

Goodmans^{LLP} Update

Ontario Introduces Legislation Prohibiting Non-Competition Clauses in Employment Contracts and Requiring Right-to-Disconnect Policies for Employees

On October 26, 2021, the Ontario government introduced Bill 27, *Working for Workers Act, 2021*. Among other changes, the Bill amends the *Employment Standards Act, 2000* (“ESA”) to add a prohibition against “entering into” an employment contract or other agreement with an employee that is or includes a non-compete, and any non-compete agreement entered into in violation of the new provisions will be rendered void. Importantly, unless the Bill is amended, this provision will be deemed to have come into force on October 25, 2021, regardless of when the Bill is actually passed by the Legislature and receives royal assent. Companies that have employees that are subject to the ESA should consider the potential impact of Bill 27 in any transactions and negotiations that are currently underway.

Bill 27 also introduces an obligation on employers with 25 or more workers (determined as of January 1 of each year) to implement a policy governing employee rights to disconnect and not perform work obligations after hours.

Non-Compete Clauses

The following are some key observations on Bill 27’s provisions concerning non-compete clauses.

Sale of a Business Exception

Bill 27 provides an exception for non-compete agreements tied to the sale of a business or part of a business, although little guidance has been given on its scope. Unless amended, the Bill 27 prohibition on entering into a non-competition agreement will not apply to an employer entering into a non-competition agreement with the “seller” of a business that is being purchased, even though the “seller” becomes an employee of the “purchaser” immediately following the transaction.

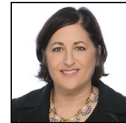
However, a number of questions remain. First, Bill 27 does not define “seller” or “purchaser”. Accordingly, it is unclear whether this important exemption will apply where the “seller” is in fact a corporation and the principals of the seller become the employees. Second, it is not clear that the exception will apply where the “seller” becomes or remains an employee of the business that is sold as opposed to becoming an employee of the purchaser. Careful consideration should be given to the structuring of any transaction to address these uncertainties until these issues are clarified through amendments, regulations or case law.

Senior Employees/Officers and Other Fiduciaries

Bill 27 currently applies to all employees, regardless of their roles or responsibilities with a business. Accordingly, unless amended, Bill 27 will prohibit and render void any non-competition agreement that is entered into with even the most senior employees and executives of an employer. Bill 27 does provide that the government may pass regulations to exempt other classes of workers from this new prohibition, so it is possible that future regulations may exempt non-competition agreements with senior executives and officers from the prohibition.

If regulations are not passed to exempt agreements with senior officers and executives, it remains possible that courts may find that the law of fiduciary duties applies to certain senior employees so as to prohibit them

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from competing with the business post-employment termination for a period of time. Whether the courts find that the common law duties of a fiduciary continue to apply in the face of Bill 27 will be unknown until the matter is formally contested in the courts.

Existing Non-Competes

It is unclear if Bill 27 will affect the enforceability of non-competes entered into before October 25, 2021, although that does not appear to be intended based on the press release and the government's background and explanatory notes. Bill 27 appears to prohibit the "entering into" of a non-competition agreement as of October 25, 2021, as opposed to voiding all existing non-competition agreements.

Other Restrictive Covenants

Bill 27 does not purport to restrict the entering into of other restrictive covenants to protect the reasonable business interests of an employer such as non-solicitation, non-interference or non-disparagement covenants, or confidentiality and protection of intellectual property rights.

Regulations to Follow

Bill 27 provides the government with the ability to implement regulations to further define the scope and parameters of the prohibition on non-competition agreements. The Ontario government typically does not release draft regulations before a bill receives royal assent. Accordingly, there may be a period of time between the prohibition on non-competition agreements coming into force as of October 25, 2021 (which will occur immediately upon Bill 27 receiving royal assent) and the date that regulations are introduced and passed. This may result in a timing gap in which non-competition agreements are illegal for certain types or classes of employees, notwithstanding the regulations will later exempt those employees from the prohibition. It is expected that any issues arising from any such timing gap will be addressed in future regulations.

Right-to-Disconnect Policy

Bill 27 also introduces an obligation on business entities with 25 or more workers (as of January 1 in each year) to implement a policy governing the rights of their employees to disconnect and not perform work activities after hours, including engaging in work-related communications through emails, telephone calls, video calls or the review of other messages. Bill 27 also provides that the contents of such policy will be prescribed by regulation. No details or draft regulations were released on the scope of this new employee right or whether certain types or classes of employees may be exempt.

Looking Forward

For information on how Bill 27 affects your business or transactions, please contact any member of our [Employment and Labour Group](#).