



Employment Law Update: Non-Competition Agreements Banned

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The enforceability of non-compete or non-competition clauses or agreements has long been the source of some confusion for both employers and employees in Ontario. While courts were prepared to enforce such clauses in some circumstances, those circumstances were becoming more and more limited as the courts found that there were less restrictive means available to protect an employer's interests, such as non-solicitation and confidentiality clauses.

With the passage of Bill 27, *Working for Workers Act, 2021*, the Province has now prohibited the use of non-compete agreements, except in very limited circumstances. Bill 27 also introduces other employment-related legislative changes, including an employee's right to disconnect from work in many workplaces in Ontario. The right to disconnect gives employers who are subject to this amended until June 2, 2022 to develop and implement a policy. This topic will be covered more in future posts.

Non-Compete Agreements

With the passage of Bill 27, Ontario became the first province to prohibit the use of non-compete agreements. While Bill 27 as a whole became law on December 2, 2021, the section prohibiting the use of non-compete agreements was deemed to have come into effect retroactive to October 25, 2021. The amendment 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 the employer ends*".

The only exceptions where non-competes are still permitted are in relation to "*Executives*" (which includes the president, CEO and other chief executive positions) and sellers of all or part of their business who then become employees of the buyer immediately after closing.

Apart from the specific exceptions, any other form of non-compete is prohibited and violates the *Employment Standards Act, 2000*. However, while it was initially believed that the prohibition also applied to existing agreements or clauses, given that there is no transition period specified, a recent court decision (*Parekh et al v. Schechter et al, 2022 ONSC 302*) clarified that non-compete

agreements or clauses entered into before October 25, 2021 are not automatically invalid. As such, the enforceability of such prior clauses or agreements will still have to be assessed based upon traditional common law principles.

While the amendments do not impact the use or enforceability of other restrictive covenants, such as non-solicitation, confidentiality, and intellectual property provisions, employers should work with counsel to revise their employment agreements to remove prohibited clauses for future hires and should be careful not to take steps to enforce any non-compete agreements or clauses already entered into after October 25, 2021 (unless one of the exceptions applies). Employers may even want to notify employees who are not covered by the exceptions that any such non-compete clauses or agreements entered into after October 25, 2021 will not be enforced by the employer.

For more information, please contact:

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