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Ontario Proposes Significant Changes to *ESA* and Other Employment-Related Legislation

Date: October 26, 2021

On October 25, 2021, the Ontario government tabled Bill 27, *Working for Workers Act, 2021*, omnibus legislation which, if passed, would make significant amendments to the *Employment Standards Act, 2000* (*ESA*). These include requiring employers with 25 or more employees to have a policy on disconnecting from work, prohibiting employers and employees from entering into non-compete agreements, and enacting licensing requirements for temporary help agencies and recruiters. Bill 27 would also make a number of amendments to other employment-related statutes.

Amendments to the *ESA*

1. Right to Disconnect

If passed, Bill 27 would amend the *ESA* by mandating employers with 25 or more employees to have a written policy on disconnecting from work.

"Disconnecting from work" is defined 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."

Employers that employ 25 or more employees (on January 1 of any year) will be required to have a written policy in place for all employees with respect to disconnecting from work. Bill 27 does not spell out any specific content that an employer's disconnecting from work policy must contain. It is anticipated, however, that a regulation will be published that will prescribe what information must be included in an employer's disconnecting from work policy.

Bill 27 provides that an employer's disconnecting from work policy must be implemented before March 1 of any year in which the employer employs 25 or more employees. Employees must be provided with a copy of the disconnecting from work policy within 30 days of an employer preparing, or making changes to, the policy. Newly hired employees must be provided with a copy of the policy within 30 days of hire.

Transitional provisions apply, which include a six-month grace period from the day the Bill receives Royal Assent, to give employers an opportunity to comply with these provisions.

2. Prohibition of Non-Compete Provisions in Employment and Other Agreements

Bill 27 would amend the *ESA* to prohibit employers from entering into an employment contract or other agreement with an employee that includes a non-compete agreement.

The Bill 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 prohibition against entering into non-compete agreements is drafted broadly as it covers not just employment contracts but "other agreements" between an employer and an employee as well. These could potentially include, for example, stand-

alone restrictive covenants or severance agreements that contain non-competition provisions. A limited exception to the prohibition would apply in a sale of a business where, as part of the sale, a purchaser and seller enter into a non-compete agreement that applies to the purchaser's business after the sale, and, immediately following the sale, the seller becomes an employee of the purchaser.

The non-compete prohibition in Bill 27 will, once the Bill becomes law, be deemed to have come into force on October 25, 2021. Thus, at a minimum, the prohibition would apply to future agreements that are entered into on or after that date. As a result of these proposed changes, employers will need to review their employment agreement templates to determine if there are any non-compete provisions that may be offside the new prohibition.

3. Temporary Help Agencies and Recruiters

Bill 27 proposes changes to both the *ESA* and the *Employment Protection for Foreign Nationals Act, 2009* that will directly impact temporary help agencies and recruiters.

Proposed amendments to the *ESA* include the introduction of licensing requirements for temporary help agencies and recruiters (a category of business that has not been directly regulated under the *ESA* to date). The amendments would include the following:

- All temporary help agencies and recruiters would need to have a licence issued by the Director of Employment Standards (Director) in order to operate their business within Ontario.
- Clients, employers or prospective employers cannot knowingly engage or use the services of a temporary help agency or recruiter unless the agency or recruiter are licensed.
- Applications for licences must be made to the Director. Licences will be issued when the Director is satisfied that the applicant has complied with any orders under applicable legislation and has met the requirements set out in the *ESA* and regulations.
- The Director can refuse to issue or renew a licence and can revoke or suspend a licence in certain circumstances. These decisions can be appealed to the Ontario Labour Relations Board.
- The Director would be required to maintain a public record regarding licence status.
- Clients of temporary help agencies and recruiters would be required to keep specific information related to assignment and prospective employees and employers.

Bill 27 provides the Director with some discretionary scope to refuse to issue or renew a licence in several circumstances, including where the Director has reasonable grounds to believe that an applicant "will not carry on business with honesty and integrity and in accordance with the law." However, Bill 27 also contemplates that much of the detail of the licensing process will be established by regulations that have yet to be published. Agencies and recruiters will want to keep apprised of the development of those regulations as the government moves toward its anticipated 2024 compliance date.

The Bill would also extend the *ESA*'s anti-reprisal protections to recruiters, who would be prohibited from penalizing or threatening a prospective employee because the prospective employee asks the recruiter to comply with the *ESA*.

Proposed amendments to the *Employment Protection for Foreign Nationals Act, 2009* provide that recruiters who use the service of another recruiter in relation to the recruitment or employment of a foreign national would be liable to repay fees that the other recruiter has improperly charged a foreign national. Where the recruiter is a corporation, its directors are jointly and severally liable to repay the fees that were improperly charged to the foreign national.

Amendments to the *Occupational Health and Safety Act* (*OHSA*)

Bill 27 proposes amending the *OHSA* to require that workplace owners ensure workers have access to a washroom when they are making deliveries to or from that workplace.

This requirement would be 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.

Amendments to the *Workplace Safety and Insurance Act, 1997* (*WSIA*)

Bill 27 would repeal the existing sections 96.1 (plan for sufficiency of insurance fund) and 97(2) (use of reserve fund) of the *WSIA* and add a new section 97.1 (distribution of surplus). The amendments provide for when the distribution of surplus insurance fund amounts to Schedule 1 employers would be permitted in excess of that prescribed by regulation.

The amendments further provide that a determination by the Workplace Safety and Insurance Board (WSIB) under section 97.1 cannot be reconsidered by, or appealed to, the WSIB or the Workplace Safety and Insurance Appeals Tribunal.

The proposed amendments to the *WSIA* would also allow the WSIB to enter into an agreement with any person or entity for the purpose of administering Part VII of the WSIA, “Employers and their Obligations.” That Part relates to registration and information requirements, calculating payments, payment obligations for Schedule 1 and Schedule 2 employers, and employer obligations in special circumstances, among other things.

Amendments to the *Fair Access to Regulated Professions and Compulsory Trades Act, 2006* (*Act*)

Bill 27 proposes to amend the *Act* to prohibit regulated professions from requiring that a person’s experience be “Canadian experience” as a necessary qualification for registration. The term “Canadian experience” would be defined by regulation.

An exemption to this requirement could be granted by the Minister, but only for the purpose of public health and safety.

The Bill would also require that regulated professions under the *Act* must comply with any regulations respecting English or French language proficiency testing requirements.

Amendments to the *Ministry of Agriculture, Food and Rural Affairs Act*

Bill 27 proposes to amend the *Ministry of Agriculture, Food and Rural Affairs Act*by authorizing the Minister to collect information, including personal health information, for the purposes set out in that legislation, with certain limitations.

We will continue to monitor the progress of Bill 27 through the legislative process. In the meantime, please feel free to reach out to your regular Hicks Morley lawyer should you have questions about the changes proposed by Bill 27.
