CHANGES TO EMPLOYEMENT LAW IN ONTARIO

RESULTING FROM THE WORKING FOR WORKERS ACT, 2021

The relationship between employee and employer has begun to move even more into an employee focused dynamic, with the passage of The Working For Workers Act, 2021 (the "Working For Workers Act"). The Working for Workers Act makes two noteworthy changes to the Employment Standards Act, 2000 (the "ESA"), which will be outlined in more detail below.

Please note that independent contractors, whose relationship with the company would not be governed by the ESA, remain outside the scope of this new legislation. With that said, employers should be cautious to simply call employees, independent contractors, simply to try and avoid this new legislation.

Disconnecting From Work Policy

The first significant change brought on by the coming into force of The Working For Workers Act is the requirement that certain employers be required to develop and distribute to their employees a policy with respect to their employees' ability to disconnect from work. This amendment has been added as new sections 21.1.1 and 21.1.2 of the ESA.

A) Meaning of disconnecting from work

"Disconnecting from work" has been given a broad definition by the Working For Workers Act, as it has been defined to mean "not engaging in work-related communications, including emails, telephone calls, video calls or sending or reviewing of other messages, so as to be free from the performance of work."

However, the definition stops short of describing a certain time period or minimum amount of time that an employee must be allowed to disconnect from work.

B) Employers who must develop a disconnecting from work policy & when the policy must be put in place

Commencing on January 1st, 2022, all employers employing 25 or more employees on January 1st of any year must ensure that a written policy on disconnecting from work has been developed and put in place for all employees by March 30th of each year in which the employer eclipses 25 employees.

Despite the aforementioned timing requirements, the Working For Workers Act provides an initial grace period, as employers who employ 25 or more employees on January 1st, 2022 shall have until June 2nd, 2022 to develop and put in place a disconnecting from work policy. This does not mean that employees may not be able to seek adherence in advance of the implementation of the policy, so please contact RJS LAW for any preliminary inquiries or questions.

Based on the current wording of the legislation, the employer's determination as to the number of employees it employs is to be made on January 1st of every year and is to only be reassessed on January 1st of the following year. That is, if an employer employs fewer than 25 employees on January 1st of any given year and subsequently employs 25 or more

employees at any point during that same year, that employer will not be required to put in place a disconnecting from work policy until March 30th of the following year, after the number of employees is reassessed on January 1st of the following year.

Similarly, the legislation implies that an employer would not be required to put in place a disconnecting from work policy if an employer has fewer than 25 employees on January 1st of any given year, reaches 25 or more employees at any point during that year, but once again employs fewer than 25 employees when the number of employees is to be re-assessed on the following January 1st.

It is important to ensure that the legislation does not differentiate as between full-time and part-time employees, so both should be included within the tally noted herein.

C) Content of the disconnecting from work policy

There are currently very few requirements as to the content of an employer's disconnecting from work policy. The only explicit content requirement found in the legislation is the requirement that the disconnecting from work policy must include the date on which the policy was developed and the date on which any amendments to the policy were made.

Aside from this, the Working For Workers Act only provides for the very broad requirement that the written policy shall contain such information as may be prescribed.Therefore, there is no requirement that the disconnecting from work policy apply to certain times of the day, that it applies for a certain amount of time, or any similar content requirement.

However, although there are currently very few content requirements, the phrasing of the legislation indicates that certain content requirements may be adopted in the future. Regulations are expected by the government to address these matters, but employers will be required to adhere by June 2, 2022, regardless.

D) Who must be provided with the Policy

An employer who is required to put in place a policy on disconnecting from work must deliver a copy of the policy to each of the employer's employees within 30 days of the date on which the policy is prepared. Similarly, all new employees must be provided with a copy of the employer's disconnecting from work policy within 30 days of the date on which the employee becomes an employee of the employer.

In addition, all employees must be provided with an updated copy of the disconnecting from work policy within 30 days of the date on which the employer adopts any amendments to the disconnecting from work policy.

As this new legislation comes into place, several industries, including those with claims or on-call workers may be required to established defined shifts to allow for coverage during extended hour periods, such as 8am to 9pm offices, or employees that may need to receive emails and calls after regular business hours.

RJS LAW will be working with many of our clients to develop new policies and procedures and to review and update our client's employment agreements to ensure compliance with these new laws.

2. Changes to the Enforceability of Non-Compete Clauses

The second important addition to the ESA brought about by The Working For Workers Act is with respect to the validity of non-compete clauses.Specifically, the addition of Sections 67.1 and 67.2 to the ESA greatly limits the enforceability of non-compete agreements entered into between an employee and employer as part of the employment agreement.

A) Prohibition against the use of non-competes

Subsection 67.2(1) provides for a general prohibition against the use of non-compete clauses in any employment agreement. This prohibition includes non-compete agreements which are limited in their geographic scope or term, as the prohibition found in Subsection 67.2(1) appears to be very broad and states that "[n]o employer shall enter into an employment contract or other agreement with an employer that is, or that includes, a non-compete agreement." Therefore, aside from two exceptions below, any non-compete clause included as part of an employment agreement is not enforceable.

For greater certainty, this does not mean that an employment agreement containing a non-compete clause is now invalid, as the non-compete clause would rather be read out of the employment agreement.

With that said, employers would need to be cautious in that new agreements signed moving forward which contain these prohibitive clauses may not get the same deference as with historical agreements.

B) Exceptions

As mentioned above, there are two situations in which a non-compete clause will remain enforceable.

First, where there is a sale of all or a part of a business and, as part of the sale, the parties enter into an agreement that prohibits the seller from engaging in any activity that is in competition with the business purchased by the purchaser, that agreement shall remain valid. However, it is important to note that this exception to the general prohibition against the enforceability of non-compete clauses is only applicable if the seller becomes an employee of the purchaser immediately following the sale.

With that said, an obviously, these non-compete terms as contained within an APA or SPA are not governed by the ESA and thus would not be impacted by the terms contained herein.

Further the courts recently within the decision in Parekh et al v. Schecter et al, 2022 ONSC 302, the Ontario Superior Court, in the first case reported since the commencement of the Amendments to the Employment Standards Act ("ESA"), enforced the understanding that any agreement that was entered into before October 25, 2021, the in-force date of the ESA changes, shall not be restricted or have such non-compete clauses enforceability impacted by the ESA Amendments.

This is a logical decision, that should be upheld, as legislation passed today that would over-write good faith negotiated contracts and agreements prior to the amendments in force date, and unknown at the time the agreement or contract was commenced, would leave all previous transactions and agreements on uncertain ground.

Second, employers may enter into non-compete agreements with executives. For the purposes of this exception, the Working For Workers Act defines an "executive" to mean "any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate officer or holds any other chief executive position."
Although this would appear to be an easy exception to exploit, employers need to be mindful of the balance between whom they are assigning a "C-level" executive title to, as such a title could also lead to an accidental result of increasing notice provisions on a termination of said employees and /or creating a veil of ostensible authority.

Aside from these two relatively limited exceptions, The Working For Workers Act has created a broadly applicable general prohibition against the use of non-compete agreements between an employee and employer.

RJS LAW would be happy to assist you if you have any questions regarding these changes to the ESA, your current policies and changes to your existing employment agreements.

Please note that the information contained herein, is for information purposes and should not be treated as legal advice. Please contact RJS LAW to discuss your businesses individual circumstances and needs.