Cassels

Bill 27 Update: Working for Workers Act, 2021 Becomes Law

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On December 2, Bill 27, *Working for Workers Act, 2021* (Bill 27), which amends a number of employment-related statutes, including the *Employment Standards Act, 2000* (ESA) and the *Occupational Health and Safety Act* (OHSA), received Royal Assent and became law.

The most notable amendments made by Bill 27 are described in greater detail below. For the highlights of the other amendments made by Bill 27, visit the Ontario government website or contact a member of the Cassels Employment & Labour Group.

Disconnecting from Work Policy

Bill 27 creates a new Part VII.0.1 of the ESA to require employers with 25 or more employees as of January 1 of any year to ensure, before March 1 of that year, that they have a written policy in place for all employees with respect to "disconnecting from work."

Bill 27 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."

Notably, Bill 27 does not stipulate any requirements for the content of the employer's policy. Specific content requirements are expected to be published later in a regulation. Future amendments to the regulations will very likely exempt certain classes of employees from the protections of this new Part VII.0.1 (particularly those exempted from the hours of work and overtime provisions of the ESA (Parts VII and VIII)). Presently, Bill 27 only requires employers to have such a disconnecting from work policy and to provide a copy of the policy to each of its employees within 30 days of preparing it or, if an existing policy is changed, within 30 days of such change. Employers must also provide the policy to each new hire within 30 days of their start date.

Notwithstanding the general March 1 deadline date to have a policy in place, for 2022 only, employers meeting the minimum employee threshold will be provided until June 2, 2022, to prepare the policy and come into compliance with the new requirement.

Prohibition of Non-Competes

Bill 27 prohibits employers from entering into employment contracts or other contracts that are, or include, a non-compete agreement with all employees, except for "executives" and when such agreements are entered into in connection with the sale of a business.

Bill 27 defines "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 the employer ends."

Bill 27 defines "executive" as "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 development officer, or holds any other chief executive position." There is no guidance yet on the duties an employee must have to be properly classified as an executive for the purposes of the exemption. Further guidance from the Ministry of Labour may be forthcoming. Likely, using an executive title in the absence of corresponding executive-level duties, will not be sufficient to fall within the exemption.

With respect to the sale of a business, Bill 27 provides that a non-compete agreement can be entered to if:

- there is a sale of a business or a part of a business; and
- as a part of the sale, the purchaser and seller enter into an agreement that prohibits the seller from engaging in any business, work, occupation, profession, project or other activity that is in competition with the purchaser's business after

the sale and, immediately following the sale; and
- the seller becomes an employee of the purchaser.

The prohibition against non-compete agreements is deemed to be in force and effective as of October 25, 2021. Any non-compete agreement entered into on or after October 25, 2021, in violation of Bill 27 will be rendered void and unenforceable.

Licensing Regime for Recruiters and Temporary Help Agencies

With respect to the hiring of foreign nationals, Bill 27 amends the *Employment Protection for Foreign Nationals Act, 2009* (the Act) to prohibit recruiters and employers from knowingly using the services of a recruiter who has charged a fee to a foreign national in contravention of the Act (which prohibits recruiters from charging fees to foreign nationals). This amendment came into force effective December 2.

Bill 27 amends the ESA to require all temporary help agencies and recruiters to apply for licenses to operate and prohibits persons from operating without a license. As part of the licensing requirements, recruiters must expressly state that they are aware of the prohibition against charging fees to foreign nationals under the Act and that they are aware the Director of Employment Standards will refuse to issue a licence or revoke or suspend a licence if fees have been charged to a foreign national in contravention of the Act. The recruiter must also confirm that it has not charged such fees.

Bill 27 also makes it an offence for a person, including an employer, to knowingly engage or use the service of an unlicensed temporary help agency or recruiter.

These changes to the ESA will come into force at a future date upon proclamation.

Requiring Business Owners to Permit Washroom Access for Delivery Workers

Bill 27 amends the OHSA to require that workplace owners ensure delivery workers have access to a washroom when they are making deliveries to or from that workplace. This requirement is subject to certain exceptions, such as where providing access would not be reasonable or practical for reasons relating to the health and safety of any person in the workplace or because of other circumstances related to the workplace.

Takeaways for Employers

- Until further details respecting the required content of the disconnecting from work policy are released, prudent employers can begin to conduct internal reviews of the number of after-hour communications sent to employees – particularly employees who perform work that is not exempt from the hours of work and overtime provisions of the ESA.
- Employers should review their template employment agreements and prepare to both remove any non-compete provisions that offend Bill 27 and ensure the agreements otherwise contain well-drafted confidentiality, intellectual property, and non-solicitation provisions.
- Employers should ensure that the temporary help agencies and recruiters with which they have existing relationships are following these legal developments and getting licensed. Once the provisions of Bill 27 regarding temporary help agencies and recruiters come into force, employers should make a practice of requesting valid licences from the agencies and recruiters with which they work and should include the requirement to have and maintain such licences in any services agreements with the agencies and recruiters.
- Employers should assess their workplaces and determine whether and how workers providing delivery services can safely use on-site washroom facilities.
