THE "RIGHT TO DISCONNECT", A BAN ON SOME NON-COMPETE AGREEMENTS AND OTHER AMENDMENTS PROPOSED TO THE *EMPLOYMENT STANDARDS ACT, 2000*

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The Ontario government proposed a new piece of legislation yesterday intended to provide a wide range of benefits to employees in the province. The new *Working for the Workers Act, 2021* (the "Workers Act") proposes a number of amendments to the *Employment Standards Act, 2000* that, if passed, will create various changes for both employees and employers in the province.

Below is a brief summary of the most significant changes in the proposed legislation:

The Right to Disconnect

Following similar pieces of legislation in the European Union, the Workers Act proposes a "Right to Disconnect" for many Ontario employees by requiring all employers with 25 or more employees to have a written policy about employees disconnecting from their jobs at the end of the workday. The legislation 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."

Employers will have six months from the Workers Act receiving Royal Assent to implement a policy that limits after-hours communications and allows employees to truly be "off the clock" once the workday ends.

Notably, however, the proposed amendments do not specify what must be included in the written policies, only that they must be in writing. The amendments also do not specify which employees or professions will be exempt from the new requirement or propose any changes to the current rules regarding hours of work, overtime pay, or daily or weekly limits on hours worked.

New Limits on Non-Compete Agreements

The Workers Act also proposes a ban on the use of non-compete agreements between employers and employees, in order to increase labour mobility and prevent employees from being restricted in their career

moves. The legislation defines a "non-compete agreement" as:

> "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 employer ends."

While such clauses are already difficult for employers to enforce and are *prima facie* unenforceable at common law, the proposed amendments would create an outright ban on such clauses, regardless of their scope or duration and regardless of the nature of the employee's position.

Importantly, the proposed ban includes an exemption in the case of a sale of business, where non-compete agreements will still be enforceable. Purchasers of businesses in Ontario will still be able to prevent sellers from competing against them following the sale of a business, which is often a crucial term of a purchase agreement that provides for the sale of a business.

Licensing Requirements for Temp Agencies and Recruiters

The Workers Act also includes a new requirement for temporary help agencies and recruiters to be licensed in order to operate in the province, in an effort to crack down on agencies and recruiters that engage in deceitful practices or otherwise abuse the rights of workers. The proposed requirements come as a result of inspections by Ministry officers that revealed a number of temporary help agencies in the province paying workers less than minimum wage and denying other basic employment rights.

Under these amendments, temporary help agencies and recruiters would be vetted before being issued a licence, and applicants would need to provide an irrevocable letter of credit that could then be drawn against to repay owed wages to workers if violations occur. Penalties and inspections measures are also part of the proposed changes, which are intended to come into effect as early as 2024.

Takeaways for Employers

While temporary help agencies and recruiters will want to carefully review these proposed amendments, for majority of employers in the province, the proposed amendments may not have an overly substantial impact on their day-to-day operations. While the "right to disconnect" may raise eyebrows, the devil will be in the details. The scope of exemptions from the right to disconnect, in particular, will heavily dictate the overall impact of this new concept. For now, the proposed "right to disconnect" only requires employers to develop a written policy on disconnecting from work, and does not require employers to provide employees with more time off, or change the way that work is compensated or calculated. We will continue to monitor and will keep you updated on related legislative and regulatory developments.

Similarly, the proposed ban on non-competes may not have too great of an impact on employers' legal rights, since the vast majority of such clauses are already unenforceable at common law. Of greater concern is that risk that courts will more broadly strike contract clauses that include (but are not limited) to non-competes. However, the fact that non-solicitation clauses, for example, are not included in the Workers Act should mean that they remain permissible in Ontario employment contracts.

For now, employers will want to follow the progress of the Workers Act, and if passed, be ready to develop written "disconnecting" policies and consider how such policies will impact their staffing decisions. Employers should also consider strengthening their standard non-solicitation covenants, given the knowledge that non-competition clauses will very likely have no effect in the near future.

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A Cautionary Note