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Demystifying Recent Ontario Employment Law Changes

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Why Having a Compensation
Philosophy is Critical for Tech
Companies in Today's
Volatile Market

Tuesday, March 7th

12pm-1:30pm ET, online

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Today's presenter



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Demystifying Recent Ontario Employment Law Changes

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FASKEN

Own tomorrow



▼ Agenda

- Electronic monitoring
- Disconnecting from work
- “New” rules for non-competes
- Competition laws impacting employment
- “New” rules for employment contracts
- Some other changes to keep in mind...

▼ Policy on Electronic Monitoring

- Employers with ≥ 25 employees on January 1 must have a written policy on electronic monitoring in place by March 1 of that year
- Electronic monitoring is not specifically defined

▼ Policy on Electronic Monitoring

- Written policy must contain:
 - Whether the employer electronically monitors employees
 - If so, how and in what circumstances and purpose for which information obtained may be used
 - The date it was prepared
 - The date any changes were made

▼ Policy on Electronic Monitoring

- Employer must provide a copy of the policy:
 - *Current employee*: within 30 days of being required to have a policy or any changes
 - *New employee*: 30 days of the day the employee becomes an employee of the employer or within 30 days from the day the employer is required to have the policy in place, whichever is later
 - *Assignment employee*: later of 24 hours of assignment start or 30 days of being required to have a policy
- Keep a copy for three years after it ceases to be in effect

▼ Policy on Electronic Monitoring

- This is a policy requirement
- It is not an employee right not to be monitored
- It does not create any new privacy rights

▼ Disconnecting from Work

- 42% of Canadians feel mentally/physically exhausted after work
- 28% are unable to disconnect after regular work hours
 - 25% of those people say this is due to their manager contacting them
- This group has a mental health score 3 points below the national average
- People ≤ 40 years old are 70% more likely to be unable to disconnect after regular work hours than those older than 50

Source: [More than one-quarter of Canadians are unable to disconnect after work hours | LifeWorks](#)

▼ Disconnecting from Work

- European jurisdictions are at the forefront of “disconnecting from work” issues
- Requirements range from
 - absolute employee right to disconnect
 - employer rights to determine disconnect parameters
- We have seen legislation in some Canadian jurisdictions and recommendations in others

▼ Disconnecting from Work

- Employers with ≥ 25 employees on January 1 must have a written policy on “disconnecting from work”
- Disconnecting from work means:
 - “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.”

▼ Disconnecting from Work

- Policy must:
 - Apply to all employees
 - Be about “disconnecting from work”
 - Include the date the policy was prepared
 - Include the date of any revisions to the policy

▼ Disconnecting from Work

- Employers must provide a copy of the policy:
 - *Current employee*: within 30 days of preparing policy or changes to existing
 - *New employee*: within 30 days of becoming an employee
- Keep a copy for three years after the policy ceases to be in effect

▼ Disconnecting from Work

- This is a policy requirement
- It is not a new right to disconnect
- Employee rights to be free from work are in the other rules in ESA (e.g., hours of work, eating period, hours free from work, etc.)
- That is ... unless you make a right to disconnect

▼ Non-Competes

- Subject to two exemptions, employers cannot enter an employment contract or other agreement with an employee that is, or includes, a non-compete agreement
- “non-compete agreement” means:
 - 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.
- “employee” includes an applicant; “employer” includes a prospective employer
- If contravened, the non-compete agreement is void

▼ Non-Competes – Exception

- An employee who is an executive
- “executive” means
 - 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

▼ Non-Competes – Exception

- In a sale of all or part of a business where:
 - as 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, the seller becomes an employee of the purchaser, subsection (1) does not apply with respect to that agreement.
- Sale includes a lease

▼ Competition impacting Employment

- Effective June 23, 2023, new criminal cartel provisions prohibiting agreements between unaffiliated employers to
 - “fix, maintain, decrease or control salaries, wages or terms and conditions of employment” or
 - “not solicit or hire employees”

▼ Competition impacting Employment

- Competition Bureau released draft Guidelines for comment by no later than March 3, 2023
- Read more about these detailed changes and the Guidelines on our Competition & Antitrust blog: [Competition chronicle | International Competition Law | Fasken Martineau](#)

▼ Employment Agreements

- A series of recent decisions have impacted the enforceability of termination provisions in Ontario
- If you have employment agreements drafted more than a year or two ago, the termination provisions may be unenforceable
- It is time to look for opportunities to update your contracts

▼ Employment Agreements

- *Waksdale v. Swegon North America Inc*, 2020 ONCA 391
 - Termination provisions must be read together
 - A cause termination provision that violates the ESA invalidates all the termination provisions in the agreement
 - A cause termination provision must account for difference between just cause at common law and “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned” under the ESA

▼ Employment Agreements

- *Henderson v. Slavkin et al.*, 2022 ONSC 2964
 - Other non-termination clauses that violate the ESA are an issue too
 - Conflict-of-interest: A failure to comply with this clause [...] constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice.
 - Confidential information: In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause.

▼ Employment Agreements

- Many older agreements may not be enforceable
- Review and revise your template for use with new hires
- Consider strategies for replacing agreements with existing employees

Some other Recent Changes

- Effective June 1, 2023, many Ontario employers will be required to have a naloxone kit in the workplace
- For federally regulated employers in Ontario:
 - Effective December 1, 2022, federally regulated employees became entitled to 10 days of paid sick leave
 - New pay equity obligations are in force



Questions?

Tap into our network of experts



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