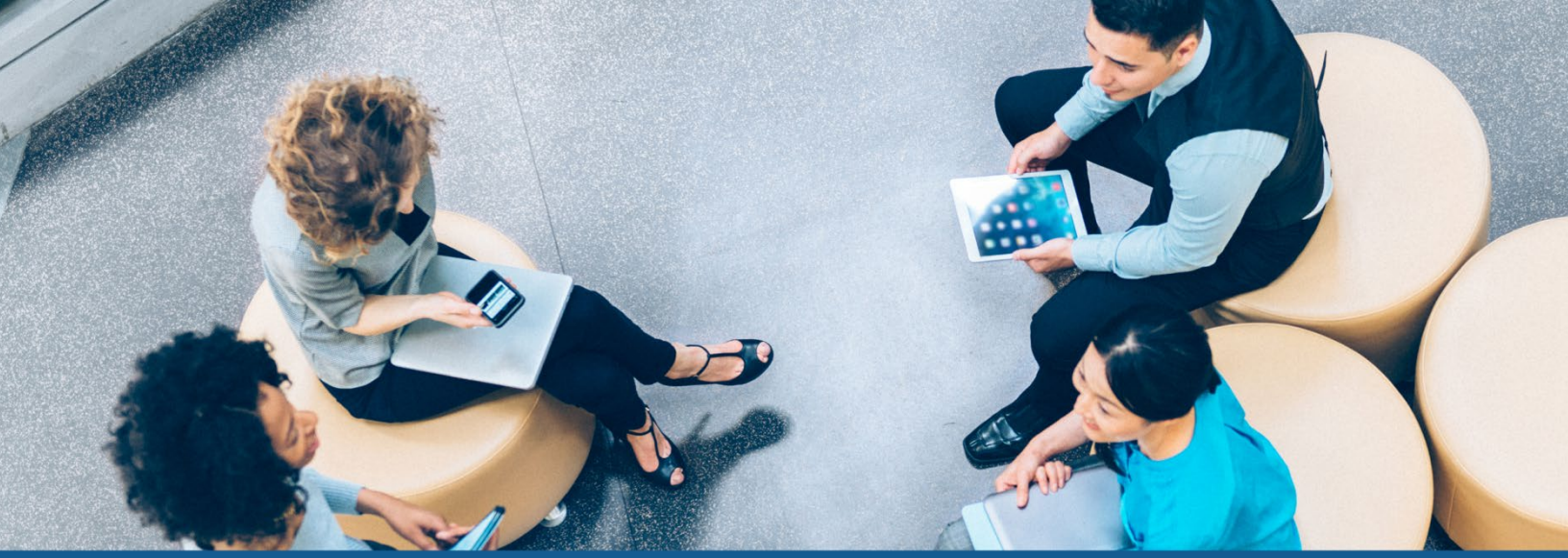

What's New in HR Law

Unplugged and Unchained: Ontario Government Introduces Legislation Addressing Employees' Right to Disconnect and Prohibition of Non-Compete Agreements

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By **Natalie Garvin**

Bottom Line

On October 25, 2021 the Ontario Government tabled Bill 27, *Working for Workers Act, 2021* ("Bill 27") with the stated purpose to promote healthy work-life balance by encouraging the disconnection from work after a productive work day, and to free employees from the restrictive chains of non-compete agreements that limit their job opportunities after the cessation of employment. Bill 27 also includes provision regarding temporary help agencies and recruiters, and internationally-trained immigrants.

If passed, Bill 27 would amend various statutes, including the *Employment Standards Act, 2000* (ESA), the *Occupational Health and Safety Act* (OHSA), the *Fair Access to Regulated Professions*

and Compulsory Trades Act, 2006, the *Workplace Safety and Insurance Act, 1997* (WSIA), *Employment Protection for Foreign Nationals Act, 2009* (EPFNA), and the Ministry of Agriculture, Food and Rural Affairs Act (MAFRAA).

Disconnecting From Work Policy

In an effort to prioritize mental health and protect family time, the Ontario Government has proposed that the ESA be amended to include a provision addressing an employee's right to disconnect from work.

Under this proposed amendment, businesses with 25 or more employees as of January 1st of each year will be required to implement a written policy on "disconnecting from work". "Disconnecting from work" is defined as:

> not engaging in work-related communications, including emails, telephones, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.

At this time, the proposed legislation does not stipulate any further requirements with respect to disconnecting from work and does not provide guidance on the contents of the written policy. The Ontario Government provided a few examples in its announcement of the new legislation, including setting expectations of response time for emails and encouraging employees to turn on their out-of-office notifications when not working. These examples are not binding on employers, but may shed light on what subsequently published regulations may require employers to include in their disconnecting from work policies.

Once implemented, an employer will be required to review their disconnecting from work policy before March 1st of each year. However, to assist with the transition of this new requirement, employers will have six (6) months after Bill 27 is passed to implement the policy, instead of the March 1st deadline.

If passed, Ontario will be the first jurisdiction in Canada to require employers to implement a policy addressing an employee's right to disconnect after their work day.

Prohibiting Non-Compete Agreements

If passed, Bill 27 will add a provision to the ESA that prohibits an employer from entering into an employment contract or other agreement with an employee that includes a non-compete agreement.

A "non-compete agreement" is defined as any agreement, or 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 includes a narrow exception to this prohibition, in that it will not apply where there is a sale of business, and as part of that transaction the purchaser and seller enter into a non-compete agreement, and the seller subsequently becomes an employee of the purchaser. However, it should be noted that, as currently drafted, the prohibition applies broadly to all types of

agreements, not just employment contracts. As such, parties may also be precluded from entering into non-compete agreements, such as post-employment settlements.

As it currently stands in Canada, non-compete agreements and clauses in employment contracts are presumptively unenforceable. Typically, non-compete agreements are only upheld in limited circumstances where there is a legitimate proprietary interest that requires protection. Cases in which non-compete agreements have been deemed to be enforceable have commonly involved employees in senior executive positions who worked closely with clients, had in-depth knowledge of confidential information, and had influence over clients. Even under those circumstances, non-compete agreements have only been upheld if they are narrowly construed and minimally restrictive.

Bill 27 suggests that, if passed, the prohibitions against non-compete agreements would come into force on October 25, 2021. However, it is unclear at present if the prohibition would have retroactive application (*i.e.* apply to agreements formed prior to this date). Employers should therefore, at a minimum, carefully consider whether to include non-compete provisions, and the corresponding risk of doing so, when preparing agreements of any kind after October 25, 2021.

It is also of note that Bill 27, if passed, would enable an employee to seek recourse if an employer includes a non-compete clause in their employment contract by filing a complaint with the Ministry of Labour.

Temporary Help Agencies and Recruiters

The Ontario Government also seeks to provide protection to vulnerable individuals from being exploited while using temporary help agencies and recruiters to find employment. If passed, Bill 27 will require temporary help agencies and recruiters to obtain a licence in order to operate. The process for obtaining a licence is further set out in Bill 27 and requires approval from the Director of Employment Standards. These licences will need to be renewed annually.

Employers should be aware that, if Bill 27 is passed as it is currently drafted, they may face sanction if they knowingly engage or use the services of a temporary help agency or recruiter who does not hold a licence. A public list identifying every person licensed as either a temporary help agency or recruiter, along with the expiring date and whose licence has been revoked or suspended, will be uploaded to the Government of Ontario's website. Employers can rely on this list when engaging with temporary help agencies and recruiters.

In furtherance of this initiative to protect employees, the Ontario Government included in Bill 27 amendments to the reprisal provisions of the ESA to prohibit an employer and temporary help agency from reprising against an employee for making inquiries about whether a person holds a licence to operate as a temporary help agency or a licence or to act as a recruiter.

Similarly, a recruiter will be prohibited from intimidating, penalizing or attempting or threatening to intimidate or penalize a prospective employee who engages or uses the services of the recruiter because the prospective employee:

- asks the recruiter to comply with the ESA and its regulations;
- gives information to an employment standards officer;

- testifies or is required to testify or otherwise participates or is going to participate in a proceeding under the ESA; or
- enquires about whether a person holds a licence to operate as a temporary help agency or a licence to act as a recruiter.

Bill 27 also proposes amendments to the EPFNA, which provide that recruiters who use the services of another recruiter in the recruitment or employment of a foreign national would be liable to repay any fees that the other recruiter improperly charged the foreign national. In situations where the recruiter is a corporation, its directors would be jointly and severally liable to repay any such fees.

Access to Washrooms for Delivery Workers

Bill 27 also proposes to amend the OHSA by requiring the owner of a workplace to provide access to a washroom to any worker delivering or collecting anything from the workplace. Owners will not have to provide access to a washroom where it would be unreasonable or impractical for reasons relating to the health and safety of the person requesting to use a washroom or the nature of the workplace, type of work at the workplace, the conditions of work at the workplace, the security of any person at the workplace and the location of the washroom within the workplace, or if the washroom is in, or can only be accessed through, a dwelling.

Removing Barriers for Internationally-Trained Immigrants

To address current province-wide labour shortages, the Ontario Government has included in Bill 27 amendments to the *Fair Access to Regulated Professions and Compulsory Trades Act, 2006* that will make it easier for internationally-trained immigrants to start their careers in their chosen professions.

These changes include prohibiting regulated professions from requiring "Canadian experience" as a qualification for registration unless exempt due to purposes related to health and safety. The regulated professions include:

- Engineers;
- Geoscientists;
- Land Surveyors;
- Early Childhood Educators;
- Veterinarians;
- Lawyers;
- Architects;
- Engineering Technicians and Technologists;
- Social Workers and Social Service Workers;
- Teachers;
- Professional Foresters;
- Human Resources Professionals; and
- Accountants.

Bill 27 also provides the Minister of Citizenship and Immigration with the ability to support access of internationally trained individuals to regulated professions through various measures such as providing information and assistance with the registration and application process for positions within regulated professions, conducting research and analyzing trends with respect to regulated professions and trades, and providing information to organizations that deal with internationally trained individuals regarding programs to support internationally trained individuals.

Additionally, regulated professions will be required under Bill 27 to ensure that they comply with any regulations respecting English or French language proficiency testing requirements.

Financial Relief for Schedule 1 Employers

In a move to provide financial relief to employers, the Ontario Government has included in its proposed legislation amendments to the WSIA that will distribute the Worker's Safety and Insurance Board's ("WSIB") reserve amongst Schedule 1 employers. Currently, the WSIB's reserve is valued at approximately $6.1 billion. This will not affect injured workers' entitlement to receive benefits.

It remains to be seen exactly how the WSIB's reserve will be distributed among eligible employers. However, Bill 27 does permit the WSIB to distribute different amounts or no amounts to employers based on criteria prescribed by the WSIB, which may include an employer's compliance with the WSIA.

Unfortunately, employers will not be permitted to appeal or request reconsideration of how the WSIB distributes its reserves.

Ministry of Agriculture, Food and Rural Affairs Act

Bill 27 also proposes amendments to the MAFRAA by granting the Minister authorization to collect information, including personal health information, for the purposes of the legislation, subject to certain limitations.

Check the Box

As of the publication of this update, Bill 27 has only been carried through First Reading. We will continue to monitor its progress through the legislative process, and will keep readers apprised of any developments. While no immediate action is required from employers, temporary help agencies, or recruiters at this time, organizations that may be impacted by the amendments proposed by Bill 27 should proactively consider what changes they may need to implement to ensure compliance with legislation that may ultimately be enacted.

Need more information?

For more information or for assistance in understanding the an employer's obligations as a result of Bill 27 contact Natalie Garvin at 416-408-5512 or your regular lawyer at the firm.

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