and how they are being electronically monitored. If passed, Ontario will be the first Canadian province to require electronic monitoring policies. According to the Ontario government, the intention of this legislation is to ensure employers are transparent regarding how they track employees' use of computers, cell phones, GPS systems and other electronic devices.

Under the proposed changes, employers with 25 or more workers will be required to have a written electronic monitoring policy for all employees. The policy would be required to contain information on whether the employer electronically monitors its workers, and if so, a description of how and in what circumstances the employer does so. In addition, the employer would be required to disclose the purpose of collecting information through electronic monitoring. If passed, this new requirement would apply to employees working in the workplace, in the field or at home.

We will continue to monitor these proposed changes and provide further updates as new details emerge.

Should you have any questions regarding these new changes or any other employment related matters, please contact a member of Koskie Minsky's Employment Law Group.

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