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|  <p>CARTERS BARRISTERS SOLICITORS TRADEMARK AGENTS</p> | <p>The 2022 Ottawa Region Charity & Not-for-Profit Law Webinar February 17, 2022</p> |
| <p>Employment Standards and Contracts Update</p> <p>By Barry W. Kwasniewski, B.B.A., LL.B. bwk@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p> | |
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| <p>A. INTRODUCTION</p> <p>1. Overview</p> <ul style="list-style-type: none">• The COVID-19 Pandemic and updated employment standards legislation (in Ontario) has renewed discussion about employment contracts and conditions for charities and not-for-profits<ul style="list-style-type: none">– Required to take a closer look at employment contracts and policies to determine employees' legal rights• Because employment laws change so frequently, employment contracts and policies need to be kept up-to-date• The employment laws discussed in this presentation relate to Ontario, so it's important to consult with employment lawyers in other provinces as necessary |
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B. THE IMPORTANCE OF WRITTEN EMPLOYMENT CONTRACTS

- In the absence of a written employment contact, the employer and the employee may have very different opinions about what conditions of employment they agreed to
- In drafting employment contracts, employers must ensure that the terms do not violate any of the minimum standards set out in their provincial labour legislation

The key provisions of an employment contract should include:

1. The position being offered and accepted, as well as a job description;
2. The compensation that will be paid, including the right to receive any bonuses or commissions and the formula of determining these forms of compensation;
3. Whether the employment is for a fixed-term or is indefinite;
4. Specifics regarding vacation time and sick leave and whether such time accrues from year to year;
5. Whether there will be a probationary period after hiring;
6. Possible changes in job or location;
7. Protection of the employer's intellectual property and confidential information and whether there will be any post-employment obligations (non-competition, non-solicitation clauses);
8. Pregnancy and Parental Leave policies;
9. Employment termination provisions

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C. ONTARIO LEGAL FRAMEWORK

- Most Ontario employers are governed by the Ontario *Employment Standards Act, 2000* (the “ESA”)
 - ESA sets out the minimum employment standards
 - Standards cannot be lessened, even by an agreement between an employer and an employee
 - Minimum obligations touch on a number of issues:
 - Minimum wage, overtime pay, vacation entitlements, statutory holidays, job protected leaves of absence and termination obligations

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- ESA minimum termination notice or pay in lieu of notice requirements:

| Length of Employment | Notice Required |
|-------------------------------|-----------------|
| Less than 3 months | None |
| 3 months but less than 1 year | 1 week |
| 1 year but less than 3 years | 2 weeks |
| 3 years but less than 4 years | 3 weeks |
| 4 years but less than 5 years | 4 weeks |
| 5 years but less than 6 years | 5 weeks |
| 6 years but less than 7 years | 6 weeks |
| 7 years but less than 8 years | 7 weeks |
| 8 years or more | 8 weeks |
- Note: If the employee is covered by a group benefit plan, the employer must extend the former employee’s benefits for the same number of weeks as the notice required

NOTICE OF TERMINATION

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- Severance Pay
 - Regulated by ESA
 - Only applies to employees who have been employed with the same employer for 5 years or more; and
 - Employer has a global payroll of at least \$2.5 million per year
 - Based upon number of years and months of service
 - Maximum amount of severance pay is equal to 26 weeks of pay

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D. THE IMPORTANCE OF CONTRACTUAL TERMINATION PROVISIONS

***Waksdale v Swegon North America*, 2020 ONCA 391 (June 17, 2020)**

- Contractual termination clause must comply with O Reg 288/01 under the ESA to be valid and enforceable
 - O Reg 288/01: an employee can only be deprived of termination notice of pay and severance pay if employee was “guilty of willful misconduct, disobedience or willful neglect of duty that is not trivial and has not be condoned by the employer”
 - Court will declare employment contracts which go beyond O Reg 288/01 standards to have invalid and unenforceable termination clauses

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- Both for cause and without cause termination clauses in contracts should be considered as a whole
 - If one clause is invalid, then the entire clause is unenforceable
- Leave to appeal the case to the Supreme Court of Canada denied
- Case not applied outside Ontario

**TERMINATION
OF
EMPLOYMENT**

E. THE IMPORTANCE OF REMOTE WORK PROVISIONS

- Historically, the general expectation was that work would be carried out at the employer's premises
 - As a result, case law about work location considers relocation rather than remote work
- Working remotely is now much more common
- If an employer wants employees to work at its premises, not remotely, this should be made clear in the employment contract
 - Clear provisions will reduce the risk of constructive dismissal claims if an employee unilaterally decides to work remotely

F. CHANGES TO ESA

- Bill 27, *Working for Workers Act, 2021* received royal assent on December 2, 2021 amending the ESA
- Two changes are most significant:
 - 1) Mandatory Right-to-Disconnect Policies
 - 2) Prohibition of Non-Competition Agreements
- Details set out on the following slides

1. Mandatory Right-to-Disconnect from Work Policies

- Bill 27 requires employers with ≥ 25 employees (including charities and not-for-profits) to establish a written policy for disconnecting from work
- Section 21.1.1
 - In this Part, “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.
- Subsection 21.1.2(1)
 - An employer that, on January 1 of any year, employs 25 or more employees shall, before March 1 of that year, ensure it has a written policy in place for all employees with respect to disconnecting from work that includes the date the policy was prepared and the date any changes were made to the policy.

- Employers with ≥ 25 employees on January 1 of any year must have a written policy on disconnecting from work in place by March 1 of that year
 - Copy of policy must be provided to employees
- Employers with ≥ 25 employees on January 1, 2022 have until June 2, 2022 to have a written policy in place
- Policy developed in context of COVID-19 pandemic and issues of employee burnout, mental health challenges, and concerns about employees' inability to disconnect at the end of the workday

2. Content of Disconnect from Work Policies

- Section 21.1.2(4) of the ESA states that a disconnect from work policy shall contain the “information as may be prescribed”
 - As of yet, there is no regulation passed pursuant to this section describing requirements, though a regulation may be passed in the near future
- Policy must address:
 - Restraint on work-related communications between the workplace and the employee
 - Objective of freeing the employee from performance of work

3. Prohibition of Non-Compete Agreements

- Bill 27 added Part XV.1 to the ESA, addressing Non-Compete Agreements (“NCAs”)
- After October 25, 2021, employers are prohibited from entering into NCAs with their employees with some limited exceptions
 - Purpose is to allow for freer movement of workers between employers
- Section 67.1
 - “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.

4. Main Exceptions to Prohibition on NCAs

- There are two main exceptions to the prohibition on NCAs
 - a) **For Executives**
 - In some limited circumstances involving “executives” – usually an organization’s most senior executive employees – NCAs may be allowed
 - Section 67.2(5)
 - “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;

b) For the Sale of a Business

- In subsection 67.2(3), the ESA provides that an NCA can be entered into if:
 - There is a sale of a business or part of a business; and
 - As a 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; and
 - The seller becomes an employee of the purchaser

G. KEY TAKEAWAYS

- Properly drafted employment contracts help limit potential liability to employees and effectively manage financial and human resources
- Remember to review and update employment contracts which are used on a regular basis so that they remain current and legally enforceable
- Charities and Not-for-profits must check their employment contract templates
- Employers with ≥ 25 employees must establish a written policy for disconnecting from work by June 2, 2022
- Non-Compete Agreements entered into after October 25, 2021 are prohibited except in limited circumstances

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