



What's New in HR Law

Ontario Superior Court of Justice Upholds Non-Compete Clause Entered into Before October 25, 2021

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Bottom Line

The Ontario Superior Court of Justice has clarified that the statutory prohibition against non-compete clauses does not apply to contracts of employment entered into prior to October 25, 2021. The enforceability of such non-compete clauses will be determined in accordance with common law principles.

Bill 27 and Non-Compete Agreements

Bill 27, *Working for Workers Act, 2021*, S.O. 2021, c. 35 (“Bill 27”), received Royal Assent on December 2, 2021. Among a number of key changes, Bill 27 amended the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the “ESA”), to prohibit the use of non-compete clauses in employment agreements, except in the context of a sale of a business and executive employment.

Employers and employees were unsure how the courts would treat non-compete clauses that pre-existed Bill 27's enactment. While the prohibition against non-compete clauses retroactively came into effect on October 25, 2021, Bill 27 did not specify whether non-compete clauses pre-dating October 25, 2021, would be voided.

Non-Compete Clauses Pre-Dating October 25, 2021, Are Governed by Common Law Principles

Recently, however, the Ontario Superior Court of Justice confirmed in *Parekh et al. v. Schechter et al.*, 2022 ONSC 302 ("*Parekh*"), that a non-compete clause entered into prior to October 25, 2021, may be upheld if it is enforceable at common law.

The plaintiffs in *Parekh* had purchased a dental practice from the defendants in 2020 for \$5.6 million. The terms of sale required one of the dentists, Dr. Ira Schechter, to continue working at the dental practice for three years following the sale. Dr. Schechter also agreed to a non-compete clause that prohibited him from practicing dentistry within a five-kilometre radius of the purchased practice. The non-compete clause was to last until two years after the end of Dr. Schechter's engagement with the purchased practice.

Despite the agreed-to terms, Dr. Schechter resigned shortly after the sale and began working at another dental practice within five kilometres of the purchased practice. As a result, the plaintiffs brought an interlocutory injunction motion to enforce the non-compete clause.

Dr. Schechter argued that the non-compete clause — to which he had agreed on January 20, 2020 — was voided by the enactment of Bill 27. Justice Sharma for the Ontario Superior Court of Justice disagreed with Dr. Schechter. In doing so, Justice Sharma noted that the Ontario legislature had selected a specific date on which the Bill 27 provisions would come into force. Given this clear legislative intent, Justice Sharma reasoned that the prohibition against non-compete clauses did not apply to contracts of employment with non-compete clauses entered into prior to October 25, 2021.

Because Bill 27 did not apply to Dr. Schechter's employment agreement, Justice Sharma stated that the enforceability of Dr. Schechter's non-compete clause would be determined by common law principles. Upon completing his analysis, Justice Sharma held that the plaintiffs had established a strong *prima facie* case of enforceability. Key to this finding was the fact that Dr. Schechter held an inextricable role in the practice that went well beyond that of a regular employee; the evidence showed that Dr. Schechter exercised extensive managerial control and his goodwill was significantly attached to the dental practice. The Court ultimately granted an Order enforcing the non-compete clause against Dr. Schechter until October 27, 2023.

Check the Box

This decision provides useful clarification for employers regarding the enforceability of non-compete clauses entered into before October 25, 2021.

Employers should remain mindful of the significant developments arising from Bill 27 and diligently review their employment contracts to ensure compliance with the changing laws. While non-compete clauses are no longer permitted in the majority of employment agreements, other forms of restrictive covenants — including, for example, non-solicitation agreements — continue to assist companies in protecting business interests.

Need More Information?

For more information or assistance in drafting or enforcing restrictive covenants, contact [Kimberly Lennon](#) at 416 737-5281, or your regular lawyer at the firm.



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