# ***Key Update for Employers: Amendments to the Employment Standards Act, 2000***

On November 30, the Ontario government passed the *Working for the Workers Act, 2021* (the "**Workers Act**") which had made a couple of key amendments to the Ontario *Employment Standards Act*, *2000* (the "**ESA**").

We have set out below a brief summary of the most significant changes:

**New Limits on Non-Compete Agreements**

The ESA now limits the use and applicability of post employment non-competition covenants in most employment contracts entered into after October 25, 2021. Ontario is the first jurisdiction in Canada to ban post-employment non-compete agreements.

Non-competes have traditionally been difficult for employers to enforce in Canada, with the courts long holding that such restrictions on trade are counter to public policy and are prima facie unenforceable at common law. However, the ESA now establishes an outright ban on such clauses, regardless of their geographic scope or limited duration. The prohibition is effective as of October 25, 2021. Subject to the exceptions set out below, any non-compete agreements entered into following October 25, 2021 are void and unenforceable.

There are two important exceptions. Non-compete agreements will still be permitted in the following two circumstances:

- To individuals who occupy an "executive" position. "Executive" is currently defined as "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".
- The non-competition covenant is tied and/or directly connected to a sale of business (i.e. the preservation of goodwill in the acquired asset/business) Purchasers of businesses in Ontario, therefore, will still be able to including non competition covenants that bind seller employees from competing against them following the sale of a business.

Ontario employers can and should still rely upon their confidentiality, non-solicitation and assignment of intellectual property agreements. We recommend employers review those agreements to ensure they are sufficiently protected.

**The Right to Disconnect**

All employers who employ 25 or more employees as of January 1 of any year will be required to have a written policy in place by March 2022 for all employees with respect to "disconnecting" from work. "Disconnecting from work" is defined as:

“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”. “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.”

The government has not yet provided Regulations as to what must be minimally included in the required policy, only that they must be in writing. The government’s news releases have indicated that the policy could include expectations about response time for emails and encouraging employees to turn on their “Out of Office”. At this time, there is no insight with respect to what employees or professions may be made exempt by virtue of their position/profession, or in respect of emergency situations. We would anticipate that high-ranking employees would be exempt, as well as those who are routinely “on-call” and need to be available to address unforeseen issues.

Further follow-up will happen once the regulations are put in place.

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*We encourage you to reach out to your Aird & Berlis contact regarding questions about the Working for the Workers Act, 2021 and the Ontario Employment Standards Act, 2000, and more broadly.*

## Contacts



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Fiona has extensive experience advising international businesses entering the Canadian market. To date, she has advised more than 100 companies expanding into Canada. Fiona advises clients in this space all day, every day. She has been practising for more than a decade and is a regular speaker and writer on market expansion matters. Fiona is proud to have been recognized by *The Best Lawyers in Canada, The Canadian Legal Lexpert Directory* and *Benchmark Canada.*

A proactive and comprehensive approach is required to succeed in a new market. Fiona manages teams of other lawyers and patent agents to provide her clients with a full range of legal services to help their businesses grow. She acts as project manager to ensure her clients receive seamless legal services in all relevant areas.

Fiona takes great care to understand her clients' businesses and deliver advice that is tailored to meeting their specific needs. Her responsiveness, dedication to clear communication and hands-on approach show that she is personally invested in the success of her clients.



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Michael is a member of the firm's Workplace Law Group. His practice focuses on all aspects of labour and employment law in both the federal and provincial jurisdictions. He advises employers in a number of industries, including manufacturing, transportation, retail, electrical distribution, construction and financial services, on various matters, including employment standards, human rights, discipline, discharge, union certification, grievances, wrongful dismissal, executive employment matters and transactions, as well as general labour and employment law issues.

Michael represents employers before the courts and administrative tribunals, such as the Ontario Labour Relations Board, the Ontario Superior Court of Justice, the Ontario Divisional Court, the Ontario Court of Appeal, the Grievance Settlement Board, the Canadian Railway Office of Arbitration, the Ontario Employment Standards Branch, the Ontario Workplace Safety and Insurance Board and in grievance arbitration and mediation.