New Year Brings Employee-Friendly Changes to Ontario's Employment Standards Act

Insights
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The Ontario government recently made significant amendments to its workplace laws in an effort to create a more pro-worker employment model. Formally known as Bill 27: Working for Workers Act, 2021, it changes a series of workplace rights and obligations, including banning non-compete agreements, requiring that employers of a certain size adopt "disconnecting from work" policies, and introducing licensing requirements for recruiters and staffing agencies. The amendments were based on the recommendations of the Ontario Workforce Recovery Advisory Committee and are the result of the Committee's discussions with various players in the workforce – workers, businesses, and unions. Here's what Canadian employers need to know about the three most critical changes – including some that have already taken effect.

Banning Non-Compete Agreements

The legislation prevents employers from entering into non-compete agreements with employees and voids any such agreement entered into after the legislation's effective date of October 25, 2021, subject to two exceptions:

- First, non-compete agreements will be permitted in the context of the sale or lease of a business or part of a business. Accordingly, if an individual sells a business and then becomes employed by the purchaser, the purchaser may enter into a non-compete agreement with that individual.
- Second, employers may use non-compete agreements with their executive-level employees, such as the company's president, chief executive officer, or chief administrative officer.

The prohibition is only applicable to employees and does not ban non-compete agreements with independent contractors or consultants. Furthermore, the legislation does not ban the use of non-solicitation agreements prohibiting the solicitation of employees and clients.

Bill 27 states that the prohibition on non-competes "is deemed to have come into force on October 25, 2021," which suggests that the prohibition is effective as of that date and does not apply retroactively to agreements entered before. However, many parties in the labor sector view this wording as ambiguous and are unsure as to whether non-compete agreements entered into before October 25, 2021 are void. Due to the vague language, we may have to wait and see whether the government will further amend the Bill for clarification, or how the Courts and the Ontario Labour Relations Board will interpret this section's retroactive application.

Relations Board will interpret this section's retroactive application.

Disconnecting From Work

The global pandemic and remote work have blurred the lines between personal and work time due to the increasing feeling that workers need to be connected and 'logged on.' In an attempt to combat this issue, the legislation requires employers with 25 or more employees to implement a written policy on "disconnecting from work" during nonworking hours. Bill 27 defines the term "disconnecting from work" as refraining from "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."

Presently, the government has yet to establish requirements as to the form of the policy or what specific steps employers must take to ensure employees disconnect from work. However, the government has required that employers develop this policy by June 2, 2022 and provide a copy of the policy to employees within 30 days of finalizing it, or within 30 days after hiring the employee. Following the initial year, employers will have to prepare their policies no later than March 1 of each year.

Licensing Requirements

Finally, the legislation prohibits recruiters and temporary help agencies from acting as such unless they first procure a license from the Director of Employment Standards. Additionally, persons or companies are prohibited from knowingly doing business with unlicensed agencies or recruiters. Therefore, anyone wishing to do business with such entities must first ensure that they are licensed. If an employment standards officer finds that a person or entity has violated these rules, the officer may issue a notice to the person or entity setting out the officer's belief and specifying the amount of the penalty for the violation.

Licenses obtained will have to be renewed every year and will be non-transferrable. Furthermore, temporary help agencies or recruiters may be refused a license and may have their licenses revoked or suspended for several reasons, including (a) if recruiters charge fees to foreign nationals; (b) if the director of Employment Standards has reasonable grounds to believe that the applicant will not do business with honesty, integrity, or in accordance with the law; and (c) if the applicant provides false or misleading information in an application.

Conclusion

Since Bill 27 has received Royal Assent, some amendments, such as the ban on non-competes, have come into force immediately. Other provisions, such as the disconnecting-from-work policies, are subject to a grace period. Employers should begin reviewing Bill 27 and note important dates and deadlines.

While some details of the legislation remain unknown due to the vague wording of the Bill, we will continue to monitor the situation regarding the forthcoming details and provide updates as

warranted, so you should ensure you are signed up for the Fisher Phillips Insight System to receive the most up-to-date information. If your organization does business or employs individuals in Canada, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our International Practice Group to learn more about the implications of the proposed legislation and to assess what changes, if any, are needed to bring the organization into compliance.

Related People

Nazanin Afshar
Partner
818.230.4259
Email

Service Focus

International