



Ontario Government Bans Non-Competition Agreements

December 2021 Employer Alert

On November 30, 2021, Bill 27, *Working for Workers Act, 2021*, carried on the third reading and will shortly receive royal assent. As a result, several substantial amendments to the *Employment Standards Act* (the "ESA") are forthcoming.

Ban on Non-Competition Agreements

Further to the forthcoming amendments, employers will now be prohibited from entering into a non-competition agreement with an employee, whether it be a standalone agreement, part of an employment agreement, or part of another agreement. There will be two exceptions to this ban on non-competition agreements. First, this ban will not apply where the employee is an executive, a term which includes CEOs, CFOs, COOs, etc. Second, this ban will not apply where the agreement is entered into further to a purchase and sale, and the seller becomes an employee of the purchaser.

It is unclear whether this prohibition of non-competition agreements will void current non-competition agreements.

In light of the above, employers should ensure that current and future employment agreements are drafted with a severability provision (i.e. a provision that cuts out unenforceability provisions, while maintaining the enforceability of the balance of the agreement). This will avoid an unenforceable provision rendering the entire agreement unenforceable.

Authors

Christine Ashton
905-940-0526
cashton@wvllp.ca

Shalinee Malhotra
905-940-8005
smalhotra@wvllp.ca

Our Employment/Labour Lawyers



Christine Ashton



Daniel Condon



Doug Langley



Shalinee Malhotra

To protect the company's interests, employers may also wish to ensure their employment agreements contain a confidentiality provision, an intellectual property development provision, and a non-solicitation provision.

Despite the prohibition of non-competition agreements, employers may still be able to address a former employee competing by way of a carefully drafted pay-if-you-compete agreement. This sort of agreement does not prevent a former employee from competing. Instead, it requires the former employee to make a payment in the event that they do compete. In the matter of *Rhebergen v. Creston Veterinary Clinic Ltd.*, the employee was a newly qualified veterinarian who was hired by a local veterinarian clinic for a three-year fixed term. The employment agreement provided that if the employment relationship ceased prior to the end of the fixed term and the employee started up her own practice, then the employee would have to make a payment to the clinic. The amount of the payment was \$150,000 if the employee set up her own practice in the 1st year, \$120,000 if she set it up in the 2nd year, and \$90,000 if she set it up in the 3rd year. The amount of the payment was based on the clinic's assessment of its potential unrecovered costs for training the employee and its potential lost revenue if it had to compete with the employee. A year into the employment relationship, the employee quit and started a competing practice. The employee sought to have the payment clause declared unenforceable. The British Columbia Court of Appeal held that the payment clause was enforceable as it was not a traditional "restraint of trade" clause and as it was not a "penalty" clause.

New Employee Disconnect Policy Requirement

Further to the forthcoming amendments, employers with 25+ employees, must have a policy ensuring that employees disconnect from work after work. In particular, the policy must address that the employees are not to engage in work communication (e.g. email, phone, etc.) during their break/rest periods. Further specifics regarding this disconnect policy may be detailed by regulation.

New Temporary Help Agency Licence Requirement

Further to the forthcoming amendments, temporary help agencies and recruiters must have and maintain a licence to operate in Ontario. As is detailed in the forthcoming new section 74.13 of the ESA, agencies and recruiters will need to apply to the Director of Employment Standards for a licence, using an application form to be issued by the Director. As part of the application process, various declarations will need to be made and information will need to be provided, including all addresses of the applicant (nationally and internationally).

For strategic advice regarding addressing the above, including drafting enforceable agreements regarding employees working for competitors, drafting employee disconnect policies, and preparing temporary help agency licence applications, please **contact our firm**.

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905.940.8700

information@wvllp.ca

60 Columbia Way, 7th Floor | Markham, Ontario | Canada L3R 0C9

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